CUL-H04997-30-LP1956

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **Privy Council**, the High Courts of **Allahabad, Bombay, Calcutta, Madras** and **Patna**, the Chief Courts of **Lower Burma** and the **Punjab**, the Courts of the Judicial Commissioners of **Central Provinces, Oudh, Sind** and **Upper Burma**

REPORTED IN

The following 23 Legal Periodicals:

Allahabad (1) Indian Law Reports, (2) Law Journal; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Burma** (1) Law Times, (2) Lower Burma Rulings, (3) Upper Burma Rulings; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Times, (4) Law Weekly, (5) Weekly Notes; **Nagpur** Law Reports; **Oudh** (1) Cases, (2) Law Journal; **Patna** Law Journal; **Punjab** (1) Law Reporter, (2) Record, (3) Weekly Reporter; **Sind** Law Reporter

WITH

A large number of extra Rulings not reported elsewhere.

30

UNIVERSITY LIBRARY LAW COLLEGE
UNIVERSITY OF CALCUTTA
NOT TO BE REMOVED
DEPARTMENT OF LAW

VOLUME XXXV, 1916.

EDITOR:

S. D. CHAUDHRI, B.A., LL.B.,

PLEADER, CHIEF COURT, PUNJAB, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

HAZRA LAW CAMPUS LIBRARY
Acc. No.....
Date.....
UNIVERSITY OF CALCUTTA

LP 1956

Department of Law Library
Acc. 37953
Date.....
C. U.

CONSOLIDATED

Comparative Tables showing seriatim the Volumes and Pages of other Indian Law Journals and Reports, for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases

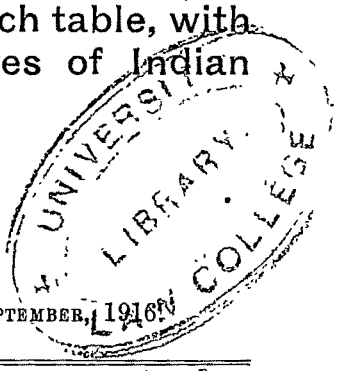


Table 1

ALLAHABAD HIGH COURT.

(A).—38 I. L. R., ALLAHABAD SERIES, FROM JULY TO SEPTEMBER, 1916.

Page of Vol. 38 I. L. R., All. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 38 I. L. R., All. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
325	Mahabir Singh v. Bhagwanti ...	33	110	425	Chhotey Lal v. Lakhmi Chand Magan Lal ...	34	113
327	Mukta Prasad v. Mahadeo Prasad	33	982	430	Emperor v. Jawahir Thakur ...	34	315
335	Himmat Bahadur v. Dhanpat Rai	35	148	433	Imami v. *Musammat* Kallo ...	34	298
339	Abdul Karim v Islamun-nissa Bibi	34	231	438	Radhika Prasad Bapudi v. Secretary of State ...	35	711
347	Jagannath Prasad v. U. P. Flour and Oil Mills Company, Limited	35	159	440	Chandrika Bakhsh Singh v. Indar Bikram Singh ...	35	958
351	Somwarpuri v. Mata Badal ...	34	280	446	Fateh Chand v. Rup Chand ...	37	122
354	Emperor v. Husain Khan ...	36	145	452	Beni Prasad v. Lajja Ram ...	35	63
357	Lachmi Narain v. Darbari Lal ...	33	737	455	Emperor v. Ghamman ...	34	989
358	Hardwari Lal v. Salamat-ullah Khan ...	34	272	457	Emperor v. Bechan Pande ...	36	879
361	Khurshed Ali v. Abdul Majid ...	35	210	458*n*	Emperor v. Jagar Deo ...	36	873
366	Jagrani v. Bisheshar Dube ...	35	701	461	Param Hans v. Randhir Singh ...	35	748
380	Hari Kunwar v. Lakhmi Ram Jain	35	833	465	Ganga Prasad v. Har Narain ...	35	739
393	Emperor v. Lal Bihari ...	35	485	468	Emperor v. Shambhu Nath ...	35	832
395	Emperor v. Lal Singh ...	36	481	469	Ganga Dahal Rai v. *Musammat* Gaura ...	35	46
398	Udhishter Singh v. Kausilla ...	34	79	474	Goswami Sri Raman Lalji v. Hari Das ...	34	364
407	Suraj Bhan v. Boot and Equipment Factory, Agra ...	36	397	481	Fazal Ahmad v. Wesal-ud-din ...	35	742
411	Kunwar Sen v. Darbari Lal ...	34	171	484	Muhammad Abdul Jalil v. Ram Dayal ...	34	357
416	Ram Charan Lal v. Rahim Baksh	34	108				

(B).—14 ALLAHABAD LAW JOURNAL, FROM JULY TO AUGUST 4TH, 1916.

Page of Vol. 14 A. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
741	Mahomed Ismail Ariff v. Hajee Ahmed Moolla Dawood ...	35	30
754	Kasturi v. Panna Lal ...	36	245
765	Abdul Rahman v. Emperor ...	36	466
769	Mathura Sahu v. Emperor ...	36	164
772	Padam Singh v. Ram Rup ...	36	217
776	Sheo Shanker v. Chunni Lal ...	36	948
784	Mahabir Singh v. Emperor ...	36	479
786	W. E. Mc'Gowan v. John George Mc'Gowan ...	37	143
789	Jafar v. Emperor ...	36	577
792	Karan Singh v. Emperor ...	36	580
794	Emperor v. Sri Deo ...	36	495
797	Sri Raja Malraju Lakshmi Venkayamma Rao Bahadur v. Sri Raja Venkala Narasimha Appa Rao Bahadur ...	34	921
814	Kashi Shukal v. King-Emperor ...	36	836
818	Bhagwan Dayal v. Param Sukh Das ...	36	366
822	Girja Bai v. Sadashiv Dhundiraj	37	321
834	Khiali Ram v. Taik Ram ...	36	452
846	Dulla v. Shib Lal ...	36	281
850	Emperor v. George Banerji ...	36	877
851	T. N. Chadha v. Emperor ...	36	878
853	Gajrajmathi Tiwarin v. Swami Nath Rai ...	36	307
873	Sushil Chandar Das v. Gauri Shankar ...	36	371
878	Dayalpuri v. Narain Datt ...	34	26

Table 2

BOMBAY HIGH COURT.

(A).—40 I. L. R., BOMBAY SERIES, FOR JULY-AUGUST, 1916.

Page of Vol. 40 I. L. R., Bom. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
341	Dwarkadas Damodar v. Dwarkadas Shamji ...	31	441
351	Sonü *valad* Khushal Khadake v. Bahinibai Krishna ...	33	950
358	Mahomed Beg Amin Beg v. Narayan Meghaji Patil ...	32	933
369	Gangabai Peerappa v. Bandu Peerappa ...	32	986
378	Narayan Ramkrishna Pandit v. Vighneshwar Ganap Hedge ...	34	414
386	Shavakshaw D. Davar v. Tyab Haji Ayub ...	*To be printed.*	
392	Secretary of State v. Gulam Rasul Gyasudin Kuwari ...	34	535
397	Gautam Jayachand v. Malhari ...	34	406
401	Bai Bhicaiji v. Perojshaw Jivanji Kerawalla ...	33	192
429	Dattatraya Sakharam Devli v. Govind Sambhaji Kulkarni ...	34	423
439	Bapuji Jagannath v. Govindlal Kasandas Shah ...	34	167
446	Abdullabhai Lalljee v. Executive Committee, Aden ...	34	141

Table 3

BURMA (LOWER) CHIEF COURT.

(B).—8 LOWER BURMA RULINGS, FROM JULY TO SEPTEMBER, 1916.

Page of Vol. 8 L. B. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 8 L. B. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
388	Ngwe Ya v. Shwe Ye ...	12	910	433	Moolla Mahomed v. P. K. Ebrahim ...	35	735
389	Hurry Krishna Pillay v. Anthilatchmy Ammal ...	33	238	440	Poona v. King-Emperor ...	34	325
399	Sein Kyi v. Ma E ...	34	159	447	King-Emperor v. Po Ket ...	35	513
404	Ma Pwa v. Yu Lwai ...	34	99	450	Badier Rahman Chowdhry v. M. A. R. R. M. R. M. Chetty Firm ...	35	288
413	Tana Peena Cheena Pitchay Meera Rowther v. Mamakkantakath Pathumakutty Uma ...	34	24	452	Po Chein v. King-Emperor ...	34	321
415	Ma Myo v. Maung Kyan ...	36	646	458	Pranjivandas Jagjivandas Mehta v. Chan Mah Phee ...	35	190
418	Nauk To v. Ma Hnin ...	36	5	461	Nga Hla v. King-Emperor ...	37	63
420	M. E. Moolla v. K. C. Bose ...	33	981	461	Ali Asghar v. Mi Kra Hla U ...	36	279
422	Moolla Cassim v. Moolla Abdul Rahim ...	35	950	463	Itala v. King-Emperor ...	37	160
425	Tok Gyi v. King-Emperor ...	35	810	463	Sit Hon v. King-Emperor ...	37	145
427	Hashim Isphany v. N. A. P. K. Chetty Firm ...	33	1003	464	King-Emperor v. Nga Pyu ...	36	156

Table 4

CALCUTTA HIGH COURT.

(A).—43 I. L. R., CALCUTTA SERIES, FOR JULY-AUGUST, 1916.

Page of Vol. 43 I. L. R., Cal. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 43 I. L. R., Cal. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
521	Musahar Sahu v. Lala Hakim Lal	32	343	625	Swarnamayee Debi v. Secretary of State ...	30	394
527	Bank of Bengal v. Ramanathan Chetty ...	32	419	632	Gopeshwar Saha v. Jadav Chandra Chanda ...	32	537
542	Emperor v. Donaldson ...	36	155	640	Nripendra Nath Sahu v. Ashutosh Ghose ...	33	548
547	Birendra Kishore Manikya v. Kalitara Debi ...	30	953	650	Bhupendra Kumar Chakravarty v. Purna Chandra Bose ...	8	34
554	Surendra Narain Roy Chowdhury v. Dina Nath Bose ...	36	33	660	Nrityamoni Dassi v. Lakhan Chandra Sen ...	33	452
558	Abdul Rahman Chowdhuri v. Ahmadar Rahmam ...	31	554	665	Dalchand Singhi v. Secretary of State ...	37	11
574	Khub Lal Singh v. Ajodhya Misser ...	31	433	671	Abdul Ali Chowdhury v. Emperor	34	961
586	Amrita Lal Kundu v. Anukul Chandra Das ...	34	253	676	Kumar Krishna Dutt v. Hari Narain Ganguly ...	33	208
591	Sital Prasad v. Emperor ...	34	974	685	Poorna Chandra Addy, *In re* ...	32	657
597	Budhu Lal v. Chattu Gope ...	36	472				
603	Jnanda Sundari Chowdhurani v. Amudi Sarkar ...	33	148				

Table 5

MADRAS HIGH COURT.

(A).—39 I. L. R., MADRAS SERIES, FOR JULY, 1916.

Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 39 I. L. R., Mad. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
617	Secretary of State for India v. Chellikani Rama Rao ...	35	902	664	Shaik Ibrahim Rowther v. Muhammad Ibrahim Rowther ...	30	806
634	Janaki Ammal v. Narayanasami Aiyer ...	37	161	673	N. V. Rama Chetty v. A. L. A. R. R. M. Arunachalam Chettiar ...	31	98
640	Maharajah of Bobbili v. Narasaraju Peda Baliara Simhulu Bahadur ...	36	682	677	K. Parameswaran Nambudri, *In re*	31	161
645	Raja of Pittapur v. G. Venkata Subba Row ...	30	94	683	G. Narayanaswami Nayudu v. N. Subramanyan ...	30	375
646*n*	Raja of Pittapur v. Venkata Subba Row ...	21	595	686	Hawkins, *In re* ...	30	444
658	Sathyabhama v. Kesavacharya ...	29	397	689	C. A. Easwara Iyer v. K. Govindarajulu Naidu ...	31	192
661	K. Narayana Moothad v. The Cochin Sircar ...	30	511	693	Kalianji Singji Bhai v. The Bank of Madras ...	31	583
				700	T. Sitharama Chetty v. Sir S. Subramania Iyer ...	32	211

(B).—31 MADRAS LAW JOURNAL, FOR JULY-AUGUST, 1916.

Page of Vol. 31 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 31 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
1	Mahant Ram Parkash Das v. Mahant Anand Das ...	33	583	58	Sri Rajah Malraju Lakshmi Venkayyamma Rao Rahadur v. Sri Rajah Venkata Narasimha Appa Rao Bahadur ...	34	921
18	Jamni Bai Saheb Mohitai Avergal v. Vasanta Rao Ananda Rao Dhaybar ...	34	213	72	Raja Debi Bakhsh Singh v. Shadi Lal ...	33	681
22	Gamarti Venkatachellam v. Gamarti Sithayamma ...	35	296	77	Sheoparsan Singh v. Ramnandan Prashad Narayan Singh ...	33	914
26	Gudimolla Rangamma v. Panchangam Narasimhacharyulu ...	35	116	84	Secretary of State v. Rangasamy Aiyangar ...	35	168
33	Kudapa Venkayamma v. Kakarla Narasimma ...	35	150	87	Kumarasmi Odayar v. Subramania Iyer ...	33	687
39	Chundry Krishnayya v. Koripalli Raju ...	35	154	90	Penugonda Rattam v. Korasika Thatha ...	35	237
44	K. Anavarsada Khan Pani Sahib v. Misiri Khan Pani Sahib ...	35	179	93	Mahomed Silar Sahib v. Nabi Khan Sahib ...	35	157
48	Pandillapalli Singa Reddi v. Yeddula Subba Reddy ...	35	185	96	Nara Reddiar v. Doraiswami Reddi	35	201
				97	Secretary of State v. Maharaja of Venkatagiri ...	35	266

(B).—31 MADRAS LAW JOURNAL, 1916—concld.

Page of Vol. 31 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 31 M. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
120	Secretary of State v. Rangasami Iyengar ...	35	168	178	Frederick Edmed Hooper v. King-Emperor ...	35	497
123	Sunkara Venkataratnam v. Sri Rajah Varadarajah Appa Rao Bahadur ...	35	213	202	Deeri Narasimhacharyulu v. Chalasani Subbayya ...	36	270
133	Anantarama Aiyar v. Yussufji Oomer Sahib ...	36	903	207	Shaik Davud Rowther v. Paramasami Pillai ...	35	70
138	Shanmuganatha Chettiar v. K. Srinivasa Aiyar ...	35	219	211	Maharajah of Venkatagiri v. Rami Reddi ...	34	607
147	Murugayya Maniyakaran v. Palaniyandi Maniyakaran ...	36	507	214	Sri Ravu Seshayya Garu v. Rajah of Pittappur ...	34	730
155	Pranjivandas Jagjivandas Mehta v. Chan Mah Phee ...	35	190	219	Moturi Seshayya v. Sri Rajah Venkatadri Appa Row ...	36	289
159	River Steam Navigation Co. v. Hathor Steamship Co. ...	35	193	222	Madala Madavarayudu v. Tanikalla Subbamma ...	35	124
168	Arunachalam Chettiar v. Mangalam ...	35	329	225	Janaki Ammal v. Narayanasami Aiyer ...	37	161

(C).—20 MADRAS LAW TIMES, FOR JULY, 1916.

Page of Vol. 20 M. L. T. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 20 M. L. T. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
1	Sheoparsan Singh v. Ramnandan Prashad Narayan ...	33	914	50	Arunachellam Chetty v. Ramaswami Chetty ...	35	1
10	Srimati Nrityamoni Dassi v. Lakhan Chunder Sen ...	33	452	53	Raja Debi Bakhsh Singh v. Shadi Lal ...	33	681
21	Maddala Ramanujamma, *In re* ...	34	307	58	Secretary of State v. Rangasawmi Aiyangar ...	35	168
25	Jatindra Nath Basu v. Srimati Peyer Deye Debi ...	34	69	60	Secretary of State v. Rangasawmy Aiyangar ...	35	168
31	Jamna Bai Saheb Mohitai v. Vasant Rao Ananda Rao Dhybar ...	34	213	62	Pandillapalli Singareddi v. Veddula Subba Reddi ...	35	185
36	Tallapragada Subba Rao v. Gopisetti Narayanaswami Naidu ...	36	727	70	Arunachelam Chettiar v. Mangalam	35	329
44	Kotam Reddi Seetamma v. Vennalakanti Kristnaswami ...	35	18				

UNIVERSITY LIBRARY LAW COLLEGE

(D).—3 LAW WEEKLY, FOR JULY, 1916.

Page of Vol. 3 L. W. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
525	Raja Debi Bakhsh Singh v. Shadi Lal ...	33	681
526	Sri Kishan Lal v. *Musammat* Kashmiro ...	34	37
540	Jamna Bai Saheb v. Vasanta Rao	34	213
542	Selambayi v. Sangu Pandithan ...	35	147
544	Sheoparsan Singh v. Narayan Singh ...	33	914
551	Koila China Mallayya v. Kannekanti Veeriah ...	31	671
552	Swaminatha Pillai v. Mondaiyan	35	480
553	Jatindra Nath Basu v. Srimati Peyer Deye Debi ...	34	69
556	Mahant Ram Parkash Das v. Mahant Anand Das ...	33	583
572	Yogamba Boi Ammani v. Arumuga Mudaliàr ...	36	128
573	Valluri Narasimha Rao Pantulu Garu v. Secretary of State for India in Council ...	36	219
576	Pamulapati Venkata Krishniah v. Kondamudi Subbarayudu ...	36	240
579	Mahomed Silar Sahib and Co. v. Nabi Khan Sahib ...	35	157
582	Maharajah of Venkatagiri v. Velikarti Rami Reddi ...	34	607
585	E. B. Swami Chetty v. S. J. Ethirajulu Naidu ...	34	853
587	Subbiah Chetty v. Kuppammal ...	35	104
589	Nara Reddiar v. Doraiswami Reddi ...	35	301
590	Dinavahi Lakshmipathi v. Pingali Narasimhan ...	34	898
592	Sunkara Venkataratnam v. Sri Rajah Varadarajah Appa Rao Bahadur ...	35	213
601	Valiakath Puthiah Maliyakkal Mammi Kutti Haji v. Thachar A. Manakkal Parameswaran Nambudri ...	35	240

(D).—4 LAW WEEKLY, FOR AUGUST, 1916.

Page of Vol. 4 L. W. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
1	Pandillapalli Singareddi v. Yeddula Subba Reddi ...	35	185
10	Chidambaram Chetty v. Karuthan Chetty ...	34	543
15	Maharajah Ram Narayan Singh v. Adhindra Nath Mukhurji ...	34	900
21	Secretary of State for India in Council v. Rangasamy Aiyangar ...	35	168
24	Secretary of State for India in Council v. Rangasamy Aiyangar ...	35	168
27	Shanmuganatha Chettiar v. K. Srinivasa Aiyar ...	35	219
32	Dhanukodi Asari v. Muthusami Aiyar ...	35	490
34	Duraisami Reddi v. Velu Asari ...	35	591
37	Arunachalam Chettiar v. Mangalam ...	35	329
48	Bollapragada Ramamurthi v. Thimmanna Gopayya ...	35	575
51	Palaniappa Mudali v. Official Receiver ...	35	690
53	Crown Prosecutor v. Sankara Narayana Chetti ...	35	488
55	Vittoba Rao v. T. Narasinga Rao	35	507
57	Kamulammal Avergal v. Vavu Rowther ...	33	314
58	Lakshmi Venkayyamma Rao Bahadur v. Narasimha Appa Rao Bahadur ...	34	921
69	Pranjivandas Jagjivandas Mehta v. Chan Mah Phee ...	35	190
73	Thonikadavath Awalla v. Ammian Mannil Kuttiali ...	36	471
74	Balu Mudali v. Durvasalu Pillai ...	34	570
77	Narna v. Ammani Amma ...	35	418
82	Frederick Edmed Hooper v. King-Emperor ...	35	497

(C).—(1916) 1 MADRAS WEEKLY NOTES, FROM 9TH TO 23RD JULY, 1916.

Page of (1916) 1 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
403	Jatindra Nath Basu v. Peyer Deye Debi ...	34	69
406	Mahant Ram Parkash Das v. Mahant Anand Das ...	33	583
419	Sheoparsan Singh v. Ramnandan Prashad Narayan Singh ...	33	914
425	Raja Debi Bakhsh Singh v. Shadi Lal ...	33	681
428	Maharaja Ram Narayan Singh v. Adhindra Nath Mukhurji ...	34	900
433	Sri Kishan Lal v. *Musammat* Kashmiro ...	34	37
443	Pranjivandas Jagjivandas Mehta v. Chan Mah Phee ...	35	190
446	Rivers Steam Navigation Co., Ltd. v. Hathor Steamship Co., Ltd. ...	35	193
452	Jamna Bai Saheb Mohitai v. Vasanta Rao Ananda Rao Dhybar	34	213
455	Meyappa Chetty v. Supramanian Chetty ...	35	323
460	Mahomed Ismail Ariff v. Hajee Ahmed Moola Dawood ...	35	30
468	Anavarada Khan Pani Sahib v. Misiri Khan Pani Sahib ...	35	179
471	Mahomed Silar Sahib and Co. v. Nabi Khan Sahib ...	35	157
473	Dinavahi Lakshmipathi v. Pingali Narasimham ...	34	898
474	Nara Reddiar v. Doraiswami Reddi	35	301

(E).—(1916) 2 MADRAS WEEKLY NOTES, FROM 30TH JULY TO AUGUST 20TH, 1916.

Page of (1916) 2 M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
1	Pandillapalli Singareddi v. Yeddula Subba Reddi ...	35	185
7	Venkataratnam v. Appa Rao ...	35	213
14	Shanmuganatha Chettiar v. Srinivasa Aiyar ...	35	219
18	Chidambaram Chetty v. Karuthan Chetty ...	34	543
21	Maharaja of Venkatagiri v. Rami Reddi ...	34	607
23	Lakshmi Venkayamma Rao v. Venkata Narasimha Appa Rao ...	34	921
31	Annalath Chathu v. Vengadan Pakker ...	34	906
33	Kotamreddi Seetamma v. Vennelakanti Krishnaswami Roy ...	35	18
38	Gangadara Mudali v. Sambasiva Mudali ...	34	769
43	Gnana Sambanda v. Menikka Vasaka ...	34	57
63	Yegamba Bai Ammanni v. Arumuga Mudaliar ...	36	128
64	Periakaruppan Chetty v. Chidambara Thambiran ...	33	443
65	*Musammat* Girja Bai v. Sadashiv Dhundiraj ...	37	321
73	Raghavachari v. Pakkiri Mahommed Rowther ...	34	760
79	Govindaswami Pillai v. Ramaswami Aiyar ...	34	6
82	Kolla Gangama Naidu v. Secretary of State for India ...	33	665
84	C. B. Swami Chetty v. S. T. Ethirajulu Naidu ...	34	853
86	Subbiah Chetti v. Kuppammal ...	35	104
87	Manikkam Pillai v. Thanikachalam Pillai ...	34	945
88	Baganathi Servai v. Velayer ...	33	830
88	Secretary of State v. Rangasamy Aiyangar ...	35	168
90	Secretary of State v. Rangasamy Iyengar ...	35	168
92	Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varu ...	35	224
96	Secretary of State v. Rajah of Venkatagiri ...	35	226

Table 6

NAGPUR JUDICIAL COMMISSIONER'S COURT.

12 NAGPUR LAW REPORTS, FROM JULY TO SEPTEMBER, 1916.

Page of Vol. 12 N. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 12 N. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
100	Govind v. *Musammat* Chandrabhaga	34	675	130	Sheikh Chand v. Laxman ...	36	534
113	*Musammat* Girja Bai v. Sadashiv...	37	321	136	Kodarnath v. Maroti ...	35	544
126	Jagannath v. Maruti ...	36	241	139	Dinanath v. Manbodhi ...	36	547

Table 7

OUDH JUDICIAL COMMISSIONER'S COURT.

19 OUDH CASES, FROM FEBRUARY TO APRIL, 1916.

Page of Vol. 19 O. C. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.	Page of Vol. 19 O. C. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
27	Kishun v. Shyam Sundar ...	35	441	58	Debi Bakhsh v. Ram Dhani	35	446
30	Bisheshar Singh v. Bikramajit Singh ...	34	349	60	*Musammat* Saheb-un-nissa v. Abdul Gaffar ...	34	360
32	Chandrawati Kunwar v. *Musammat* Bhagwanta ...	35	444	64	Kalka Prasad v. Sitla Bakhsh ...	35	427
36	Raghubar Dayal v. *Musammat* Champa Kunwar ...	33	756	67	Ram Piare v. Rameshar ...	36	623
39	Gouri Shanker Singh v. Rai Bajrang Bahadur Singh ...	35	434	69	Izzat-un nissa Begam v. *Musammat* Kaniz Fatima Begam ...	36	643
44	Jagannath Kuar v. Sheo Singh ...	35	439	75	Satrohan Lal v. Nageshwar Prasad	35	770
48	Chhab Lal v. *Musammat* Parbati	33	737	89	Ram Behari Lal v. Jagan Nath ...	*To be printed.*	
49	Deputy Commissioner, Fyzabad v. Jagjiwan Bakhsh Singh ...	33	461	91	Madam Feodore v. Miss A. Des Brosses ...	36	835
55	Debi Bakhsh Singh v. Shadi Lal...	33	681	92	Tika v. Mahabir Prasad ...	36	629
				100	Muneshar Bakhsh Singh v. Arjun Singh ...	34	738

Table 8

PUNJAB CHIEF COURT.

(A).—17 PUNJAB LAW REPORTER, FROM 7TH AUGUST TO 15TH SEPTEMBER, 1916.

No. of Vol. 17 P. L. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
92	Ahmad v. Jam Khan ...	36	200
93	Jhanda v. Data Ram ...	35	597
94	Ghansham v. Balak Ram ...	36	215
95	Onkar Lal v. Radha Nath ...	36	267
96	Bhagwan Singh v. Mohan Bai ...	36	209
97	Kallu Mal v. *Musammat* Chahindi	36	222
98	Harjas Rai v. Narain Singh ...	29	938
99	Muhammad Chiragh Shah v. Choghatta ...	36	221
100	Nawab v. Crown ...	*Not reportable.*	
101	Lachhman Das v. Narsingh Das...	36	207
102	Pirdi Das v. Lal Chand ...	36	209
103	Ram Singh v. Kundan Singh ...	36	211
104	Bhan Singh v. Pirthmi Chand ...	36	212
105	Bega v. Crown ...	*To be printed.*	
106	Bishen Singh v. Dadna ...	36	262
107	Baqri v. Crown ...	36	130
108	Ladha Ram v. Gurdas ...	36	6
109	Jahana v. Crown ...	36	131
110	Wasawa Singh v. Crown ...	35	1003
111	Raghbir Brothers v Daulat Ram	36	32
112	A. L. Donca, Proprietress of "Spring Field Hotel," Dalhousie v. A. H. S. Teed ...	36	34
113	Jahan Khan v. Chandi Shah ...	29	854

(B).—51 PUNJAB RECORD, FOR JULY-AUGUST, 1916.

No. of Vol. 51 P. R. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
	Civil.		
66	Gopal Singh v. Ganpat Rai ...	35	321
67	Secretary of State v. Jiwan Bakhsh	36	213
68	Diwan Chand v. Sundar ...	36	199
69	Akbar Khan v. Khan Bahadur ...	35	235
70	Chiragh Din v. Allah Din ...	35	303
71	*Musammat* Rukman v. Sain Das ...	32	875
72	Ramji Das v. *Musammat* Thakar Devi ...	35	366
73	Abul Fatteh v. Fatteh Ali ...	35	363
74	Bhagwan Das v. *Musammat* Balwanti ...	36	84
75	Abdul Samad v. Municipal Committee of Delhi ...	35	377
76	Morton v. Morton ...	35	367
77	Kasim Beg v. Jhanda ...	33	338
78	Parma Dat v. Bipju ...	35	887
79	Guran Rakha v. Bindraban ...	35	233
80	Daya Ram v. *Musammat* Jatti ...	35	938
81	Jowala Singh v. Lakha Singh ...	35	892
	Civil—contd.		
82	Bani Singh v. Surat Singh ...	35	884
83	Sajjad Ali v. Muhammad Zulfikar Ali Khan ...	33	943
84	*Musammat* Murad Khatun v. Muhammad Bakhsh ...	33	742
85	*Musammat* Ralli v. Ralla ...	33	783
86	Kishan Chand v. Ramsukh Das ...	33	815
87	Hukam Singh v. *Musammat* Gyan Devi ...	36	35
88	Asa Ram v. Budhu Mal ...	35	67
89	Diwan Singh v *Musammat* Paro ...	33	529
90	Amir Din v. *Musammat* Sahiban ...	33	752
	Criminal.		
17	Crown v. *Musammat* Soma ...	36	850
18	Tota Ram v. Crown ...	35	482
19	Crown v. Sujan Singh ...	35	486
20	Crown v. Faiz ...	35	998

Table 9

CRIMINAL LAW JOURNAL OF INDIA.

17 CRIMINAL LAW JOURNAL OF INDIA FROM JULY TO SEPTEMBER, 1916.

Page of Vol. 17 Cr. L. J. 1916.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
225	Sher Singh v. Emperor ...	34	641
226	Karm Singh v. Emperor ...	34	642
229	Jugal Chandra, *In the matter of* ...	34	645
231	Jiwanji & Co. v. Emperor ...	34	647
233	Jumo Allarakhio v. Emperor ...	34	649
234	Jadunandan Prasad v. Emperor ...	34	650
235	Palaniyandi Pandaram v. Palaniappa Thevan ...	34	651
236	Gurdit Singh v. Emperor ...	34	652
238	Khohun Moran v. Emperor ...	34	654
238	Miran Bakhsh v. Beli Ram ...	34	654
239	Jairo v. Emperor ...	34	655
240	Girdharimal v. Emperor ...	34	656
241	Abdul Ali Choudhury v. Emperor	34	961
242	Tota Ram v. Emperor ...	34	962
245	Yado v. Emperor ...	34	965
249	Bakir Saheb Amir Saheb v. Emperor ...	34	969
251	Baijnath Marwari v. W. S. Street	34	971
253	Anna Laxman Bhintade v. Emperor	34	973
254	Emperor v. Salimi ...	34	974
254	Sital Prasad v. Emperor ...	34	974
256	Govind Balvant Laghate v. Emperor ...	34	976
265	Nabin Chandra Aich v. Noakhali Municipality ...	34	985
266	Lakhimi Ram Gagoi v. Emperor...	34	986
267	Kaimi v. Emperor ...	34	987
269	Jhamman v. Emperor ...	34	989
270	*Musammat* Siryan v. Emperor ..	34	990
272	Sadho Lal v. Emperor ...	34	992
273	Jagat Ram v. Emperor ...	34	993
273	Ram Singh v. Emperor ...	34	993
278	Sher Singh v. Emperor ...	34	998
279	Tajoo v. Emperor ...	34	999
280	Karmun v. Emperor ...	34	1000
282	Lehna Singh v. Emperor ...	34	1002
283	*Musammat* Mehran v. Emperor ...	34	1003
284	Bela Singh v. Emperor ...	34	1004
286	Hardeo Singh v. Ram Chariter Singh ...	34	1006
288	Subramanian v. Emperor ...	34	1008
289	Bhawani Das v. Emperor ...	35	161
293	Bob Doro, *In re* ...	35	165
295	Bhagwat Saran Misir v. Emperor	35	167
296	Secretary of State v. Rangasamy Aiyangar ...	35	168
299	Ahmad Khan v. Emperor ...	35	171
300	Noor Mahommed v. Emperor ...	35	172
301	Chunni Lal v. Emperor ...	35	173
303	Ram Jas v. Emperor ...	35	175
304	Budha v. Emperor ...	35	176
305	Dodumal v. Emperor ...	35	481
306	Tota Ram v. Emperor ...	35	482
308	Ali Mohamed v. Emperor ...	35	484
309	Lal Behari v. Emperor ...	35	485
310	Emperor v. Sujan Singh ...	35	486
312	Emperor v. Sankara Narayan Chetti ...	35	488
313	Sarjug Lal v. Emperor ...	35	489
314	Dhanukodi Asari v. Muthuswamy Aiyar ...	35	490
315	Kuldip Pandey v. Ramnath Singh	35	491
316	Maung Po Nyun v. Mutu Kurpen Chetty ...	35	492
318	Nawab v. Topan Ram ...	35	494
319	Emperor v. Nga Po Aung ...	35	495
321	Frederick Edmed Hooper v. Emperor ...	35	497
330	Srikishen Lal v. Emperor ...	35	506
331	Vitoba Rao v. Narasinga Rao ...	35	507
332	Gajanand Thakur v. Emperor ...	35	508
335	Nga Tun v. Emperor ...	35	511
336	Sarjug Prasad Singh v. Emperor	35	512
337	Emperor v. Nga Po Ket ...	35	513
339	Akshoy Singh v. Rameswar Bagdi	35	515
342	Boyhenj Chandra v. Rangoon Municipality ...	35	518
343	Badri Prasad v. Emperor ...	35	519
347	Emperor v. Nga Kala ...	35	523
348	Nemdhari Singh v. Ram Tahal Rai ...	35	524
349	Begraj Basharam v. Emperor ...	35	525
350	Jagannath v. Emperor ...	35	526
351	Gokul Singh v. Emperor ...	35	527

UNIVERSITY LIBRARY

TABLE

OF

Cases reported in Volume XXXV of Indian Cases, 1916.

An asterisk (*) denotes cases not reported yet elsewhere.

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Abdul Gani v. Raja Ram ...	s. c. 20 C. W. N. 829; 1 P. L. J. 232 **F. B.** ...	468
Abdul Hussain v. Mohomad Ibrahim ...	s. c. 3 L. W. 379; 19 M. L. T. 346 ...	243
Abdul Qader Khalifa v. Fritz Kapp ...	s. c. 20 C. W. N. 691; 23 C. L. J. 493 ...	951
Abdul Samad v. Municipal Committee of Delhi	s. c. 75 P. R. 1916; 140 P. L. R. 1916 ...	377
Abdur Razzaq v. Partab Singh ...	*Allahabad High Court ...	638
Abul Fatteh v. Fatteh Ali ...	s. c. 73 P. R. 1916; 121 P. W. R. 1916; 137 P. L. R. 1916 ...	363
Adit Narayan Singh v. Mahabir Prosad Tewari ...	s. c. 1 P. L. J. 324 ...	687
Ahmad Khan v. Emperor ...	s. c. 5 P. R. 1916 Cr.; 122 P. L. R. 1916; 17 Cr. L. J. 299 ...	171
Aijaz Husain v. Emperor ...	s. c. 14 A. L. J. 731; 17 Cr. L. J. 413 ...	973
Aiya Nadar v. Tennammal ...	s. c. 4 L. W. 285; (1916) 2 M. W. N. 256 ...	939
Akbar Khan v. Khan Bahadur ...	s. c. 69 P. R. 1916; 120 P. W. R. 1916; 131 P. L. R. 1916 ...	335
Akshoy Singh v. Rameswar Bagdi ...	s. c. 20 C. W. N. 1071; 17 Cr. L. J. 339 ...	515
Alagappa Chetty v. Annamalai Chetty ...	s. c. 4 L. W. 411 ...	74
Ali Mohamed v. Emperor ...	s. c. 10 S. L. R. 56; 17 Cr. L. J. 308 ...	484
Ali Sheikh v. Imam Ali Sarkar ...	*Calcutta High Court ...	102
Allahabad Bank, Ltd. v. Moti Lal Barman ...	*Calcutta High Court ...	95
Allahwarayo v. Emperor ...	s. c. 10 S. L. R. 64; 17 Cr. L. J. 368 ...	672
Alluri Subbaraju v. Alluri Rambhadra Raju ...	s. c. 17 Cr. L. J. 389; 4 L. W. 440	821
Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal ...	s. c. 4 L. W. 331 ...	201
Amiruddin v. Saidur Rahman ...	s. c. 1 P. L. J. 73 ...	433
Ananda Mohan Saha v. Ananda Chandra Saha	*Calcutta High Court ...	182
Anant Lal Sahu v. Gokul Sahu ...	*Patna High Court ...	344

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Anavarda Khan v. Misiri Khan ...	s. c. 31 M. L. J. 44; (1916) 1 M. W. N. 468 ...	179
Arjun Prasad v. Laiq Singh ...	s. c. 3 O. L. J. 276 ...	845
Arunachallam Chettiar v. Mangalam ...	s. c. 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168 ...	329
Asa Ram v. Budhu Mal ...	s. c. 43 P. W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916 ...	67
Ashmatulla Sircar v. Pan Mahmud Chowdhury	s. c. 20 C. W. N. 874 ...	343
Asita Mohan Ghose v. Nerode Mohan Ghose ...	s. c. 20 C. W. N. 901 ...	127
Aung Hla v. Ton Gyi ...	s. c. 8 L. B. R. 264 ...	432
Aut Behary Gui v. Rameswar Mitra ...	*Calcutta High Court ...	40
Baba Khan v. Maung Ba Naing ...	s. c. 9 Bur. L. T. 108; 17 Cr. L. J. 398 ...	830
Badier Rahman Chowdry v. M. A. R. R. M. R. M. Chetty Firm ...	*Lower Burma Chief Court ...	288
Badri Prasad v. Emperor ...	s. c. 17 Cr. L. J. 343 ...	519
Bagala Sundari Debi v. Prosanna Nath Mukerjee ...	*Calcutta High Court ...	797
Baij Nath Rai v. Dharam Deo Tewari ...	s. c. 14 A. L. J. 353; 38 A. 315 ...	707
Bakhtawari v. Shibban Lal ...	s. c. 55 P. R. 1916 ...	532
Bakir Alli Khan Sahib, *In re* ...	s. c. 17 Cr. L. J. 406 ...	966
Balai Lall Mookerjee v. Pashupati Chatterjee	s. c. 17 Cr. L. J. 396 ...	828
Balli Singh v. Bindeswari Tewari ...	s. c. 1 P. L. J. 133 ...	532
Balusu Veeraraghavalu v. Boppana Manikyam ...	s. c. 31 M. L. J. 380; 20 M. L. T. 329 ...	92
Bamandas Bhattacharyya v. Nilmadhab Saha ...	s. c. 20 C. W. N. 1340 ...	754
Bani Singh v. Surat Singh ...	s. c. 82 P. R. 1916; 129 P. W. R. 1916 ...	884
Bank of Multan, Ltd. v. Kamta Prasad ...	s. c. 14 A. L. J. 949 ...	199
Bansiram v. Secretary of State ...	s. c. 20 C. W. N. 638 ...	284
Banwari Lal v. Jagar Nath Prasad ...	s. c. 1 P. L. J. 71 ...	431
Barachi v. Emperor ...	s. c. U. B. R. (1916) II, 108; 17 Cr. L. J. 401 ...	961
Basi Nath Pal v. Jagat Kisore Acharjee ...	s. c. 20 C. W. N. 643 ...	298
Baslingappa v. Chandrappa ...	s. c. 18 Bom. L. R. 695 ...	860
Begraj Basharam v. Emperor ...	s. c. 10 S. L. R. 68; 17 Cr. L. J. 349 ...	525
Beni Madho v. Basanto Kunbi ...	*Allahabad High Court ...	252
Beni Prasad v. Lajja Ram ...	s. c. 14 A. L. J. 438; 38 A. 452 ...	63
Bepin Behari Saha v. Abdul Barik ...	*Calcutta High Court ...	613
Bhagirathi Nethiaramma v. Meenakshi Nethiaramma ...	s. c. 4 L. W. 225; 31 M. L. J. 438; (1916) 2 M. W. N. 249 ...	891

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Bhagwat Saran Misir v. Emperor ...	s. c. 14 A. L. J. 399; 17 Cr. L. J. 295 ...	167
Bhaiganti Bewa v. Himmat Bidyakar ...	s. c. 24 C. L. J. 103; 20 C. W. N. 1335 ...	7
Bhairon Prasad v. Amina Begam ...	s. c. 14 A. L. J. 890 ...	693
Bhawan v. Madan Mohan Lal	s. c. 14 A. L. J. 734 ...	41
Bhawani v. Anantha Kamthi ...	s. c. 20 M. L. T. 263; (1916) 2 M. W. N. 244; 31 M. L. J. 556; 4 L. W. 357 ...	789
Bhawani Das v. Emperor ...	s. c. 14 A. L. J. 74; 38 A. 169; 17 Cr. L. J. 289 ...	161
Bhawani Din v. Jhamman ...	s. c. 3 O. L. J. 252 ...	753
Bhirgee Nath v. Narsing Tewari ...	*Allahabad High Court ...	475
Bhoj Raj v. Ram Narain ...	s. c. 14 A. L. J. 717 ...	915
Bidya Nath v. Khikhinda Koer ...	s. c. 1 P. L. J. 157 ...	544
Bijoy Chand v. Iswar Chandra Das ...	*Calcutta High Court ...	60
Bilawal v. Gianmal ...	s. c. 10 S. L. R. 58 ...	652
Bindeshri v. Somnath Bhadry ...	s. c. 14 A. L. J. 382 ...	347
Birj Bhukan Lal v. Mahadeo Pershad ...	*Allahabad High Court ...	205
Biseswar Gangooly v. Bhagabati Charan Banerjee ...	s. c. 24 C. L. J. 38 ...	26
Bishun Perkash Narain Singh v. Muhammad Sadique ...	*Patna High Court ...	375
Biswambhar Lal v. Jhulan Ram Tewari ...	*Patna High Court ...	87
Bob Dore, *In re* ...	s. c. 4 L. W. 405; 17 Cr. L. J. 293	165
Bollapragada Ramamurthy v. Thammanna Gopayya ...	s. c. 4 L. W. 48; 20 M. L. T. 129; 31 M. L. J. 231 ...	575
Boyhenj Chandra v. Rangoon Municipality ...	s. c. 8 L. B. R. 328; 17 Cr. L. J. 342 ...	518
Brij Behari Lal v. Shevanath Prasad ...	s. c. 20 C. W. N. 1354 ...	837
Budha v. Emperor ...	s. c. 21 P. R. 1916 Cr.; 123 P. L. R. 1916; 44 P. W. R. 1916 Cr.; 17 Cr. L. J. 304 ...	176
Buniyad Husain v. Hazir-un-nisa ...	s. c. 3 O. L. J. 354 ...	764
Chain Sukh v. Gopi Ram ...	s. c. 116 P. W. R. 1916; 134 P. L. R. 1916 ...	120
Chand Gorain v. Khub Lal Mahton ...	*Patna High Court ...	445
Chandra Kanta v. Lakshan Chandra ...	*Calcutta High Court ...	651
Chandrawati Kunwar v. Bhagwanta ...	s. c. 19 O. C. 32 ...	444
Chandrika Bakhsh Singh v. Bikram Singh ...	s. c. 20 C. W. N. 1149; 20 M. L. T. 164; (1916) 2 M. W. N. 120; 4 L. W. 288; 31 M. L. J. 505; 14 A. L. J. 1024; 18 Bom. L. R. 846; 38 A. 440; 24 C. L. J. 291 **P.C.**	958
Charapattada Siddalinga Swamulu v. Sondur Ramachandra Charlu ...	s. c. 4 L. W. 186 ...	646

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Chintamoni Patni v. Tarak Chandra Goswami	*Calcutta High Court ...	17
Chiragh Din v. Allah Din ...	s. c. 70 P. R. 1916; 118 P. W. R. 1916; 129 P. L. R. 1916 ...	303
Chitravelu Servai v. Samanna Iyer ...	*Madras High Court ...	108
Chundury Krishnayya v. Koripalli Raju ...	s. c. 31 M. L. J. 39 ...	154
Chunni Lal v. Emperor ...	s. c. 14 A. L. J. 430; 17 Cr. L. J. 301 ...	173
Chunnilal v. Habib Ali ...	*Allahabad High Court ...	571
Danpati Mahto v. Midnapur Zamindary Co., Ltd. ...	*Calcutta High Court ...	582
Darpan Koer v. Kedar Nath ...	s. c. 1 P. L. J. 140 ...	539
Dasarath Sahu v. Secretary of State ...	*Patna High Court ...	97
Davud Rowther v. Paramaswami Pillai ...	s. c. 31 M. L. J. 207 ...	70
Daya Ram v. Jatti ...	s. c. 80 P. R. 1916; 128 P. W. R. 1916 ...	938
Debendra Bala Dasi v. Chandra Sekhar Prasad Singh.	*Patna High Court ...	589
Debi Bakhsh v. Ram Dhani ...	s. c. 19 O. C. 58 ...	446
Debi Charan Lal v. Mehdi Husain ...	s. c. 20 C. W. N. 1303 ...	888
Deodhari v. Dayanand ...	*Calcutta High Court ...	610
Devi Ditta v. Indar Devi ...	s. c. 56 P. R. 1916 ...	542
Dhanpat v. Kesho Ram ...	s. c. 34 P. W. R. 1916 Cr.; 17 Cr. L. J. 417 ...	977
Dharamdeo Singh v. Emperor ...	s. c. 14 A. L. J. 733; 17 Cr. L. J. 418 ...	978
Dhanpatmal-Diwanchand v. Kishinlal-Indraj...	s. c. 10 S. L. R. 1 ...	536
Dhanraj Singh v. Lakhrani Kuer ...	s. c. 14 A. L. J. 709 ...	601
Dhanukodi Asari v. Muthuswamy Aiyar ...	s. c. 4 L. W. 32; (1916) 2 M. W. N. 159; 17 Cr. L. J. 314 ...	490
Dharanidhar Mukherji v. Rakhal Das Bhattacharjee ...	*Calcutta High Court ...	631
Dodumal v. Emperor ...	s. c. 10 S. L. R. 65; 17 Cr. L. J. 305 ...	481
Dularam Piniomal v. Badaldas Jamiatrai ...	s. c. 10 S. L. R. 34 ...	478
Eastern Trust Co. v. McKenzie, Mann & Co....	s. c. 20 C. W. N. 457; 84 L. J. P. C. 152 **P. C.** ...	378
Ebadut Ali v. Muhammad Fareed ...	*Patna High Court ...	56
Eknath Sahay v. Emperor ...	s. c. 17 Cr. L. J. 353; 1 P. L. J. 317	657
Emperor v. Aung Ba ...	s. c. U. B. R. (1916) II, 114; 17 Cr. L. J. 402 ...	962
——— v. Faiz ...	s. c. 20 P. R. 1916 Cr.; 17 Cr. L. J. 438 ...	998
——— v. Mendai ...	s. c. 3 O. L. J. 265; 17 Cr. L. J. 392 ...	824

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Emperor v. Munna ...	s. c. 17 Cr. L. J. 390; 14 A. L. J. 1074 ...	822
——— v. Nanda Gopal Roy ...	s. c. 20 C. W. N. 1128; 17 Cr. L. 428 ...	988
——— v. Nga Kala ...	s. c. 8 L. B. R. 329; 17 Cr. L. J. 347 ...	523
——— v. Nga Po Aung ...	s. c. 8 L. B. R. 378; 17 Cr. L. J. 319 ...	495
——— v. Nga Po Ket ...	s. c. 17 Cr. L. J. 337 ...	513
——— v. Sankara Narayana Chetti ...	s. c. 4 L. W. 53; 17 Cr. L. J. 312	488
——— v. Sreenath Mahapatra ...	s. c. 43 C. 426; 20 C. W. N. 976; 17 Cr. L. J. 423 ...	983
——— v. Sujan Singh ...	s. c. 19 P. R. 1916 Cr.; 41 P. W. R. 1916 Cr.; 144 P. L. R. 1916; 17 Cr. L. J. 310 ...	486
Fakira Lal Sahu v. Ram Charan Lal ...	s. c. 1 P. L. J. 146 ...	554
Fani Bhusan Sarkar v. Pulin Chandra Mandal ...	*Calcutta High Court ...	838
Fatteh Khan v. Baz Khan ...	s. c. 87 P. L. R. 1916 ...	875
Fazal Ahmad v. Wesal-ud-Din ...	s. c. 14 A. L. J. 669; 38 A. 481 ...	742
Firm of Tarachand Ghanshamdas v. Messrs. Louis Dreyfus & Co. ...	s. c. 10 S. L. R. 14 ...	449
Fleming Shaw & Co., *In the matter of a petition by* ...	s. c. 10 S. L. R. 47 ...	539
Foeson v. Adi Chandro Borwa ...	s. c. 8 L. B. R. 301 ...	431
Frederick Edmed Hooper v. Emperor ...	s. c. 4 L. W. 82; 20 M. L. T. 180; (1916) 2 M. W. N. 161; 17 Cr. L. J. 321 ...	497
Gadadhar Bhatta v. Sarat Chandra Mukherjee	*Calcutta High Court ...	634
Gajadhar Prosad v. Lohia ...	*Calcutta High Court ...	698
Gajanand Thakur v. Emperor ...	s. c. 1 P. L. J. 99; 17 Cr. L. J. 332	508
Galstaun, J. C. v. Woomesh Chandra Bannerjee ...	*Calcutta High Court ...	850
Ganga Charan Das v. Akhil Chandra Saha ...	s. c. 24 C. L. J. 355 ...	595
Ganga Dahal Rai v. Gaura ...	s. c. 14 A. L. J. 657; 38 A. 469 ...	46
Ganga Narayan Dutta v. Indra Narayan Saha ...	*Calcutta High Court ...	49
Ganga Prasad v. Har Narain ...	s. c. 14 A. L. J. 666; 38 A. 465 ...	739
Ganga Ram v. Sardara ...	s. c 60 P. W. R. 1916; 64 P. L. R. 1916 ...	278
Ganga Singh v. Begam ...	s. c. 57 P. R. 1916 ...	549
Gangadhar Karmakar v. Shekharbasini Dasya	s. c. 20 C. W. N. 967; 24 C. L. J. 235 ...	348
Gauri Datt Basdeo v. Nanik Ram Chauthmal	s. c. 14 A. L. J. 597 ...	203
Gaya Bhar v. Emperor ...	s. c. 14 A. L. J. 719; 17 Cr. L. J. 419 ...	979
Gehimal Dyalmal v. Karmoomal Siroomal ...	s. c. 10 S. L. R. 38 ...	551

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Girija Kanta Chakrabutty v. Mohim Chandra Acharjya ...	s. c. 20 C. W. N. 675 ...	294
Girija Prosunno Roy v. Becharam Patra ...	*Calcutta High Court ...	546
Godimella Rangamma v. Panchangam Narasimhacharyulu ...	s. c. 31 M. L. J. 26; (1916) 2 M. W. N. 258 ...	116
Gokal Chand v. Milkhi ...	s. c. 65 P. R. 1916 ...	543
Gokaldas Motiram Surti v. Partab Kabhai Barot ...	s. c. 18 Bom. L. R. 693 ...	871
Gokul Singh v. Emperor ...	s. c. 17 Cr. L. J. 351 ...	527
Gopal Singh v. Ganpat Rai ...	s. c. 66 P. R. 1916; 117 P. W. R. 1916; 130 P. L. R. 1916 ...	321
Govind Ram v. G. I. P. Railway ...	s. c. 14 A. L. J. 601 ...	208
Govinda Chandra Basak v. Haridas Basak ...	s. c. 23 C. L. J. 148; 20 C. W. N. 634 ...	48
Gouri Shanker Singh v. Bajrang Bahadur Singh ...	s. c. 19 O. C. 39 ...	434
Gulab v. Muhammad Ismail ...	*Allahabad High Court ...	598
Gulab Chand v. Sher Singh ...	s. c. 149 P. W. R. 1916 ...	608
Gulab Chand v. Sher Singh ...	s. c. 150 P. W. R. 1916 ...	616
Gulab Singh v. Emperor ...	s. c. 17 Cr. L. J. 404 ...	964
Gulab Singh v. Emperor ...	s. c. 14 A. L. J. 688; 17 Cr. L. J. 431 ...	991
Gulzari Lal v. Latif Husain ...	s. c. 14 A. L. J. 84; 38 A. 181 ...	27
Gunjra Koer v. Lakhan Koer ...	*Patna High Court ...	337
Gur Dayal Singh v. Karam Singh ...	s. c. 14 A. L. J. 304; 38 A. 254 ...	289
Gur Prasad Singh v. Sant Bakhsh Singh ...	s. c. 3 O. L. J. 256 ...	759
Gur Sahai Mahto v. Keshwar Sahu ...	s. c. 1 P. L. J. 76 ...	437
Guran Rakha v. Bindraban ...	s. c. 55 P. W. R. 1916; 79 P. R. 1916; 125 P. L. R. 1916 ...	233
Gurappa Shivgenappa Putti v. Tayawa Shidappa	s. c. 18 Bom. L. R. 343; 40 B. 513	16
Hanuman Rai v. Jagdis Rai ...	*Patna High Court ...	675
Harbans Prasad Tewari v. Rama Kant Tewari	*Patna High Court ...	588
Harchand Singh v. Munshi Ram ...	s. c. 143 P. W. R. 1916; 142 P. L. R. 1916 ...	471
Harendra Chandra Bhattacharjee v. Gagan Chandra Das ...	*Calcutta High Court ...	177
Hari Kunwar v. Lakhmi Ram Jani ...	s. c. 14 A. L. J. 481; 38 A. 380 ...	833
Harish Chandra Bose v. Ram Gobinda Nandy	*Calcutta High Court ...	584
Harjas v. Harditta ...	s. c. 79 P. L. R. 1916 ...	709
Harnam Singh v. Bhagwan Singh ...	s. c. 85 P. L. R. 1916 ...	867
Hem Chandra Biswas v. Purna Chandra Mookerjee ...	*Calcutta High Court ...	638
Himmat Bahadur v. Dhanpat Rai ...	s. c. 14 A. L. J. 340; 38 A. 335 ...	148
Hira Lal v. Maharaj Singh ...	*Allahabad High Court ...	105
Hira Pandey v. Bachu Pandey ...	*Patna High Court ...	345
Hyam, J. I. J. v. Bengal Stone Co., Ltd. ...	s. c. 20 C. W. N. 368 ...	83

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Indar Singh v. Karm Singh ...	s. c. 86 P. L. R. 1916 ...	870
Indian Specie Bank Ltd. v. Nagindas Hurjivandas ...	s. c. 18 Bom. L. R. 689 ...	628
Ishar Das v. Harkishan Das ...	s. c. 148 P. W. R. 1916 ...	577
Jagan Nath v. Emperor ...	s. c. 10 S. L. R. 45; 17 Cr. L. J. 367 ...	671
Jagannath v. Emperor ...	s. c. 17 Cr. L. J. 350 ...	526
Jagannath Kuar v. Sheo Singh ...	s. c. 19 O. C. 44; 3 O. L. J. 441 ...	439
Jagannath Prasad v. U. P. Flour and Oil Mills Co., Ltd. ...	s. c. 14 A. L. J. 349; 38 A. 347 ...	159
Jagattarini Dasi v. Prafulla Chandra Ghosh ...	*Calcutta High Court ...	792
Jagrani Misrain v. Bisheshar Dube ...	s. c. 14 A. L. J. 449; 38 A. 366 **F. B.** ...	701
Jahnavi Prasad Singh v. Gharbaran Dubey ...	*Patna High Court ...	404
Jai Ram v. Gulzari Mal ...	*Allahabad High Court ...	612
Jai Ram v. Purna ...	*Allahabad High Court ...	625
Jamuna Prasad v. Magai Ram ...	*Patna High Court ...	443
Jang Bahadur v. Muhammad Abul Hasan Khan ...	s. c. 3 O. L. J. 279 ...	743
Jatindra Nath Roy v. Sabidannessa Khatun ...	s. c. 24 C. L. J. 165; 20 C. W. N. 1258 ...	36
Jhanda v. Data Ram ...	s. c. 59 P. R. 1916; 93 P. L. R. 1916 ...	597
Jhunni Lal v. B. B. & C. I. Railway ...	s. c. 14 A. L. J. 396 ...	265
Jiwatmal Bhuromal v. Gianibai ...	s. c. 10 S. L. R. 49 ...	681
Jogendra Nath Datta Chowdhury v. Haridas Chong ...	*Calcutta High Court ...	778
Jowala Singh v. Lakha Singh ...	s. c. 81 P. R. 1916; 126 P. W. R. 1916 ...	892
Joy Lal & Co., v. Monmotho Nath Mullik ...	s. c. 20 C. W. N. 365 ...	3
Kadirvelu Chetty v. Nanjundaiyar ...	s. c. 3 L. W. 512 ...	88
Kailash Mai v. Dwarika Nath Majhi ...	*Calcutta High Court ...	788
Kakumara Anjaneyalu, *In re* ...	s. c. 17 Cr. L. J. 381 ...	813
Kala v. Hasham ...	s. c. 63 P. W. R. 1916; 127 P. L. R. 1916 ...	291
Kala Mal v. Sohara Mal ...	s. c. 113 P. W. R. 1916 ...	910
Kalipada Sirkar v. Harimohan Dalal ...	s. c. 24 C. L. J. 375 ...	856
Kalka Prasad v. Sitla Bakhsh ...	s. c. 19 O. C. 67 ...	427
Kamatchi Ammal v. Pichu Iyer ...	s. c. 4 L. W. 103; (1916) 2 M. W. N. 152; 31 M. L. J. 561 ...	876
Kangali Dhubi v. Ichhamoyi Debi ...	*Calcutta High Court ...	840
Kanhaya Lal v. Alliance of Simla, Ltd. ...	s. c. 62 P. R. 1916 ...	564
Kanhaya Lal v. Kishori Lal ...	s. c. 14 A. L. J. 881 ...	683
Kanta Mohini Dasi v. Nanichora Soba ...	*Calcutta High Court ...	566
Karali Prasad Guru v. Emperor ...	s. c. 20 C. W. N. 1075; 17 Cr. L. J. 424 ...	924

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Karam Ilahi v. Sharf-ud-din ...	s. c. 14 A. L. J. 119; 38 A. 212 ...	14
Kasim Ali v. Chairman of Municipal Commissioners, Chittagong ...	*Calcutta High Court ...	782
Katari Veranna, *In re* ...	s. c. 17 Cr. L. J. 388 ...	820
Kesho Prasad Sinha Bahadur v. Lalji Ray ...	s. c. 1 P. L. J. 138 ...	535
Khalil v. Yaqin-ud-din ...	s. c. 135 P. L. R. 1916; 147 P. W. R. 1916 ...	342
Kharaganath Misra v. Nakcheddi Jha ...	*Patna High Court ...	914
Khetra Mohan Giri v. Darpa Narain Giri ...	s. c. 20 C. W. N. 1170; 17 Cr. L. J. 419 ...	979
Khirode Chandra Roy v. Ashtulla Bee ...	s. c. 20 C. W. N. 845 ...	557
Khudiram Mahto v. Chandi Charan Mahto ...	s. c. 1 P. L. J. 306 ...	358
Khurshed Ali v. Abdul Majid ...	s. c. 14 A. L. J. 441; 38 A. 361 ...	210
King, S. v. D. J. Buchanan ...	s. c. 9 Bur. L. T. 106 ...	741
Kishori Lal v. Badri Das ...	*Allahabad High Court ...	218
Kishun v. Shyam Sundar ...	s. c. 19 O. C. 27 ...	441
Kishun Deyal Singh v. Kishun Deo Jha ...	s. c. 1 P. L. J. 69 ...	430
Krishna Chandra Bagdi v. Satish Chandra Banerjee ...	s. c. 20 C. W. N. 872 ...	365
Krishna, Kering & Co. v. J. R. Miller ...	s. c. 18 Bom. L. R. 686; 17 Cr. L. J. 377 ...	809
Krishna Lal v. Emperor ...	s. c. 14 A. L. J. 1072; 17 Cr. L. J. 448 ...	1008
Krishna Murthi Ayyer, *In re* ...	s. c. (1916) 2 M. W. N. 179; 17 Cr. L. J. 369 ...	801
Krishna Row v. President of the Corporation of Madras ...	*Madras High Court ...	581
Krista Chandra v. Ratan Ram Pal ...	s. c. 20 C. W. N. 645; 23 C. L. J. 432 ...	673
Kuber Saithwar Ram Tahal Upadhia v. Guptai Saithwar ...	*Allahabad High Court ...	237
Kudapa Venkayamma v. Kakarla Narasamma ...	s. c. 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189 ...	150
Kuldip Pandey Ramnath Singh ...	s. c. 17 Cr. L. J. 315 ...	491
Kumarappan Chettiar v. Narayanan Chettiar...	*Madras High Court ...	455
Kuna Puna Mahomed Ebrahim v. Kabana Ena Mahomed ...	s. c. 9 Bur. L. T. 110 ...	337
Kure v. Jhinguria ...	*Allahabad High Court ...	847
Labhu Ram v. Amir Chand ...	s. c. 73 P. L. R. 1916; 105 P. W. R. 1916 ...	633
Lal Behari v. Emperor ...	s. c. 14 A. L. J. 445; 38 A. 393; 17 Cr. L. J. 309 ...	485
Lal Gajendra Nath Sahi Deo v. Lal Mathurlal Nath Sahi Deo ...	s. c. 20 C. W. N. 876; 1 P. L. J. 109 ...	383

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Lalit Kishore Mitra v. Girdhari Singh ...	s. c. 20 C. W. N. 1306 ...	861
Laxmipathaya v. Ramachendra ...	s. c. 31 M. L. J. 311; (1916) 2 M. W. N. 133; 20 M. L. T. 228 ...	421
Locha Ram v. Jindwadda Khan ...	s. c. 56 P. W. R. 1916; 141 P. L. R. 1916 ...	235
Lochan Bhinmali v. Adhar Chandra Mahanta	*Calcutta High Court ...	630
M. R. R. M. Firm v. U Zan ...	*Lower Burma Chief Court ...	469
Ma Min Thin v. Maung Po Win ...	*Lower Burma Chief Court ...	438
Ma Yon v. Maung Kya Gaing ...	s. c. 9 Bur. L. T. 98 ...	710
Maddala Madhayarayudu v. Tanikalla Subbamma ...	s. c. 31 M. L. J. 222; (1916) 2 M. W. N. 233 ...	124
Madhu Sudan Pal v. Parbati Sundari Dasya ...	*Calcutta High Court ...	643
Mahadeo Prasad Sahu v. Ram Chandar Narain Singh ...	*Patna High Court ...	579
Mahasunder Kuer v. Ram Ratan Prasad Sahi	*Patna High Court ...	416
Mahomed Hanif Sahib v. Anagappa Mudali ...	*Madras High Court ...	106
Mahomed Ismail Ariff v. Ahmed Moola Dawood ...	s. c. 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141 **P. C.** ...	30
Mahomed Silar Sahib and Co. v. Nabi Khan ...	s. c. (1916) 1 M. W. N. 471; 3 L. W. 579; 31 M. L. J. 93; 20 M. L. T. 381 ...	157
Makhlachor Rahman v. Faizur Rahman ...	*Calcutta High Court ...	880
Makund Ram v. Ramraj ...	s. c. 14 A. L. J. 310 ...	292
Mala Singh v. Emperor ...	s. c. 40 P. W. R. 1916 Cr.; 17 Cr. L. J. 414 ...	974
Mangra v. Bedi Ram ...	*Allahabad High Court ...	328
Manindro Nath Mitter v. Bengal Nagpur Railway Co. ...	s. c. 17 Cr. L. J. 361 ...	665
Mannar Krishna Chetty, *In re* ...	s. c. (1916) 2 M. W. N. 267; 4 L. W. 373; 17 Cr. L. J. 384 ...	816
Mathura Mohan Saha v. Ramkumar Saha ...	s. c. 23 C. L. J. 26; 20 C. W. N. 370; 43 C. 790 ...	305
Maung Ba Kyaw v. Janalli ...	*Lower Burma Chief Court ...	426
Maung Kaw La v. Maung Ke ...	*Lower Burma Chief Court ...	356
Maung Kya Hnin v. Maung Ko Kyaw ...	*Lower Burma Chief Court ...	336
Maung Maung v. S. G. Firm. ...	s. c. 8 L. B. R. 233 ...	448
Maung Po Hla v. Emperor ...	s. c. 9 Bur. L. T. 76; 17 Cr. L. J. 391; 8 L. B. R. 357 ...	823
Maung Po Kyaing v. Maung Pyi ...	*Lower Burma Bhief Court ...	277
Maung Po Myaing v. Palaniappa ...	*Lower Burma Chief Court ...	369

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Maung Po Nyun v. Mutu Kurpen Chetty ...	s. c. 17 Cr. L. J. 316 ...	492
Maung Po Te v. Maung Shwe Ko ...	*Lower Burma Chief Court ...	373
Maung Shwe Bon v. Maung Pu ...	s. c. 9 Bur. L. T. 97 ...	731
Maung Tha Te v. Ko Shwe Byan ...	*Lower Burma Chief Court ...	394
Maung Tha U v. Maung Mya Khin ...	s. c. 9 Bur. L. T. 162; 17 Cr. L. J. 412 ...	972
Mehr Singh v. Sochet Singh ...	s. c. 151 P. W. R. 1916 ...	620
Mercantile Bank of India, Ltd., Madras v. Official Assignee of Madras ...	s. c. 39 M. 250 ...	942
Mi Chit Lu Ma v. Wi Win Ma U ...	*Lower Burma Chief Court ...	423
Mitho v. Emperor ...	s. c. 10 S. L. R. 9; 17 Cr. L. J. 364	668
Mohamad Rowther v. Pichai Rowther ...	s. c. 4 L. W. 534 ...	624
Mohamed Ali v. Mahabir Prasad ...	*Allahabad High Court ...	411
Mohammad Kazi v. Emperor ...	s. c. 20 C. W. N. 1206; 17 Cr. L. J. 412 ...	972
Mohammad Kazi v. Emperor ...	s. c. 20 C. W. N. 1294; 17 Cr. L. J. 379 ...	811
Mohammad Shakur v. Gopi ...	*Allahabad High Court ...	202
Moolla Cassim v. Moolla Abdul Rahim ...	s. c. 9 Bur. L. T. 148 ...	950
Moolla Mahomed v. P. K. Ebrahim ...	s. c. 9 Bur. L. T. 101 ...	735
Morton v. Morton ...	s. c. 76 P. R. 1916; 122 P. W. R. 1916; 139 P. L. R. 1916 **S. B.**	367
Moti Bouli v. Bhagawan Misri ...	*Calcutta High Court ...	655
Motihari Concern Ltd. v. Lachmi Prosad Sah ...	*Patna High Court ...	81
Muhammad Ahmad Said Khan v. Madho Prasad ...	*Allahabad High Court ...	911
Muhammad Farid v. Hakim Shah Abdul Wahab ...	*Patna High Court ...	424
Muhammad Hamid Ullah Khan v. Sita Ram	s. c. 3 O. L. J. 377 ...	732
Muhammad Rustam Ali Khan v. Muhammad Mushtaq Husain ...	s. c. 14 A. L. J. 554 ...	718
Muhammad Yusuf v. Raja Ram ...	*Allahabad High Court ...	867
Mukunda Lal v. Jogesh Chandra ...	s. c. 20 C. W. N. 1276 ...	370
Mulla Veettil Ussain v. Subramania Ayyar ...	s. c. 31 M. L. J. 431 ...	877
Municipal Committee, Karnal v. Mahomed Umar Daraz Ali Khan ...	s. c. 109 P. R. 1916; 145 P. W. R. 1916; 136 P. L. R. 1916 ...	355
Municipal Committee, Karnal v. Muhammad Rustam Ali Khan ...	s. c. 108 P. R. 1916; 146 P. W. R. 1916 ...	458
Muniswami Goudu v. Junjadu ...	*Madras High Court ...	65
Muthiah Chetty v. Kothandaramaswami Naidu ...	s. c. 31 M. L. J. 347; (1916) 2 M. W. N. 221; 4 L. W. 472 ...	864
Muthu Reddi v. Velu Asari ...	s. c. 4 L. W. 34; (1916) 2 M. W. N. 107 ...	591

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Nagendra Nath Basu v. Parbati Charan Koyal ...	s. c. 20 C. W. N. 819 ...	339
Nara Reddiar v. Doraiswami Reddi ...	s. c. (1916) 1 M. W. N. 474; 31 M. L. J. 96; 3 L. W. 589 ...	301
Narain Das v. Dhania ...	s. c. 14 A. L. J. 65; 38 A. 154 ...	23
Narasinga Row v. Rangasami Thevan ...	s. c. (1916) 2 M. W. N. 191; 4 L. W. 397 ...	871
Narayana Chettiar v. Veerappa Chettiar ...	s. c. 20 M. L. T. 318; (1916) 2 M. W. N. 271; 4 L. W. 422 ...	918
Narinjan Dass v. Devi Dass ...	s. c. 112 P. W. R. 1916 ...	899
Narna v. Ammani Amma ...	s. c. 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125 ...	418
Nathu Mal v. Pala Mal ...	s. c. 78 P. W. R. 1916; 103 P. R. 1916; 133 P. L. R. 1916 ...	110
Nawab Bahadur of Murshidabad v. Ahmad Hussain ...	*Calcutta High Court ...	695
Nawab v. Topan Ram ...	s. c. 62 P. W. R. 1916 Cr.; 110 P. R. 1916; 17 Cr. L. J. 318 ...	494
Nazir Husain v. Kanhaya Lal ...	*Allahabad High Court ...	473
Nemdhari Singh v. Ram Tahal Rai	s. c. 17 Cr. L. J. 348 ...	524
Nga Kyaw Zan Hla v. Emperor ...	s. c. U. B. R. (1916) II, 113; 17 Cr. L. J. 402 ...	962
Nga Tin Gyi v. Nga Twe Aung ...	s. c. 9 Bur. L. T. 35 ...	12
Nga Tun v. Emperor ...	s. c. 17 Cr. L. J. 335 ...	511
Niader Singh v. Ganga Dei ...	s. c. 14 A. L. J. 728 ...	86
Niddha Lal v. Collector of Bulandshahr ...	s. c. 14 A. L. J. 610 ...	209
Nihal Singh v. Sewa Ram ...	s. c. 14 A. L. J. 434; 38 A. 292 ...	275
Nisar Husain v. Ashraf-un-nissa ...	*Oudh Judicial Commissioner's Court ...	395
Noor Mohammed v. Emperor ...	s. c. 17 Cr. L. J. 300 ...	172
Palaniappa Mudali v. Official Receiver of Trichinopoly ...	s. c. 4 L. W. 51; (1916) 2 M. W. N. 123; 20 M. L. T. 334 ...	610
Pamanmal Hemanmal, *In the matter of* ...	s. c. 10 S. L. R. 28 ...	541
Pandillapalli Singa Reddi v. Yeddula Subba Reddi ...	s. c. 31 M. L. J. 48; 20 M. L. T. 62; (1916) 2 M. W. N. 1; 4 L. W. 1 ...	185
Pandiri Veeramma v. Mandavili Subba Rao ...	s. c. 31 M. L. J. 257 ...	98
Param Hans v. Randhir Singh ...	s. c. 14 A. L. J. 673; 38 A. 461 ...	748
Parbhu Narain Singh v. Harbans Lal ...	s. c. 14 A. L. J. 281 ...	279
Parma Dat v. Bipju	s. c. 78 P. R. 1916; 124 P. W. R. 1916 ...	887
Parmessar Singh v. Kailaspati ...	s. c. 17 Cr. L. J. 369; 1 P. L. J. 336 **F. B.** ...	801

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Pentacota Gareebu v. Pentakota Peddarayudu ...	*Court of the Board of Revenue, Madras ...	153
Penugonda Rattam v. Korasika Thatha ...	s. c. 31 M. L. J. 90; 20 M. L. T. 327 ...	237
Pirthi Chand Lal v. Mohamed Tair ...	s. c. 1 P. L. J. 67 ...	427
Ponnambala Moothan v. Mahadeva Pattar ...	s. c. (1916) 2 M. W. N. 117 ...	697
Porna Koer v. Chunni Lal ...	s. c. 14 A. L. J. 654 ...	718
Prag Narain v. Prag Narain ...	s. c. 14 A. L. J. 605 ...	198
Pragji Kala v. Assa Jalal ...	s. c. 10 S. L. R. 53 ...	530
Pran Krishna Saha v. Kripa Nath ...	*Calcutta High Court ...	76
Pranjivandas Jagjivandas Mehta v. Chan Mah Phee ...	s. c. (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 24 C. L. J. 314 **P. C.** ...	190
President, District Board, Tanjore v. Kannuswami Thondaman ...	*Madras High Court ...	122
Priyanath Pal v. Tarini Charan Roy ...	*Calcutta High Court ...	618
Punjab Sindh Bank, Ltd. v. Ram Kishen ...	*Punjab Chief Court ...	529
Qasim Ali v. Emperor ...	s. c. 17 Cr. L. J. 407 ...	967
Radha Kunwar v. Reoti Singh ...	s. c. 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303 **P. C.** ...	939
Radhe Shiam v. Chunni ...	s. c. 14 A. L. J. 361 ...	192
Radhika Prasad Bapuli v. Secretary of State	s. c. 14 A. L. J. 650; 38 A. 438 ...	711
Raghunath Tewari v. Radhessor Kuar ...	*Patna High Court ...	368
Raghuraj Bahadur Singh v. Rajeshwar Bali ...	s. c. 3 O. L. J. 258 ...	761
Rahas Bihari Lal v. Municipal Board, Cawnpore	*Allahabad High Court ...	222
Rahiman Beebi v. Khatoon Bee ...	s. c. 4 L. W. 193 ...	569
Raimohan Karmokar v. Emperor ...	s. c. 20 C. W. N. 1171; 17 Cr. L. J. 409 ...	969
Raja Ram v. Emperor ...	s. c. 33 P. W. R. 1916 Cr.; 17 Cr. L. J. 405 ...	965
Raja Ram Lal v. Hanuman Upadhya ...	*Patna High Court ...	43
Rajah of Kalahasti v. Prayag Dossjee Varu ...	s. c. 30 M. L. J. 391; (1916) 2 M. W. N. 92 ...	224
Rajah of Karvetnagar v. Echampadi Sarvana Pillai ...	s. c. 4 L. W. 200 ...	893
Ram Asray Singh v. Sheonandan Singh ...	*Patna High Court **F. B.** ...	868
Ram Bharose v. Emperor ...	s. c. 14 A. L. J. 327; 17 Cr. L. J. 353 ...	657
Ram Chand v. Ali Akbar ...	s. c. 90 P. W. R. 1916 ...	534
Ram Chandra Das v. Hachunia Fakir ...	*Calcutta High Court ...	843

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Ram Chandar Sahai v. Emperor	s. c. 17 Cr. L. J. 411 ...	971
Ram Charan Mahato v. Harihar Mahato ...	*Patna High Court ...	392
Ram Jas v. Emperor ...	s. c. 66 P. L. R. 1916; 27 P. W. R. 1916 Cr.; 17 Cr. L. J. 303 ...	175
Ram Karan v. Achal Singh ...	s. c. 3 O. L. J. 271 ...	799
Ram Kristo Chakrabartty v. Narendra Kishore Roy ...	*Calcutta High Court. ...	885
Ram Sarup Sahu v. Ratan Sen Singh ...	*Allahabad High Court ...	239
Ram Singh v. Narain Lal ...	*Allahabad High Court ...	326
Ram Tahal Singh v. Sukeswar Reyain ...	s. c. 1 P. L. J. 143 ...	547
Rama Bapu Pujari, *In re* ...	s. c. 18 Bom. L. R. 683; 17 Cr. L. J. 393 ...	825
Ramachendra Marda v. Muli Podhano ...	s. c. 4 L. W. 278 ...	640
Ramachandra Naidu v. Tirupathi Naidu ...	s. c. (1916) 2 M. W. N. 128 ...	614
Ramanandi v. Chhajju Singh ...	*Allahabad High Court ...	241
Ramdas Vithaldas Durbar v. Amerchand & Co. ...	s. c. 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 Bom. L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 1045; 85 L. J. P. C. 214; 24 C. L. J. 320 **P. C.** ...	954
Ramji v. Koman Das ...	*Allahabad High Court ...	603
Ramji Das v. Thakar Devi ...	s. c. 72 P. R. 1916; 119 P. W. R. 1916; 138 P. L. R. 1916 ...	366
Ramman Lal v. Ram Gopal ...	s. c. 3 O. L. J. 367 ...	713
Rang Behari Lal v. Racheya Lal ...	s. c. 1 P. L. J. 65 ...	429
Rangasmi Naidu v. Sundararajulu Naidu ...	s. c. 31 M. L. J. 472 ...	52
Rangaswamy Bhattar v. Seshadri Aiyengar ...	*Madras High Court ...	204
Rangi Lal v. Jassa ...	s. c. 14 A. L. J. 393; 38 A. 286 ...	208
Ranku v. Hukmi ...	*Punjab Chief Court ...	545
Rathna Padayachi, *In re* ...	s. c. 17 Cr. L. J. 363 ...	667
Reajudin Bepari v. Chand Baksha Haji ...	*Calcutta High Court ...	28
Regina Guha, *In the matter of* ...	*Calcutta High Court **S. B.** ...	925
Rikhi v. Badri Singh ...	s. c. 3 O. L. J. 251 ...	760
Rivers Steam Navigation Co., Ltd. v. Hathor Steamship Co., Ltd. ...	s. c. 20 C. W. N. 1022, (1916) 1 M. W. N. 446; 31 M. L. J. 159; 4 L. W. 176 **P. C.** ...	193
Sahdeo Lal Bhagat v. Kesho Mohan Thakur ..	s. c. 20 C. W. N. 1274 ...	916
Sahebzad Singh v. Lalsa Singh ...	s. c. 14 A. L. J. 324 ...	152
Sajiwan Mahto v. Gulab Chand Lal ...	*Patna High Court ...	678
Samba Pillai, *In re* ...	s. c. 4 L. W. 125; (1916) 2 M. W. N. 213; 17 Cr. L. J. 391 ...	823
Sankaralinga Tevan v. Avudai Ammal ...	*Madras High Court ...	826
Santi Lal v. Indian Exchange Bank, Lahore...	s. c. 14 A. L. J. 722; 38 A. 537 ...	6

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Sardar Begam v. Muhammad Sharif ...	s. c. 63 P. R. 1916 ...	555
Sardar Sher Singh, *In re* v. Mazrulla ...	s. c. 64 P. W. R. 1916; 128 P. L. R. 1916 ...	293
Sarjoo Prasad v. Nanoo Rai ...	*Patna High Court ...	779
Sarju Parshad v. Umanpatgir ...	*Allahabad High Court ...	454
Sarjug Lal v. Emperor ...	s. c. 17 Cr. L. J. 313 ...	489
Sarjug Prasad Singh v. Emperor ...	s. c. 1 P. L. J. 106; 17 Cr. L. J. 336	512
Sashishi Mohan Shaha v. Kumud Kumar Biswas	*Calcutta High Court ...	415
Satrohan Lal v. Nageshar Prasad ...	s. c. 3 O. L. J. 339; 19 O. C. 75 ...	770
Secretary of State v. Chelikani Rama Rao ...	s. c. 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617 **P. C.** ...	902
Ses Lal Singh v. Haldhar Narain ...	s. c. 1 P. L. J. 95 ...	441
Secretary of State v. Nanak ...	s. c. 61 P. W. R. 1916; 126 P. L. R. 1916 ...	283
Secretary of State v. Pemmaraju Venkayya Garu ...	s. c. 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575 ...	254
Secretary of State v. Rajah of Venkatagiri ...	s. c. 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 284 ...	266
Secretary of State v. Rangasamy Aiyangar ...	s. c. 4 L. W. 21 & 24; (1916) 2 M. W. N. 88 & 90; 31 M. L. J. 84 & 120; 20 M. L. T. 58 & 60; 17 Cr. L. J. 296 ...	168
Seetamma v. Krishnaswamy Row ...	s. c. (1916) 2 M. W. N. 33; 31 M. L. J. 240 ...	18
Selambayi v. Sangu Pandithan ...	s. c. 3 L. W. 542 ...	147
Shaik Sahed v. Krishna Mohan Basak ...	s. c. 24 C. L. J. 371 ...	563
Shambhu Nath v. Emperor ...	s. c. 14 A. L. J. 656; 17 Cr. L. J. 400; 38 A. 468 ...	832
Shankar Lal v. Latafat Ali ...	s. c. 14 A. L. J. 713 ...	600
Shanmuganatha Chettiar v. Srinivasa Aiyar ...	s. c. (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172 ...	219
Sheo Nath v. Sampat ...	s. c. 3 O. L. J. 274 ...	843
Shiam Lal v. Roshan Lal ...	s. c. 14 A. L. J. 363 ...	230
Shib Diyal v. Mathra Das ...	s. c. 61 P. R. 1916 ...	561
Shivbharan Ayodhya Prasad v. Emperor ...	s. c. 18 Bom. L. R. 682; 17 Cr. L. J. 383 ...	815
Shyama Sundari Ghose v. Aswini Kumar Chakravarti ...	*Calcutta High Court ...	91
Simil Rowther v. Kumarappa Chetty ...	s. c. (1916) 2 M. W. N. 182 ...	875
Sohan Lal v. Puran Singh ...	s. c. 54 P. R. 1916 ...	537
Sonai Singh v. Randhir Singh ...	*Allahabad High Court ...	624

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Soona Mayna Kena Roona Meyappa Chetty v. Soona Navena Suppramanian Chetty ...	s. c. 20 C. W. N. 833; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; 85 L. J. P. C. 179 **P. C.** ...	323
Sooryaprakasalingam Garu v. Shaw Trikamlal	s. c. (1916) 2 M. W. N. 131 ...	625
Stonewigg v. Sheo Rachhaya Singh ...	*Patna High Court ...	622
Srikishen Lal v. Emperor ...	s. c. 1 P. L. J. 97; 17 Cr. L. J. 330	506
Subbiah Chetty v. Kuppammal ...	s. c. 3 L. W. 587; (1916) 2 M. W. N. 86; 31 M. L. J. 437 ...	104
Suna Ana Arunachellam Chetty v. S. R. M. Ramaswami Chetty ...	s. c. 30 M. L. J. 555; 20 C. W. N. 673; 3 L. W. 508; (1916) 1 M. W. N. 399; 18 Bom. L. R. 408; 23 C. L. J. 632; 20 M. L. T. 50 **P. C.**	1
Sundar Lal v. Upendra Nath Seal ...	*Patna High Court ...	15
Sundaresa Aiyar v. Krishnamoorthy Aiyar ...	s. c. 31 M. L. J. 317; (1916) 2 M. W. N. 156; 4 L. W. 238 ...	677
Sunkara Venkataratnam v. Varadarajah Appa Rao ...	s. c. (1916) 2 M. W. N. 7; 3 L. W. 592; 31 M. L. J. 123; 20 M. L. T. 118 ...	213
Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy ...	s. c. 20 C. W. N. 292; 17 Cr. L. J. 439 ...	999
Surendra Nath v. Dwarka Nath ...	s. c. 24 C. L. J. 350 ...	605
Suryadevara Seetaramayya v. Suryadevara Kotayya ...	*Madras High Court ...	111
Swaminatha Mudaly v. VeluMudaly ...	s. c. 4 L. W. 128; (1916) 2 M. W. N. 192 ...	749
Swaminatha Pillai v. Mondaiyan ...	s. c. 3 L. W. 552 ...	480
Taj Singh v. Jagan Lal ...	s. c. 14 A. L. J. 370; 38 A. 289 ...	234
Tajammul Husain Khan v. Muhammad Husain Khan ...	s. c. 14 A. L. J. 328 ...	158
Tajo v. Allah Din ...	s. c. 53 P. W. R. 1916; 124 P. L. R. 1916 ...	229
Tangya Falla v. Trimbak Daga ...	s. c. 18 Bom. L. R. 700 ...	794
Tikamdas Mulchand v. Gokaldas Vishindas ...	s. c. 10 S. L. R. 12 ...	593
Todan Mir v. Emperor ...	s. c. 20 C. W. N. 1267; 17 Cr. L. J. 421 ...	981
Tok Gyi v. Emperor ...	s. c. 17 Cr. L. J. 378 ...	810
Tomejuddi v. Mulai Chowkidar ...	*Calcutta High Court ...	72
Tota Ram v. Emperor ...	s. c. 18 P. R. 1916 Cr.; 17 Cr. L. J. 306 ...	482
Torap Ali v. Emperor ...	s. c. 17 Cr. L. J. 386 ...	818
Tursi v. Mohan ...	*Allahabad High Court ...	302
Udhasing Tahilsingh v. Emperor ...	s. c. 10 S. L. R. 69; 17 Cr. L. J. 366 ...	670

Names of cases reported.	Where reported.	Page of Ind. Cas. Vol. XXXV.
Udit Narain Misir v. Asharfi Lal ...	s. c. 14 A. L. J. 662 ...	732
Umrai Lal v. Rukmin Kuar ...	s. c. 14 A. L. J. 953 ...	647
Umrao Singh v. Chheda Lal ...	*Allahabad High Court ...	262
Valiakath Puthiah v. Manakkal Parameswaran	s. c. 3 L. W. 601 ...	240
Valliappa Chetty v. Rungasawmy Naicker ...	s. c. 8 L. B. R. 300 ...	429
Veerabhadrah Iyer v. President, Corportion of Madras ...	s. c. 31 M. L. J. 315; (1916) 2 M. W. N. 130 ...	589
Venkata Ratnam v. Raja Ram Mohana Rao ...	s. c. 31 M. L. J. 277; 4 L. W. 248 ...	854
Venkatachallam v. Sithayamma ...	s. c. 31 M. L. J. 22 ...	296
Vitoba Rao v. Narasinga Rao ...	s. c. 4 L. W. 55; 20 M. L. T. 247; (1916) 2 M. W. N. 173; 17 Cr. L. J. 331 ...	507
Vir Singh v. Tirath Ram ...	s. c. 64 P. R. 1916 ...	583
Wahidunnissa v. Dip Narain Pershad ...	s. c. 20 C. W. N. 1174 **F. B.** ...	873
Wasawa Singh v. Emperor ...	s. c. 110 P. L. R. 1916; 47 P. W. R. 1916 Cr.; 17 Cr. L. J. 443 ...	1003
Wor Lon v. G. Rainey ...	*Lower Burma Chief Court ...	347
Yellampalle Venkatappa v. Matam Nanjappa	s. c. 4 L. W. 112 ...	594
Yusuf Akram v. Arfan Ali Khan ...	s. c. 23 C. L. J. 147 ...	45

Comparative Table

OF

Cases Reported in Volume XXXV of Indian Cases, 1916.

Cases marked with an asterisk (*) have not yet been reported elsewhere.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
1	Suna Ana Arunachellam Chetty v. Ramaswami Chetty ...	s. c. 30 M. L. J. 555; 20 C. W. N. 673; 3 L. W. 508; (1916) 1 M. W. N. 399; 18 Bom. L. R. 408; 23 C. L. J. 632; 20 M. L. T. 50 **P. C.**
3	Joy Lal & Co. v. Manmotha Nath Mullik ...	s. c. 20 C. W. N. 365.
6	Santi Lal v. Indian Exchange Bank, Lahore ...	s. c. 14 A. L. J. 722; 38 A. 537.
7	Bhaiganti Bewa v. Himmat Bidyakar ...	s. c. 24 C. L. J. 103; 20 C. W. N. 1335.
12	Nga Tin Gyi v. Nga Twe Aung ...	s. c. 9 Bur. L. T. 35.
14	Karam Ilahi v. Sharf-ud-din ...	s. c. 14 A. L. J. 119; 38 A. 212.
15	Sundar Lal v. Upendra Nath Seal ...	*Patna High Court.
16	Gurappa Shivgenappa Putti v Tayawa Shidappa ...	s. c. 18 Bom. L. R. 343; 40 B. 513.
17	Chintamoni Patni v. Tarak Chandra Goswami ...	*Calcutta High Court.
18	Seetamma v. Krishnaswamy Row ...	s. c. (1916) 2 M. W. N. 33; 31 M. L. J. 240.
23	Narain Das v. Dhania ...	s. c. 14 A. L. J. 65; 38 A. 154.
26	Biseswar Gangooly v. Bhagabati Charan Banerjee ...	s. c. 24 C. L. J. 38.
27	Gulzari Lal v. Latif Husain ..	s. c. 14 A. L. J. 84; 38 A. 181.
28	Reajudin Bepari v. Chand Baksha Haji ...	*Calcutta High Court.
30	Mahomed Ismail Ariff v. Ahmed Moola Dawood ..	s. c. 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141 **P. C.**
36	Jatindra Nath Roy v. Sabidannessa Khatun ...	s. c. 24 C. L. J. 165; 20 C. W. N. 1258.
40	Aut Behary Gui v. Rameswar Mitra ...	*Calcutta High Court.
41	Bhawan v. Madan Mohan Lal ...	s. c. 14 A. L. J. 734.
43	Raja Ram Lal v. Hanuman Upadhya ..	*Patna High Court.
45	Yusuf Akram v. Arfan Ali Khan ...	s. c. 23 C. L. J. 147.
46	Ganga Dahal Rai v. Gaura ...	s. c. 14 A. L. J. 657; 38 A. 469.
48	Govinda Chandra Basak v. Haridas Basak ...	s. c. 23 C. L. J. 148; 20 C. W. N. 634.
49	Ganga Narayan Dutta v. Indra Narayan Saha ...	*Calcutta High Court.
52	Rangasami Naidu v. Sundararajulu Naidu ...	s. c. 31 M. L. J. 472.
56	Ebadut Ali v. Muhammad Fareed ...	*Patna High Court.
60	Bijoy Chand v. Iswar Chandra Das ...	*Calcutta High Court.
63	Beni Prasad v. Lajja Ram ...	s. c. 14 A. L. J. 438; 38 A. 452.
65	Muniswami Goudu v. Junjadu ...	*Madras High Court.
67	Asa Ram v. Budhu Mal ...	s. c. 43 P. W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916.
70	Davud Rowther v. Paramaswami Pillai ...	s. c. 31 M. L. J. 207.
72	Tomejuddi v. Mulai Chowkidar ...	*Calcutta High Court.
74	Alagappa Chetty v. Aunamalai Chetty ...	s. c. 4 L. W. 411.
76	Pran Krishna Saha v. Kripa Nath ...	*Calcutta High Court.
81	Motihari Concern Ltd. v. Lachmi Prosad Sah ...	*Patna High Court.
83	Hyam, J. L. J. v. Bengal Stone Co., Ltd. ...	s. c. 20 C. W. N. 868.
86	Niader Singh v. Ganga Dei ...	s. c. 14 A. L. J. 728.
87	Biswambhar Lal v. Jhulan Ram Tewari ...	*Patna High Court.
88	Kadirvelu Chetty v. Nanjundaiyar ...	s. c. 3 L. W. 512.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
91	Shyama Sundari Ghose v. Aswini Kumar Chakravarti ...	*Calcutta High Court.
92	Balusu Veeraraghavalu v. Boppana Manikyam ...	s. c. 31 M. L. J. 380; 20 M. L. T. 329.
95	Allahabad Bank, Ltd. v. Moti Lal Barman ..	*Calcutta High Court.
97	Dasarath Sahu v. Secretary of State ...	*Patna High Court.
98	Pandiri Veeramma v. Mandavili Subba Rao ...	s. c. 31 M. L. J. 257.
102	Ali Sheikh v. Imam Ali Sarkar ...	*Calcutta High Court.
104	Subbiah Chetty v. Kuppammal ...	s. c. 3 L. W. 587; (1916) 2 M. W. N. 86; 31 M. L. J. 437.
105	Hira Lal v. Maharaj Singh ...	*Allahabad High Court.
106	Mahomed Hanif Sahib v. Anagappa Mudali ...	*Madras High Court.
108	Chitravelu Servai v. Samanna Iyer ...	*Madras High Court.
110	Nathu Mal v. Pala Mal ...	s. c. 78 P. W. R. 1916; 103 P. R. 1916; 133 P. L. R. 1916.
111	Suryadevara Seetaramayya v. Suryadevara Kotayya ...	*Madras High Court.
116	Godimella Rangamma v. Panchangam Narasimhacharyulu ...	s. c. 31 M. L. J. 26; (1916) 2 M. W. N. 258.
120	Chain Sukh v. Gopi Ram ...	s. c. 116 P. W. R. 1916; 134 P. L. R. 1916.
121	President, District Board, Tanjore v. Kannuswami Thondaman ...	*Madras High Court.
124	Maddala Madhayarayudu v. Tanikalla Subbamma...	s. c. 31 M. L. J. 222; (1916) 2 M. W. N. 233.
127	Asita Mohan Ghose v. Nerodo Mohan Ghose ...	s. c. 20 C. W. N. 901.
147	Selambayi v. Sangu Pandithan ...	s. c. 3 L. W. 542.
148	Himmat Bahadur v. Dhanpat Rai ...	s. c. 14 A. L. J. 340; 38 A. 335.
150	Kudapa Venkayama v. Kakarla Narasamma ...	s. c 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189.
152	Sahebzad Singh v. Lalsa Singh ...	s. c. 14 A. L. J. 324.
153	Pentacota Gareebu v. Pentakota Peddarayudu ...	*Court of the Board of Revenue, Madras.
154	Chundury Krishnayya v. Koripalli Raju ...	s. c. 31 M. L. J. 39.
157	Mahomed Silar Sahib & Co. v. Nabi Khan ...	s. c. (1916) 1 M. W. N. 471; 3 L. W. 579; 31 M. L. J. 93; 20 M. L. T. 381.
158	Tajammul Husain Khan v. Muhammad Husain Khan	s. c. 14 A. L. J. 328.
159	Jagannath Prasad v. U. P. Flour and Oil Mills Co., Ltd. ...	s. c. 14 A. L. J. 349; 38 A. 347.
161	Bhawani Das v. Emperor ...	s. c. 14 A. L. J. 74; 38 A. 169; 17 Cr. L. J. 289.
165	Bob Doie, *In re* ...	s. c. 4 L. W. 405; 17 Cr. L. J. 293.
167	Bhagwat Saran Misir v. Emperor ...	s. c. 14 A. L. J. 399; 17 Cr. L. J. 295.
168	Secretary of State v. Rangasamy Aiyangar ...	s. c. 31 M. L. J. 84 & 120; 20 M. L. T. 58 & 60; 4 L. W. 21 & 24; (1916) 2 M. W. N. 88 & 90; 17 Cr. L. J. 296.
171	Ahmad Khan v. Emperor ...	s. c. 5 P. R. 1916 Cr.; 122 P. L. R. 1916; 17 Cr. L. J. 299.
172	Noor Mohammed v. Emperor ...	s. c. 17 Cr. L. J. 300.
173	Chunni Lal v. Emperor ...	s. c. 14 A. L. J. 430; 17 Cr. L. J. 301.
175	Ram Jas v. Emperor ...	s. c. 66 P. L. R. 1916; 27 P. W. R. 1916 Cr.; 17 Cr. L. J. 303.
176	Budha v. Emperor ...	s. c. 21 P. R. 1916 Cr.; 123 P. L. R. 1916; 44 P. W. R. 1916 Cr.; 17 Cr. L. J. 304.
177	Harendra Chandra Bhattacharjee v. Gagan Chandra Das ...	*Calcutta High Court.
179	Anavarda Khan v. Misiri Khan ...	s. c 31 M. L. J. 44; (1916) 1 M. W. N. 468.
182	Ananda Mohon Saha v. Ananda Chandra Saha ...	*Calcutta High Court.
185	Pandillapalli Singa Reddi v. Yeddula Subba Reddi	s. c. 31 M. L. J. 48; 20 M. L. T. 62; (1916) 2 M. W. N. 1; 4 L. W. 1.
190	Pranjivandas Jagjivandas Mehta v. Chan Mah Phee	s. c. (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 Bom. L. R. 664; 20 M. L. T. 242; 9 Bur. L. T. 125; 43 C. 895; 24 C. L. J. 314 **P. C.**
192	Radhe Shiam v. Chunni ...	s. c. 14 A. L. J. 361.

Pages of Vol. XXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
193	River Steam Navigation Co., Ltd. v. Hathor Steamship Co. Ltd. ...	s. c. 20 C. W. N. 1022; (1916) 1 M. W. N. 446; 31 M. L. J. 159; 4 L. W. 176 **P. C.**
198	Prag Narain v. Prag Narain ...	s. c. 14 A. L. J. 605.
199	Bank of Multan, Ltd., v. Kamta Prasad ...	s. c. 14 A. L. J. 949.
201	Ambalavana Pandarasannadhi v. Kuppachi Janaki Ammal ...	s. c. 4 L. W. 331.
202	Mohammad Shakur v. Gopi ...	*Allahabad High Court.
203	Gauri Datt Basdeo v. Nanik Ram Chauthmal ...	s. c. 14 A. L. J. 597.
204	Rangaswamy Bhattar v. Seshadri Aiyengar ...	*Madras High Court.
205	Birj Bhukan Lal v. Mahadeo Pershad ...	*Allahabad High Court.
208	Govind Ram v. G. I. P. Railway ...	s. c. 14 A. L. J. 601.
208	Rangi Lal v. Jassa ...	s. c. 14 A. L. J. 393; 38 A. 286.
209	Niddha Lal v. Collector of Bulandshahr ...	s. c. 14 A. L. 610.
210	Khurshad Ali v. Abdul Majid ...	s. c. 14 A. L. J. 441; 38 A. 361.
213	Sunkara Venkataratnam v. Veradarajah Appa Rao ...	s. c. (1916) 2 M. W. N. 7; 3 L. W. 592; 31 M. L. J. 123; 20 M. L. T. 118.
218	Kishori Lal v. Badri Das ...	*Allahabad High Court.
219	Shanmugantha Chettiar v. Srinivasa Aiyar ...	s. c. (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L W. 27; 20 M. L T. 172.
222	Rahas Bihari Lal v. Municipal Board, Cawnpore ...	*Allahabad High Court.
224	Rajah of Kalahasti v. Prayag Dossjee Varu ...	s. c. 30 M. L. J. 391; (1916) 2 M. W. N. 92.
229	Tajo v. Allah Din ...	s. c. 53 P. W. R. 1916; 124 P. L. R. 1916.
230	Shiam Lal v. Roshan Lal ...	s. c. 14 A. L. J. 363.
233	Guran Rakha v. Bindraban ...	s. c. 55 P. W. R. 1916; 79 P. R. 1916; 125 P. L. R. 1916.
234	Taj Singh v. Jagan Lal ...	s. c. 14 A. L. J. 370; 38 A. 289.
235	Locha Ram v. Jindwadda Khan ...	s. c. 56 P. W. R. 1916; 141 P. L. R. 1916.
237	Kuber Saithwar Ram Tahal Upadhia v. Gupatai Saithwar ...	*Allahabad High Court.
237	Penugonda Rattam v. Korasika Thatha ...	s. c. 31 M. L. J. 90; 20 M. L T. 327.
239	Ram Sarup Sahu v. Ratan Sen Singh ...	*Allahabad High Court.
240	Valiakath Puthiah v. Manakkal Parameswaran ...	s. c. 3 L. W. 601.
241	Ramanandi v. Chhajju Singh ...	*Allahabad High Court.
243	Abdul Hussain v. Mohammad Ibrahim ...	s. c. 3 L. W. 379; 19 M. L. T. 346.
252	Beni Madho v. Basanto Kunbi ...	*Allahabad High Court.
254	Secretary of State v. Pemmaraju Venkayya Garu ...	s. c. 19 M. L. T. 318; 3 L. W. 443; (1916) 1 M. W. N. 342; 30 M. L. J. 575.
262	Umrao Singh v. Chheda Lal ...	*Allahabad High Court.
265	Jhunni Lal v. B. B. & C. I. Railway ...	s. c. 14 A. L. J. 396.
266	Secretary of State v. Rajah of Venkatagiri ...	s. c. 31 M. L. J. 97; (1916) 2 M. W. N. 86; 4 L. W. 133; 20 M. L. T. 284.
275	Nihal Singh v. Sewa Ram ...	s. c. 14 A. L. J. 434; 38 A. 292.
277	Maung Po Kyaing v. Maung Pyi ...	*Lower Burma Chief Court.
278	Ganga Ram v. Sardara ...	s. c. 60 P. W. R. 1916; 64 P. L. R. 1916.
279	Parbhu Narain Singh v. Harbans Lal ...	s. c. 14 A. L. J. 281.
283	Secretary of State v. Nanak ...	s. c. 61 P. W. R. 1916; 126 P. L. R. 1916.
284	Bansiram v. Secretary of State ...	s. c. 20 C. W. N. 638.
288	Badier Rahman Chowdry v. M. A. R. R. M. R. M. Chetty Firm ...	*Lower Burma Chief Court.
289	Gur Dayal Singh v. Karam Singh ...	s. c. 14 A. L. J. 304; 38 A. 254.
291	Kala v. Hasham ...	s. c. 63 P. W. R. 1916; 127 P. L. R. 1916.
292	Makund Ram v. Ramraj ...	s. c. 14 A. L. J. 310.
293	Sardar Sher Singh, *In re* v. Mazrulla ...	s. c. 64 P. W. R. 1916; 128 P. L. R. 1916.
294	Girija Kanta Chakrabutty v. Mohim Chandra Acharjya ...	s. c. 20 C. W. N. 675.
296	Venkatachallam v. Sithayamma ...	s. c. 31 M. L. J. 22.
298	Basi Nath Pal v. Jagat Kisore Acharjee ...	s. c. 20 C. W. N. 643.

Pages of Vol. XXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
301	Nara Reddiar v. Doraiswami Reddi ...	s. c. (1916) 1 M. W. N. 474; 31 M. L. J. 96; 3 L. W. 589.
302	Tursi v. Mohan ...	*Allahabad High Court.
303	Chiragh Din v. Allah Din ...	s. c. 70 P. R. 1916; 118 P. W. R. 1916; 129 P. L. R. 1916.
305	Mathura Mohan Saha v. Ramkumar Saha ...	s. c. 23 C. L. J. 26; 20 C. W. N. 370; 43 C. 790.
321	Gopal Singh v. Ganpat Rai ...	s. c. 66 P. R. 1916; 117 P. W. R. 1916; 130 P. L. R. 1916.
323	Soona Mayna Kena Roona Meyappa Chetty v. Soona Navena Suppramanian Chetty ...	s. c. 20 C. W. N. 833; (1916) 1 M. W. N. 455; 18 Bom. L. R. 642; 85 L. J. P. C. 179 **P. C.**
326	Ram Singh v. Narain Lal ...	*Allahabad High Court.
328	Mangra v. Bedi Ram ...	*Allahabad High Court.
329	Arunachallam Chettiar v. Mangalam ...	s. c. 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168.
335	Akbar Khan v. Khan Bahadur ...	s. c. 69 P. R. 1916; 120 P. W. R. 1916; 131 P. L. R. 1916.
336	Maung Kya Hnin v. Maung Ko Kyaw ...	*Lower Burma Chief Court.
337	Kuna Puna Mahomed Ebrahim v. Kabana Ena Mahomed ...	s. c. 9 Bur. L. T. 110.
337	Gunjra Koer v Lakhan Koer ...	*Patna High Court.
339	Nagendra Nath Basu v. Parbati Charan Koyal ...	s c. 20 C. W. N. 819.
342	Khalil v. Yaqin-ud-din ...	s. c. 135 P. L. R. 1916; 147 P. W. R 1916.
343	Ashmatulla Sircar v. Pan Mahmud Chowdhury ...	s. c. 20 C. W. N. 874.
344	Anant Lal Sahu v. Gokul Sahu ...	*Patna High Court.
345	Hira Pandey v. Bachu Pandey ...	*Patna High Court.
347	Bindeshiri v. Somnath Bhadry ...	s. c. 14 A. L. J. 382.
347	Wor Lon v. G. Rainey ...	*Lower Burma Chief Court.
348	Gangadhar Karmakar v. Shekharbasini Dasya ...	s. c. 20 C. W. N. 967; 24 C. L. J. 235.
355	Municipal Committee, Karnal v. Mahomed Umar Daraz Ali Khan ...	s. c. 109 P. R. 1916; 145 P. W. R. 1916; 136 P. L. R. 1916.
356	Maung Kaw La v. Maung Ke ...	*Lower Burma Chief Court.
358	Khudiram Mahto v. Chandi Charan Mahto ...	s. c. 1 P. L. J. 306.
363	Abul Fatteh v. Fatteh Ali ...	s. c. 73 P. R. 1916; 121 P. W. R. 1916; 137 P. L. R. 1916.
365	Krishna Chandra Bagdi v. Satish Chandra Banerjee	s. c. 20 C. W. N. 872.
366	Ramji Das v. Thakar Devi ...	s. c. 72 P. R. 1916; 119 P. W. R. 1916; 138 P. L. R 1916.
367	Morton v. Morton ...	s. c. 76 P. R. 1916; 122 P. W. R. 1916; 139 P. L. R. 1916 **S. B.**
368	Raghunath Tewari v. Radhessor Kuar ..	*Patna High Court.
369	Maung Po Myaing v. Palaniappa ...	*Lower Burma Chief Court.
370	Mukunda Lal v. Jogesh Chandra ...	s. c. 20 C. W. N. 1276.
373	Maung Po Te v. Maung Shwe Ko ...	*Lower Burma Chief Court.
375	Bishun Perkash Narain Singh v. Muhammad Sadique ...	*Patna High Court.
377	Abdul Samad v. Municipal Committee of Delhi ...	s. c. 75 P. R. 1916; 140 P. L. R. 1916.
378	Eastern Trust Co. v. McKenzie, Mann & Co., ...	s. c. 20 C. W. N. 457; 84 L. J. P. C. 152 **P. C.**
383	Lal Gajendra Nath Sahi Deo v. Lal Mathurlal Nath Sahi Deo ...	s. c. 20 C. W. N 876; 1 P. L. J. 109.
392	Ram Charan Mahato v. Harihar Mahato ...	*Patna High Court.
394	Maung Tha Te v. Ko Shwe Byan ...	*Lower Burma Chief Court.
395	Nisar Husain v. Ashraf-un-nissa ...	*Oudh Judicial Commissioner's Court.
404	Jahnavi Prasad Singh v. Gharbaran Dubey ...	*Patna High Court.
411	Mohamed Ali v. Mahabir Prasad ...	*Allahabad High Court.
415	Sashishi Mohan Saha v. Kumud Kumar Biswas ...	*Calcutta High Court.
416	Mahasunder Kuer v. Ram Ratan Prasad Sahi ...	*Patna High Court.
418	Narna v. Ammani Amma ...	s. c. 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
421	Laxmipathaya v. Ramachendra ...	s. c. 31 M. L. J. 311; (1916) 2 M. W. N. 133; 20 M. L. T. 228.
423	Mi Chit Lu Ma v. Mi Win Ma U ...	*Lower Burma Chief Court.
424	Muhammad Farid v. Hakim Shah Abdul Wahab ...	*Patna High Court.
426	Maung Ba Kyaw v. Janalli ...	*Lower Burma Chief Court.
427	Pirthi Chand Lal v. Mohamed Tahir ...	s. c. 1 P. L. J. 67.
427	Kalka Prasad v. Sitla Bakhsh ...	s. c. 19 O. C. 67.
429	Rang Behari Lal v. Racheya Lal ...	s. c. 1 P. L. J. 65.
429	Valliappa Chetty v. Rungasawmy Naicker ...	s. c. 8 L. B.R. 300.
430	Kishun Deyal Singh v. Kishun Deo Jha ...	s. c. 1 P. L. J. 69.
431	Foeson v. Adi Chandro Borwa ...	s. c. 8 L. B. R. 301.
431	Banwari Lal v. Jagar Nath Prasad ...	s. c. 1 P. L. J. 71.
432	Aung Hla v. Ton Gyi ...	s. c. 8 L. B. R. 264.
433	Amiruddin v. Saidur Rahman ...	s. c. 1 P. L. J. 73.
434	Gouri Shanker Singh v. Bajrang Bahadur Singh ...	s. c. 19 O. C. 39.
437	Gur Sahai Mahto v. Keshwar Sahu ...	s. c. 1 P. L. J. 76.
438	Ma Min Thin v. Maung Po Win ...	*Lower Burma Chief Court.
439	Jagannath Kuar v. Sheo Singh ..	s. c. 19 O. C. 44; 3 O. L J. 441.
441	Ses Lal v. Haldhar Narain ...	s. c. 1 P. L. J. 95.
441	Kishun v. Shyam Sundar ...	s. c. 19 O. C. 27.
443	Jamuna Prasad v. Magai Ram ...	*Patna High Court.
444	Chandrawati Kunwar v. Bhagwanta ...	s. c. 19 O. C. 32.
445	Chand Gorain v. Khub Lal Mahton ...	*Patna High Court.
446	Debi Bakhsh v. Ram Dhani ...	s. c. 19 O. C. 58.
448	Maung Maung v. S. G. Firm ...	s. c. 8 L. B. R. 238.
449	Firm of Tarachand Ghanshamdas v. Messrs. Louis Dreyfus & Co. ...	s. c. 10 S. L. R. 14.
455	Kumarappan Chettiar v. Narayanan Chettiar ...	*Madras High Court.
458	Municipal Committee, Karnal v. Muhammad Rustam Ali Khan ...	s c. 108 P. R. 1916; 146 P. W. R. 1916.
464	Sarju Parshad v. Umanpatgir ...	*Allahabad High Court.
468	Abdul Gani v. Raja Ram ...	s. c. 20 C. W. N. 829; 1 P. L. J. 232 **F. B.**
469	M. R. R. M. Firm v. U Zan ...	*Lower Burma Chief Court.
471	Harchand Singh v. Munshi Ram ...	s. c. 143 P. W. R. 1916; 142 P. L. R. 1916.
473	Nazir Husain v. Kanhaya Lal ...	*Allahabad High Court.
475	Bhirgee Nath v. Narsing Tewari ...	*Allahabad High Court.
478	Dularam Piniomal v. Badaldas Jamiatrai ...	s c. 10 S. L. R. 34.
480	Swaminatha Pillai v. Mondaiyan ...	s. c. 3 L. W. 552.
481	Dodumal v. Emperor ...	s. c. 10 S. L. R. 65; 17 Cr. L. J. 305.
482	Tota Ram v. Emperor ...	s. c. 18 P. R. 1916 Cr.; 17 Cr. L. J. 306.
484	Ali Mohamed v. Emperor ...	s. c. 10 S. L. R. 56; 17 Cr. L. J. 308.
485	Lal Behari v. Emperor ...	s. c. 14 A. L. J. 445; 38 A. 393; 17 Cr. L. J. 309.
486	Emperor v. Sujan Singh ...	s. c. 19 P. R. 19 6 Cr.; 41 P. W. R. 1916 Cr.; 144 P. L. R. 1916; 17 Cr. L. J. 310.
488	Emperor v. Sankara Narayana Chetti ...	s. c 4 L. W. 53; 17 Cr. L. J. 312.
489	Sarjug Lal v. Emperor ...	s. c. 17 Cr. L. J. 313.
490	Dhanukodi Asari v. Muthuswamy Aiyar ...	s. c. 4 L. W. 32; (1916) 2 M. W. N. 159; 17 Cr. L. J. 314.
491	Kuldip Pandey v. Ramnath Singh ...	s. c. 17 Cr. L. J. 315.
492	Maung Po Nyun v. Mutu Kurpen Chetty ...	s. c. 17 Cr. L. J. 316.
494	Nawab v. Topan Ram ...	s. c. 62 P. W. R. 1916 Cr.; 110 P. R. 1916; 17 Cr. L. J. 318.
495	Emperor v. Nga Po Aung ...	s. c. 8 L. B R. 378; 17 Cr. L. J. 319.
497	Frederick Edmed Hooper v. Emperor ...	s. c. 4 L. W. 82; 20 M. L. T. 180; (19 6) 2 M. W. N. 161; 17 Cr. L. J. 321.
506	Srikishen Lal v. Emperor ...	s. c. 1 P. L. J. 97; 17 Cr. L. J. 330.
507	Vitoba Rao v. Narasinga Rao ...	s. c. 4 L. W. 55; 20 M. L. T. 247; (1916 2 M. W. N. 173; 17 Cr. L. J. 331.
508	Gajanand Thakur v. Emperor ...	s. c. 1 P. L. J. 99; 17 Cr. L. J. 332.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
511	Nga Tun v. Emperor ...	s. c. 17 Cr. L. J. 335.
512	Sarjug Prasad Singh v. Emperor ...	s. c. 1 P. L. J. 106; 17 Cr. L. J. 336.
513	Emperor v. Nga Po Ket ...	s. c. 17 Cr. L. J. 337.
515	Akshoy Singh v. Rameswar Bagdi ...	s. c. 20 C. W. N. 1071; 17 Cr. L. J. 339.
518	Boyhenj Chandra v. Rangoon Municipality ...	s. c. 8 L. B. R. 328; 17 Cr. L. J. 342.
519	Badri Prasad v. Emperor ...	s. c.; 17 Cr. L. J. 343.
523	Emperor v. Nga Kala ...	s. c. 8 L. B. R. 329; 17 Cr. L. J. 347.
524	Nemdhari Singh v. Ram Tahal Rai ...	s. c. 17 Cr. L. J. 348.
525	Begraj Basharam v. Emperor ...	s. c. 10 S. L. R. 68; 17 Cr. L. J. 349.
526	Jagannath v. Emperor ...	s. c. 17 Cr. L. J. 350.
527	Gokul Singh v. Emperor ...	s. c. 17 Cr. L. J. 351.
529	Punjab Sindh Bank, Ltd. v. Ram Kishen ...	*Punjab Chief Court.
530	Pragji Kala v. Assa Jalal ...	s. c. 10 S. L. R. 53.
532	Bakhtawari v. Shibban Lal ...	s. c. 55 P. R. 1916.
532	Balli Singh v. Bindeswari Tewari ...	s. c. 1 P. L. J. 133.
534	Ram Chand v. Ali Akbar ...	s. c. 90 P. W. R. 1916.
535	Kesho Prasad Sinha Bahadur v. Lalji Ray ...	s. c. 1 P. L. J. 138.
536	Dhanpatmal-Diwanchand v. Kishinlal-Indraj ...	s. c. 10 S. L. R. 1.
537	Sohan Lal v. Puran Singh ...	s. c. 54 P. R. 1916.
539	*In the matter of a petition by* Messrs. Fleming Shaw & Co. ...	s. c. 10 S. L. R. 47.
539	Darpan Koer v. Kedar Nath ...	s. c. 1 P. L. J. 140.
541	Pamanmal Hemanmal, *In the matter of* ...	s. c. 10 S. L. R. 28.
542	Devi Ditta v. Indar Devi ...	s. c. 56 P. R. 1916.
543	Gokal Chand v. Milkhi ...	s. c. 65 P. R. 1916.
544	Bidya Nath v. Khikhinda Koer ...	s. c. 1 P. L. J. 157.
545	Ranku v. Hukmi ...	*Punjab Chief Court.
547	Ram Tahal Singh v. Sukeswar Reyain ...	s. c. 1 P. L. J. 143.
549	Ganga Singh v. Begam ...	s. c. 57 P. R. 1916.
551	Gehimal Dyalmal v. Karmoomal Siroomal ...	s. c. 10 S. L. R. 38.
554	Fakira Lal Sahu v. Ram Charan Lal ...	s. c. 1 P. L. J. 146.
555	Sardar Begam v. Muhammad Sharif ...	s. c. 63 P. R. 1916.
557	Khirode Chandra Roy v. Ashtulla Bee ...	s. c. 20 C. W. N. 845.
561	Shib Diyal v. Mathra Das ...	s. c. 61 P. R. 1916.
563	Shaik Sahed v. Krishna Mohan Basak ...	s. c. 24 C. L. J. 371.
564	Kanhaya Lal v. Alliance Bank of Simla, Ltd. ...	s. c. 62 P. R. 1916.
566	Kanta Mohini Dasi v. Nanichora Soba ...	*Calcutta High Court.
569	Rahiman Beebi v Khatoon Bee ...	s. c. 4 L. W. 193.
571	Chunnilal v. Habib Ali ...	*Allahabad High Court.
575	Bollapragada Ramamurthy v. Thammanna Gopayya	s. c. 4 L. W. 48; 20 M. L. T. 123; 31 M. L. J. 231.
577	Ishar Das v. Harkishan Das ...	s. c. 148 P. W. R. 1916.
579	Mahadeo Prasad Sahu v. Ram Chandar Narain Singh ...	*Patna High Court.
581	Krishna Row v. President of the Corporation of Madras ...	*Madras High Court.
582	Danpati Mahto v. Midnapur Zamindary Co. Ltd. ...	*Calcutta High Court.
583	Vir Singh v. Tirath Ram ...	s. c. 64 P. R. 1916.
584	Harish Chandra Bose v. Ram Gobinda Nandy ...	*Calcutta High Court.
588	Harbans Prasad Tewari v. Rama Kant Tewari ...	*Patna High Court.
589	Veerabhadrah Iyer v. President, Corporation of Madras ...	s. c. 31 M. L. J. 315; (1916) 2 M. W. N. 130.
589	Debendra Bala Dasi v. Chandra Sekhar Prasad Singh	*Patna High Court.
591	Muthu Reddi v. Velu Asari ...	s. c. 4 L. W. 34; 1916) 2 M. W. N. 107.
593	Tikamdas Mulchand v. Gokaldas Vishindas ...	s. c. 10 S. L. R. 12.
594	Yellampalle Venkatappa v. Matam Nanjappa ...	s. c. 4 L. W. 112.
595	Ganga Charan Das v. Akhil Chandra Saha ...	s. c. 24 C. L. J. 355.
597	Jhanda v. Data Ram ...	s. c. 59 P. R. 1916; 93 P. L. R. 1916.
598	Gulab v. Muhammad Ismail ...	*Allahabad High Court.
600	Shankar Lal v. Latafat Ali ...	s. c. 14 A. L. J. 713.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
601	Dhanraj Singh v. Lakhrani Kuar ...	s. c. 14 A. L. J. 709.
603	Ramji v. Koman Das ...	*Allahabad High Court.
605	Surendra Nath v. Dwarka Nath ...	s. c. 24 C. L. J. 350.
608	Gulab Chand v. Sher Singh ...	s. c. 149 P. W. R. 1916.
610	Palaniappa Mudali v. Official-Receiver of Trichinopoly ...	s. c. 4 L. W. 51; (1916) 2 M. W. N. 123; 20 M. L. T. 334.
610	Deodhari v. Dayanand ...	*Calcutta High Court.
612	Jai Ram v. Gulzari Mal ...	*Allahabad High Court.
613	Bepin Behari Saha v. Abdul Barik ...	*Calcutta High Court.
614	Ramachandra Naidu v. Tirupathi Naidu ...	s. c. (1916) 2 M. W. N. 128.
616	Gulab Chand v. Sher Singh ...	s. c. 150 P. W. R. 1916.
618	Priyanath Pal v. Tarini Charan Roy ...	*Calcutta High Court.
620	Mehr Singh v. Sochet Singh ...	s. c. 151 P. W. R. 1916.
622	Stonewigg v. Sheo Rachhaya Singh ...	*Patna High Court.
624	Mohamad Rowther v. Pichai Rowther ...	s. c. 4 L. W. 534.
624	Sonai Singh v. Randhir Singh ...	*Allahabad High Court.
625	Jai Ram v. Purna ...	*Allahabad High Court.
625	Sooryaprakasalingam Garu v. Shah Trikamlal ...	s. c. (1916) 2 M W. N. 131.
628	Indian Specie Bank, Ltd. v. Nagindas Hurjivandas	s. c. 18 Bom. L. R. 689.
630	Lochan Bhinmali v. Adhar Chandra Mahanta ...	*Calcutta High Court.
631	Dharanidhar Mukherji v. Rakhal Das Bhattacharjee ...	*Calcutta High Court.
633	Labhu Ram v. Amir Chand ...	s. c. 73 P. L. R. 1916; 105 P. W. R. 1916.
634	Gadadhar Bhatta v. Sarat Chandra Mukherjee ...	*Calcutta High Court.
638	Abdur Razzaq v. Partab Singh ...	*Allahabad High Court.
638	Hem Chandra Biswas v. Purna Chandra Mookerjee ...	*Calcutta High Court.
640	Ramachendra Marda v. Muli Podhano ...	s. c. 4 L. W. 278.
643	Madhu Sudan Pal v. Parbati Sundari Dasya ...	*Calcutta High Court.
646	Charapattada Siddalinga Swamulu v. Sondur Ramchandra Charlu ...	s. c. 4 L. W. 186.
647	Umrai Lal v. Rukmin Kuar ...	s. c. 14 A. L. J. 953.
651	Chandra Kanta v. Lakshan Chandra ...	*Calcutta High Court.
652	Bilawal v. Gianmal ...	s. c. 10 S. L. R. 58.
655	Moti Bouli v. Bhagawan Misri ...	*Calcutta High Court.
657	Ram Bharose v. Emperor ...	s. c. 14 A. L. J. 327; 17 Cr. L. J. 353.
657	Eknath Sahai v. Emperor ...	s. c. 17 Cr. L. J. 353; 1 P. L. J. 317.
665	Manindro Nath Mitter v. Bengal Nagpur Railway, Co. ...	s. c. 17 Cr. L. J. 361.
667	Rathna Padyachi, *In re* ...	s. c. 17 Cr. L. J. 363.
668	Mitho v. Emperor ...	s. c. 10 S. L. R. 9; 17 Cr. L. J. 364.
670	Udhasing Tahilsing v. Emperor ...	s. c. 10 S. L. R. 69; 17 Cr. L. J. 366.
671	Jagan Nath v. Emperor ...	s. c. 10 S. L. R. 45; 17 Cr. L. J. 367.
672	Allahwarayo v. Emperor ...	s. c. 10 S. L. R. 64; 17 Cr. L. J. 368.
673	Krista Chandra v. Ratan Ram Pal ...	s. c. 20 C. W. N. 645; 23 C. L. J. 432.
675	Hanuman Rai v. Jagdis Rai ...	*Patna High Court.
677	Sundaresa Aiyar v. Krishnamoorthy Aiyar ...	s. c. 31 M. L. J. 317; (1916) 2 M. W. N. 156; 4 L. W. 238.
678	Sajiwan Mahto v. Gulab Chand Lal ...	*Patna High Court.
681	Jiwatmal Bhuromal v. Gianibai ...	s. c. 10 S. L. R. 49.
683	Kanhaya Lal v. Kishori Lal ...	s. c. 14 A. L. J. 881.
687	Adit Narayan Singh v. Mahabir Prosad Tewari ...	s. c. 1 P. L. J. 324.
693	Bhairon Prasad v. Amina Begam ...	s. c. 14 A. L. J. 890.
695	Nawab Bahadur of Murshidabad v. Ahmad Hussain	*Calcutta High Court.
697	Ponnambala Moothan v. Mahadeva Pattar ...	s. c. (1916) 2 M. W. N. 117.
698	Gajadhar Prosad v. Lohia ...	*Calcutta High Court.
701	Jagrani Misrain v. Bisheshar Dube ...	s. c. 14 A. L. J. 449; 38 A. 366 (F. B.).
707	Baij Nath Rai v. Dharam Deo Tewari ...	s. c. 14 A. L. J. 353; 38 A. 315.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
709	Harjas v. Harditta ...	s. c. 79 P. L. R. 1916.
710	Ma Yon v. Maung Kya Gaing ...	s. c. 9 Bur. L. T. 98.
711	Radhika Prasad Bapuli v. Secretary of State ...	s. c. 14 A. L. J. 650; 38 A. 438.
713	Ramman Lal v. Ram Gopal ...	s. c. 3 O. L. J. 367.
718	Porna Koer v. Chunni Lal ...	s. c. 14 A. L. J. 654.
718	Muhammad Rustam Ali Khan v. Muhammad Mushtaq Husain ...	s. c. 14 A. L. J. 554.
731	Maung Shwe Bon v. Maung Pu ...	s. c 9 Bur. L. T. 97.
732	Muhammad Hamid Ullah Khan v. Sita Ram ...	s. c. 3 O. L. J. 377.
732	Udit Narain Misir v. Asharfi Lal ...	s. c 14 A. L. J. 662.
735	Moolla Mahomed v. P. K. Ebrahim ...	s. c. 9 Bur. L. T. 101.
739	Ganga Prasad v. Har Narain ...	s. c. 14 A. L. J. 666; 38 A. 465.
741	King, S. v. D. J. Buchanan ...	s. c. 9 Bur. L. T. 106.
742	Fazal Ahmad v. Wesal-ud-Din ...	s. c. 14 A. L. J. 669; 38 A. 481.
743	Jang Bahadur v. Muhammad Abul Hasan Khan ...	s. c. 3 O. L. J. 279.
748	Param Hans v. Randhir Singh ...	s c. 14 A. L. J. 673; 38 A. 461.
749	Swaminatha Mudaly v. Velu Mudaly ...	s. c. 4 L. W. 128; (1916) 2 M. W. N. 192.
753	Bhawani Din v. Jhamman ...	s. c. 3 O. L. J. 252.
754	Bamandas Bhattacharyya v. Nilmadhab Saha ...	s. c. 20 C. W. N. 1340.
759	Gur Prasad Singh v. Sant Bakhsh Singh ...	s. c. 3 O. L. J. 256.
760	Rikhi v. Badri Singh ...	s. c 3 O. L. J. 251.
761	Raghuraj Bahadur Singh v. Rajeshwar Bali ...	s. c. 3 O. L. J. 258.
764	Buniyad Husain v. Hazir-un-Nisa ...	s. c 3 O. L. J. 354.
770	Satrohan Lal v. Nageshar Prasad ...	s. c. 3 O. L. J. 339; 19 O. C, 75.
778	Jogendra Nath Datta Chowdhury v. Haridas Chong	*Calcutta High Court.
779	Sarjoo Prasad v. Nanoo Rai ...	*Patna High Court.
782	Kasim Ali v. Chairman of Municipal Commissioners, Chittagong ...	*Calcutta High Court.
788	Kailash Mai v. Dwarika Nath Majhi ...	*Calcutta High Court.
789	Bhawani v. Anantha Kamthi ...	s. c. 20 M. L. T. 263; (1916) 2 M. W. N. 244; 31 M. L. J. 556; 4 L. W. 357.
792	Jagattarini Dasi v. Prafulla Chandra Ghose ...	*Calcutta High Court.
794	Tangya Falla v. Trimbak Daga ...	s. c. 18 Bom. L. R. 700.
797	Bagala Sundari Debi v. Prosanna Nath Mukerjee ...	*Calcutta High Court.
799	Ram Karan v. Achal Singh ...	s. c. 3 O. L. J. 271.
801	Krishnamurthi Ayyer, *In re* ...	s. c. (1916) 2 M. W. N. 179; 17 Cr. L. J. 369.
801	Parmessar Singh v. Kailaspati ...	s. c. 17 Cr. L. J. 369; 1 P. L. J. 336.
809	Krishna, Kering & Co. v. J. R. Miller. ...	s. c. 18 Bom. L. R 686; 17 Cr. L. J. 377.
810	Tok Gyi v. Emperor ...	s. c 17 Cr. L. J. 378.
811	Mohammad Kazi v. Emperor ...	s. c. 20 C. W. N. 1294 (F. B.); 17 Cr. L. J. 379.
813	Kakumara Anjaneyalu, *In re* ...	s. c. 17 Cr. L J. 381.
815	Shivbharan Ayodhya Prasad v. Emperor ...	s. c. 18 Bom. L. R. 682; 17 Cr. L. J. 383.
816	Mannar Krishna Chetty, *In re* ...	s. c. (1916) 2 M. W. N. 267; 4 L. W. 373; 17 Cr. L. J. 384.
818	Torap Ali v. Emperor ...	s. c. 17 Cr. L. J. 386.
820	Katari Veranna, *In re* ...	s. c. 17 Cr. L. J. 388.
821	Alluri Subbaraju v. Alluri Rambhadra Raju ...	s. c. 17 Cr. L. J. 389; 4 L. W. 440.
822	Emperor v. Munna ...	s. c. 17 Cr. L. J. 390; 14 A. L. J. 1074.
823	Maung Po Hla v. Emperor ...	s. c. 9 Bur. L. T. 76; 17 Cr. L. J. 391; 8 L. B. R. 357.
823	Samba Pillai, *In re* ...	s. c. 4 L W. 125; (1916) 2 M. W. N. 213; 17 Cr. L. J 391.
824	Emperor v. Mendai ...	s. c. 3 O. L. J. 265; 17 Cr. L. J. 392.
825	Rama Bapu Pujari, *In re* ...	s. c. 18 Bom. L. R 683; 17 Cr. L. J. 393.
826	Sankaralinga Tevan v. Avudai Ammal ...	*Madras High Court.
828	Balai Lall Mookerjee v. Pashupati Chatterjee ...	s. c. 17 Cr. L. J. 396.
830	Baba Khan v. Maung Ba Naing ...	s. c. 9 Bur. L. T. 108; 17 Cr. L. J. 398.
832	Shambhu Nath v. Emperor ...	s. c. 14 A. L. J. 656; 17 Cr. L. J. 400; 38 A. 468.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
833	Hari Kunwar v. Lakhmi Ram Jani ...	s. c. 14 A. L. J. 481; 38 A. 380.
837	Brij Behari Lal v. Shevanath Prasad ...	s. c. 20 C. W. N. 1354.
838	Fani Bhusan Sarkar v. Pulin Chandra Mandal ...	*Calcutta High Court.
840	Kangali Dhubi v. Ichhamoyi Debi ...	*Calcutta High Court.
843	Sheo Nath v. Sampat ...	s. c. 3 O. L. J. 274.
843	Ram Chandra Das v. Hachunia Fakir ...	*Calcutta High Court.
845	Arjun Prasad v. Laiq Singh ...	s. c. 3 O. L. J. 276.
846	Girija Prosunno Roy v. Becharam Patra ...	*Calcutta High Court.
847	Kure v. Jhinguria ...	*Allahabad High Court.
850	Galstaun, J. C. v. Woomesh Chandra Bannerjee ...	*Calcutta High Court.
854	Venkata Ratnam v. Raja Ram Mohana Rao ...	s. c. 31 M. L. J. 277; 4 L. W. 248.
856	Kalipada Sirkar v. Harimohan Dalal ...	s. c. 24 C. L. J. 375.
860	Baslingappa v. Chandrappa ...	s. c. 18 Bom. L. R. 695.
861	Lalit Kishore Mitra v. Girdhari Singh ...	s. c. 20 C. W. N. 1306.
864	Muthiah Chetty v. Kothandaramaswami Naidu ...	s. c. 31 M. L. J. 347; (1916) 2 M. W. N. 221; 4 L. W. 472.
867	Harnam Singh v. Bhagwan Singh ...	s. c. 85 P. L. R. 1916.
867	Muhammad Yusuf v. Raja Ram ...	*Allahabad High Court.
868	Ram Asray Singh v. Sheonandan Singh ...	*Patna High Court **F. B.**
870	Indar Singh v. Karam Singh ...	s. c. 86 P. L. R. 1916.
871	Gokaldas Motiram Surti v. Partab Kabhai Barot ...	s. c. 18 Bom. L. R. 693.
871	Narasinga Row v. Rangasami Thevan ...	s. c. (1916) 2 M. W. N. 191; 4 L. W. 337.
873	Wahidunnissa v. Dip Narain Pershad ...	s. c. 20 C. W. N. 1174 **F. B.**
875	Simil Rowther v. Kumarappa Chetty ...	s. c. (1916) 2 M. W. N. 182.
875	Fatteh Khan v. Baz Khan ...	s. c. 87 P. L. R. 1916.
876	Kamatchi Ammal v. Pichu Iyer ...	s. c. 4 L. W. 103; (1916) 2 M. W. N. 152; 31 M. L. J. 561.
877	Mulla Veettil Ussain v. Subramania Ayyar ...	s. c. 31 M. L. J. 431.
880	Makhlachor Rahman v. Faizur Rahman ...	*Calcutta High Court.
884	Bani Singh v. Surat Singh ...	s. c. 82 P. R. 1916; 129 P. W. R. 1916.
885	Ram Kristo Chakraburtty v. Narendra Kishore Roy	*Calcutta High Court.
887	Parma Dat v. Bipju ...	s. c. 78 P. R 1916; 124 P. W. R. 1916.
888	Debi Charan Lal v. Mehdi Hussain ...	s. c. 20 C. W. N. 1303.
891	Bhagirathi Nethiaramma v. Meenakshi Nethiaramma ...	s. c. 4 L. W. 225; 31 M. L. J. 438; (1916) 2 M. W. N. 249.
892	Jowala Singh v. Lakha Singh ...	s. c. 81 P. R. 1916; 126 P. W. R. 1916.
893	Rajah of Karvetnagar v. Echampadi Sarvana Pillai	s. c. 4 L. W. 200.
899	Narinjan Dass v. Devi Dass ...	s. c. 112 P. W. R. 1916.
902	Secretary of State v. Chelikani Rama Rao ...	s. c. 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617 **P. C.** 8
910	Kala Mal v. Sohara Mal ...	s. c. 113 P. W. R. 1916.
911	Muhammad Ahmad Said Khan v. Madho Prasad ...	*Allahabad High Court.
914	Kharagnath Misra v. Nakcheddi Jha ...	*Patna High Court.
915	Bhoj Raj v. Ram Narain ...	s. c. 14 A. L. J. 717.
916	Sahdeo Lal Bhagat v. Kesho Mohan Thakur ...	s. c. 20 C. W. N. 1274.
918	Narayana Chettiar v. Veerappa Chettiar ...	s. c. 20 M. L. T. 318; (1916) 2 M. W. N. 271; 4 L. W. 442.
925	Regina Guha, *In the matter of* ...	*Calcutta High Court **S. B.**
938	Daya Ram v. Jatti ...	s. c. 80 P. R. 1916; 123 P. W. R. 1916.
939	Aiya Nadar v. Tenammal ...	s. c. 4 L. W. 235; (1916) 2 M. W. N. 253.
939	Radha Kunwar v. Reoti Singh ...	s. c. 14 A. L. J. 1003; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 20); 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303 **P. C.**
942	Mercantile Bank of India, Ltd, Madras v. Official Assignee of Madras ...	s. c. 39 M. 250.
950	Moolla Cassim v. Moolla Abdul Rahim ...	s. c. 9 Bur. L. T. 148.
951	Abdul Qader Khalifa v. Fritz Kapp ...	s. c. 20 C. W. N. 691; 23 C. L. J. 403.

Pages of Vol. XXXV of Ind. Cas.	Names of Parties.	Corresponding pages of other Reports and Journals.
954	Ramdas Vithaldas Durbar v. Amerchand & Co. ...	s. c. 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 Bom. L. R. 670; 20 M. L. T. 194; 31 M. L J. 541; 4 L. W. 342; 14 A. L. J. 1045; 85 L. J. P. C. 214; 24 C. L. J. 320 **P. C.**
958	Chandrika Bakhsh Singh v. Bikram Singh ...	s. c. 20 C. W. N. 1149; 20 M L T. 164; (1916) 2 M. W. N. 120; 4 L. W. 288; 31 M. L. J. 505; 14 A. L. J. 1024; 18 Bom. L. R. 846; 38 A. 440; 24 C. L. J. 291 **P. C.**
961	Barachi v. Emperor ...	s. c. U. B. R. (1916) II, 108; 17 Cr. L. J. 401.
962	Nga Kyaw Zan Hla v. Emperor ...	s. c. U. B. R. (1916) II, 113; 17 Cr. L. J. 402.
962	Emperor v. Nga Aung Ba ...	s. c. U. B. R. (1916) II, 114; 17 Cr. L. J. 402.
964	Gulab Singh v. Emperor ...	s. c. 17 Cr. L. J. 404.
965	Raja Ram v. Emperor ...	s. c. 33 P. W. R. 1916 Cr.; 17 Cr. L. J. 405.
966	Bakir Alli Khan Sahib, *In re* ...	s. c. 17 Cr. L. J. 406.
967	Qasim Ali v. Emperor ...	s. c. 17 Cr. L. J. 407.
969	Raimohan Karmokar v. Emperor ...	s. c. 20 C. W. N. 1171; 17 Cr. L. J. 409.
971	Ram Chandar Sahai v. Emperor ...	s. c. 17 Cr. L. J. 411.
972	Maung Tha U v. Maung Mya Khin ...	s. c. 9 Bur. L. T. 162; 17 Cr. L. J. 412.
972	Mohammad Kazi v. Emperor ...	s. c. 20 C. W. N. 1106; 17 Cr. L. J. 412.
973	Aijaz Husain v. Emperor ...	s. c. 14 A. L. J. 731; 17 Cr. L. J. 413.
974	Mala Singh v. Emperor ...	s. c. 40 P. W. R. 1916 Cr.; 17 Cr. L. J. 414.
977	Dhanpat v. Kesho Ram ...	s. c. 34 P. W. R. 1916 Cr.; 17 Cr. L. J. 417.
978	Dharamdeo Singh v. Emperor ...	s. c. 14 A. L. J. 738; 17 Cr. L. J. 418.
979	Khetra Mohan Giri v. Darpa Narain Giri ...	s. c. 20 C. W. N. 1170; 17 Cr. L. J. 419.
979	Gaya Bhar v. Emperor ...	s. c. 14 A. L. J. 719; 17 Cr. L. J. 419.
981	Todan Mir v. Emperor ...	s. c. 20 C. W. N. 1267; 17 Cr. L. J. 421.
983	Emperor v. Sreenath Mahapatra ...	s. c. 43 C. 426; 20 C. W. N. 976; 17 Cr. L. J. 423.
984	Karali Prasad Guru v. Emperor ...	s. c. 20 C. W. N. 1075; 17 Cr. L. J. 424.
988	Emperor v. Nanda Gopal Roy ...	s. c. 20 C. W. N. 1128; 17 Cr. L. J. 428.
991	Gulab Singh v. Emperor ...	s. c. 14 A. L. J. 688; 17 Cr. L. J. 431.
998	Emperor v. Faiz ...	s. c. 20 P. R. 1916 Cr; 17 Cr. L. J. 438.
999	Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy ...	s. c. 20 C. W. N. 292; 17 Cr. L. J. 439.
1003	Wasawa Singh v. Emperor ...	s. c. 110 P. L. R. 1916; 47 P. W. R. 1916 Cr.; 17 Cr. L. J. 443.
1008	Krishna Lal v. Emperor ...	s. c. 14 A. L. J. 1072; 17 Cr. L. J. 448.

TABLE
OF
Cases Cited in Volume XXXV of Indian Cases, 1916.

A

Page.

Abadi Begam v. Ali Husen, A. W. N. (1897) 26 ... 517
Abdool Hoosein v. Turner, 14 I. A. 111; 11 B. 620. 287, 340
Abdool Latif Moonshi v. Jadub Chandra Mitter, 25 C. 216 ... 781
Abdul Ghani v. Muhammad Fasih, 28 A. 95; A. W. N. (1905) 200; 2 A. L. J. 667 ... 320
Abdul Haq v. Niaz Ahmad, 7 Ind. Cas. 718; 83 P. R. 1910; 104 P. W. R. 1910; 82 P. L. R. 1910 ... 609
Abdul Hasan Khan v. Bhura, A. W. N. (1906) 226; 3 A. L. J. 763; 28 A. 763 ... 613
Abdul Hossein v. Kasi Sahu, 27 C. 362; 4 C. W. N. 41 ... 354
Abdul Jalil v. Amar Chand Paul, 21 Ind. Cas. 510; 18 C. L. J. 223 ... 874
Abdul Kadir v. Salima, 8 A. 149 (F. B.); A. W. N. (1886) 53 ... 729
Abdul Karim Patwari v. Abdul Rahman, 13 Ind. Cas. 964; 15 C. L. J. 672; 16 C. W. N. 618 ... 758
Abdul Khadar v. Chidambaram Chettyar, 3 Ind. Cas. 876; 32 M. 276; 5 M. L. T. 201 ... 224
Abdul Khadir v. Emperor, 7 Cr. L. J. 466 ... 828
Abdul Mozumdar v. Mahomed Gazi Chowdhry, 21 C. 605 ... 340
Abdul Rahim Sahib v. Kullappa Gownden, 30 Ind. Cas. 845; 18 M. L. T. 243 ... 609
Abdul Rahman Chowdhuri v. Ahmadar Rahman, 31 Ind. Cas. 554; 19 C. W. N. 1217; 22 C. L. J. 356; 43 C. 558 ... 587
Abdul Rajak v. Bai Jimbabai, 14 Ind. Cas. 988; 14 Bom. L. R. 295 ... 730
Abdulla Beary v. Mammali Beary, 5 Ind. Cas. 87; 33 M. 446; 7 M. L. T. 376 ... 291
Abdullah v. Amantullah, 21 A. 292; A. W. N. (1899) 82 ... 871
Abdullah v. Jitu, 22 A. 216 ... 977
Abdullah Khan v. Emperor, 5 Ind. Cas. 62; 37 C. 52; 14 C. W. N. 132; 11 Cr. L. J. 45 ... 493
Abed Khondkar v. Mohendra Lal De, 29 Ind. Cas. 282; 42 C. 830; 19 C. W. N. 804 ... 651
Abhesang Tirabhai v. Raisang Fatesang, 16 Ind. Cas. 561; 14 Bom. L. R. 602 ... 683
Abhoy Churn Mookerjee v. Shaik Titu, 2 C. W. N. 175 ... 839
Abhoya Churn Chukerbutty v. Gour Mohun Dutt, 24 W. R. 26 ... 596
Ably v. Dale, 11 C. B. 378 at p. 391; 20 L. J. C. P. 233; 87 R. R. 697; 2 L. M. & P. 433; 15 Jur. 1012; 138 E. R. 519 ... 785
Accidental Death Insurance Co. v. Mackenzie, (1861) 5 L. T. (N. S.) 20; 9 W. R. 783; 122 R. R. 964 ... 11

A—contd.

Page.

Achal Ram v. Kazim Husain Khan, 27 A. 271 (P. C.); 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 113; 8 Sar. P. C. J. 772 301, 457
Achuta Menon v. Achutan Nayar, 21 M. 35 ... 186
Achutaramaraju v. Subbaraju, 25 M. 7; 11 M. L. J. 370 ... 631
Adaikulam Chetti v. Subban Chetti, 26 Ind. Cas. 35; 27 M. L. J. 621; (1914) M. W. N. 684; 16 M. L. T. 279 ... 457
Adhar Chandra Dey v. Subodh Chandra Ghosh, 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 Cr. L. J. 728 ... 516
Adityam Iyer v. Ramakrishna Iyer, 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 282; 25 M. L. J. 602 ... 301
Advocate-General v. Fatima Sultani Begam, 9 B. H. C. R. 19 ... 31
Adya Saran Singh v. Thakur, 31 Ind. Cas. 853 ... 741
Aghore Nath Mukerjee v. Kamini Debi, 6 Ind. Cas. 554; 11 C. L. J. 461 ... 273
Agricultural Cattle Insurance Co. v. Fitzgerald, (1851) 16 Q. B. 432; 20 L. J. Q. B. 244; 15 Jur. 489; 117 E. R. 944 ... 183
Ahmad Bakhsh v. Lalta Prasad, 28 A. 238; A. W. N. (1905) 263 ... 414
Ahmad Sahib Shutari v. Magnesite Syndicate, Ltd., 29 Ind. Cas. 60; 28 M. L. J. 598; 2 L. W. 460; 17 M. L. T. 387 ... 147
Ahmadullah Chowdhury v. Harkaru Saha, 27 Ind. Cas. 176; 20 C. W. N. 39; 22 C. L. J. 106 586
Ahmedabad Municipality v. Manilal Udenath, 29 B. 146 355, 463
Airey, *In re*, Airey v. Stapleton (1897) 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286 ... 300
Aisa Siddika v. Bidhu Sekhar Banerjee, 18 Ind. Cas. 633; 17 C. L. J. 30 ... 18
Aiyavu Mooppan v. Swaminatha Kavundun, 28 M. 236 ... 357
Akshoy Kumar Banerjee v. Corporation of Calcutta, 27 Ind. Cas. 261; 42 C. 625, 19 C. W. N. 37; 21 C. L. J. 177 ... 898
Alagappa Chettiar v. Tirunagavalli, 13 M. L. J. 377 ... 335
Alchorne v. Gomme, (1824) 2 Bing. 54; 9 Moore 130; 2 L. J. (O. S.) C. P. 118; 130 E. R. 225 ... 11
Aleman Rama Rao v. Secretary of State for India, 24 Ind. Cas. 904; 1 L. W. 339; (1914) M. W. N. 388. ... 123
Alexandar John Forbes v. Meer Mahomed Tuqee, 13 M. I. A. 438; 14 W. R. (P. C.) 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614 ... 860

A—contd.

	Page.
Ali Bakhsh v. Ghurai, 28 Ind. Cas. 180; 2 O. L. J. 97; 18 O. C. 122 ...	716
Ali Khan Bahadur v. Indar Parshad, 23 C. 950; 23 I. A. 92 ...	287
Ali Mahammad Bepari v. Nayan Rajah Bhuiya, 13 Ind. Cas. 912; 15 C. L. J. 122; 16 C. W. N. 620*n*.	758
Alimuddin Khan v. Hira Lall Sen, 23 C. 87 ...	78
Allah Jilai v. Umrao Husain, 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810 ...	242
Allahdad Khan v. Sant Ram, 17 Ind. Cas. 486; 10 A. L. J. 506; 35 A. 74 ...	712
Allan v. Pratt, 13 A. C. 780; 57 L. J. P. C. 104; 57 L. T. 674 ...	607
Allcard v Skinner, (1887) 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251 ...	403
Alliance Bank, Simla v. Carey, 49 L. J. C. P. 781; 5 C. P. D. 429; 29 W. R. 30f; 44 J. P. 735 ...	741
Allunni v. Kunjusha, 7 M. 264 ...	189
Alma Spinning Company *In re*, Bottomley's case, (1880) 16 Ch. D. 681; 50 L. J. Ch 167; 43 L. T. 620; 26 W. R. 133 ...	313
Ameer Khan's case, 6 B. L. R. 892 ...	953
Amichand Talakchand v. Collector of Sholapur, 13 B. 234 ...	859
Amin Chand v. Gujar Mal, 73 P. R. 1906; 78 P. L. R. 1906 ...	911
Aminuddin Munshi v. Ulfutunnissa Bibi, 3 Ind. Cas 315; 13 C. W. N. 108; 9 C. L. J. 131 ...	828
Amir Begam v. Bank of Upper India, Limited, 30 A. 273; A. W. N. (1908) 107; 5 A. L. J. 336	414
Amir Hasan v. Rahim Bakksh, 19 A. 466; A. W. N. (1897) 118 ...	871
Amir Kazim v. Zainab Begam, A. W. N. (1897) 152 ...	572
Ammu v. Ramakishna Sastri, 2 M. 226 ...	9
Amrito Lal Mukerjee v. Ram Chandra Roy, 29 C. 60 ...	350
Anandibai v. Hari Suba Pai, 10 Ind. Cas. 911; 35 B. 293; 13 Bom. L. R. 287 ...	55
Anangamanjari Chowdhrani v. Tripura Sundari Chowdhrani, 14 I. A. 101; 14 C. 740; 5 Sar. P. C. J. 45; 11 Ind. Jur. 350; 7 Ind. Dec. (N. s.) 490	886, 904
Anderson v. Juggodumba Dabi, 6 C. L. R. 282 ...	462
Angammal v Malic Mahomed Syed Aslami Sahib, 21 Ind. Cas. 583; (1913) M. W. N. 974; 14 M. L. T. 418; 38 M. 710; 25 M. L. J. 625 ...	738
Angammal v. Malik Saeed Aslami Sahib, 11 Ind. Cas. 745; 10 M. L. T. 193; 21 M. L. J. 891	737
Annamalai Mudaliar v. Ramier, 31 M. 234; 18 M. L. J. 24; 4 M. L. T. 72 ...	615
Antony Gibbs & Sons v. La Societe Industrielle Et. Commerciale Des Metaux, 25 Q. B. D. 399	920
Appa Rao v. Krishna Ayyangar, 25 M. 537 ..	857
Appaya v. Padappa, 23 B. 122 ...	205
Arab Ali v. Rachimaddi, 10 Ind. Cas. 562; 13 C. L. J. 656 ...	758
Arayil Kali Amma v. Pelappakkara Manakal Sankaram Nambudripad, 5 Ind. Cas. 420; 7 M. L. T. 115; 20 M. L. J. 347; (1910) M. W. N. 156; 34 M. 292 ...	69
Ardesir v. Vajesing, 25 B. 593; 3 Bom. L. R. 190 ...	255

A—concld.

	Page.
Arjun Das v. Gunendra Nath Basu Mallik, 27 Ind Cas. 294; 20 C. L. J. 341; 18 C. W. N. 1266 ...	859
Armour v. Bate, (1891) 2 Q. B. 233; 60 L. J. Q. 433; 65 L. T. 137; 39 W. R. 546 ...	66
Arumagasundara Maharaja Pillai v. Narasimha Iyer, 29 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110 ...	226
Arunachalam Chettiar, *In re*, 30 Ind. Cas. 679; 2 L. W. 828 ...	333
Arunachella Row v. Rangiah Appa Row, 29 M. 519; 16 M. L. J. 563; 1 M. L. T. 318 ...	576
Arunachellam Chetty v. Muthayanai Theven, 25 Ind. Cas. 675; 26 M. L. J. 575 ...	333
Arunachellam Chetty v. Ramanadhan Chetty, 29 M. 309 ...	72
Aseemoonissa v. Ameeroonnissa Khatoon, 15 W. R. 285 ...	225
Asgar Ali v. Swami, U. B. R. (1902-03) I, 3 ...	831
Ashbury Railway Carriage & Iron Company v. Riche, (1875) 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451; 24 W. R. 794 ...	313
Ashok Bhuiyan v. Karim Bepari, 9 C.W. N. 843	595
Ashutosh Ghose v. Abinash Chandra Chowdhuri, 11 Ind. Cas. 501; 15 C. W. N. 782 ...	537
Astley v. Earl of Essex, 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620. ...	420
Atar Singh v. Ganga Singh, 18 Ind. Cas. 594; 1 P. R. 1913 Rev.; 1 P. W. R. 1913 Rev.; 146 P. L. R. 1913 ...	804
Atimannessa Bibi v. Abdul Sobhan 32 Ind. Cas. 21; 20 C. W. N. 113; 22 C. L. J. 577; 43 C. 467 ...	881
Attorney-General (Ontario) v. Attorney-General (Dominion) of Canada, (1896) App. Cas. 348; 65 L. J. P. C. 26; 74 L. T. 533 ...	311
Attorney-General v. Biphosphated Guano Co, 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621 ...	898
Attorney-General v. Pearce, (1740) 26 E. R. 454; 2 Atk. 87 ...	881
Attorney-General v. Vigor, (1803) 8 Ves. 256; 32 E. R. 352 ...	93
Atul Chandra Singha v. Kunja Behari Singha, 30 Ind. Cas. 321; 22 C. L. J. 90 ...	874
Atul Hazra v. Uma Charan Changdar, 33 Ind. Cas. 822; 17 Cr. L. J. 181; 20 C. W. N. 796 ...	809
Audan Khan v. Ashraf Khan, 3 O. & A. L. R. 319 ...	772
Avathani Muthukrishnier v. Sankaralingam Pillai, 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135 ...	115
Ayancheri Kovilagath Rama Varma Tamburan v. Acholathil Varikol Raman Nayar, 5 M. 89 ...	621
Ayatannessa Bibi v. Kulper Khalifa, 22 Ind. Cas 677; 41 C. 749; 19 C. W. N. 234 ...	846
Ayesha Bee v. Somasundram Iyer, 11 Bur. L. R. 257 ...	374
Azgar Ali v. Asaboddin Kazi, 9 C. W. N. 134 ...	586
Aziz Bux v. Kanik Fatima Bibi, 15 Ind. Cas. 49; 34 A. 420; 10 A. L. J. 48 ...	241

B

	Page.
Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee, 12 M. I. A. 1 at p. 28; 9 W. R. 15 (P. C.), 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 24 ...	901
Babu v. Sita Ram, 25 Ind. Cas. 426; 36 A. 478; 12 A. L. J. 806 ...	456
Babu Kasturi Singh v. Rajkumar Babu Bissun Pragas Narain Singh, 8 C. W. N. 876 ...	555
Babu Lal v. Nanku Ram, 22 C. 339 ...	693
Badar Bee v. Habib Merican Noordin, (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161	273
Badham, *In re*, Palmer, *Ex parte*, (1876) 10 Morrell, 252; 5 R. 521; 69 L. T. 356 ...	949
Bahal-ud-din v. Rafaqat Husain, 18 Ind. Cas. 451 ...	25
Bai Motivahoo v. Purshotam Dayal, 29 B. 306 at p. 312; 6 Bom. L. R. 975 ...	570
Bai Vijli v. Bai Prabhalakshmi, 9 Bom. L. R. 1129 ...	691
Baidyanath Singh v. Muspratt, 14 C. 141 ...	829
Baij Nath Goenka v. Pudmanand Singh, 14 Ind. Cas. 124; 39 C. 848; 16 C. W. N. 621; 16 C. L. J. 154 ...	273
Baijnath v. Ahmed Musaji Saloji, 18 Ind. Cas. 978; 40 C. 219; 17 C. W. N. 395 ...	454
Baijnath Singh v. Palcu, 30 A. 125; 4 A. L. J. 96; A. W. N. (1908) 33 ...	24
Baiju Lal Parbatia *v.* Bulak Lal Pathuk, 24 C. 385 ...	118
Bairangi Singh v. Manokarnika Bakhsh Singh, 20 A. 1; 35 I. A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 763; 5 A. L. J 1; 17 M. L. J. 605 ...	682
Bal Gangadhar Tilak v. Queen-Empress, 22 B. 528 at p. 532 (P. C.); 25 I. A. 1 ...	664
Bal Kishan Lal v. Topeswar Singh, 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219 ...	558
Balabux v. Rukhmabai, 30 C. 725 at p 736 (P. C.); 5 Bom. L. R. 459; 7 C. W. N. 642; 30 I. A. 130 ...	54
Balaji v. Gangadhar, 32 B 255; 10 Bom. L. R. 276 ...	34)
Balaji Anant Rajadiksha v. Ganesh Jonardan Kamati, 5 B. 499 at p. 504 ...	296
Balakrishna Mudaliar v. Raju Mudaliar, 27 Ind. Cas 736; (1915) M. W. N. 17; 16 M. L. T. 610 ...	55
Baldeo Singh v. Puttu Lal, 21 Ind. Cas. 69 ...	845
Baleshwar Bagarti v. Bhagirathi Dass, 7 C. L. J. 563; 35 C. 701 at p. 713; 12 C. W. N. ...	311
Balkishen Das v. W. F. Legge, 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar P. C. J. 601; 27 I. A. 58	103, 631
Balmakand Ram v. Ghansamram, 22 C. 391 ...	287
Balwant Rao v. Puran Mal, 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C. J. 435 ...	646
Balwant Singh v. Rani Kishori, 20 A. 267; 25 I. A. 54; 2 C. W. N 273; 7 Sar. P. C. J. 279 ...	409
Balwantsingh Ramchandra v. Sakharam Mancharam, 33 Ind. Cas. 137; 18 Bom. L. R. 80*n* ...	874
Banarsi Prasad v. Kasi Krisna Narain, 23 A. 227; 28 I A. 11 (P. C.); 5 C. W. N. 193	584, 940
Banbihari Kapur v. Khetra Pal Singh Roy, 13 Ind. Cas. 785; 16 C. W. N. 259; 38 C. 923 ...	586
Bando Subrao Jamnis v. Jambu Tavnappa Adake, 7 Ind. Cas. 986; 12 Bom. L. R. 801 ...	78
Bandy v. Cartwright, (1853) 8 Ex. 913; 22 L. J. Ex. 185; 1 W. R. 415; 91 R. R. 836 ...	260
Banee Madhub Ghose v. Thakoor Dass Mundul, (1863) B. L. R. Supp. Vol. 588; 6 W. R. Act X, 71 ...	12
Bangsa Das v. Genalal Jha, 12 Ind. Cas. 155; 14 C. L. J. 530 ...	410
Bani Madhab Mitter v. Matungini Dassi 13 C. 104; (F. B.)	869, 890
Bank of Columbia v. Patteson, (1813) 7 Cranch 299 ...	315
Bank of New South Wales v. Owston, 4 A. C. 270; 48 L. J. P. C. 25; 40 L. T. 500 ...	608
Bankala Vittil v. Usman Koya v. Chidriamokkunsa Akoth, 15 M L J. 368 ...	8
Banke Lal v. Jagat Narain, 23 A. 94; A. W. N. (1900) 8 ...	584
Baramanund Mahanti v. Krishna Charan Patnaik, 12 Ind Cas. 6; 14 C. L. J. 183 p 187 ...	136
Barhamdeo Singh v. Harmango Narain Singh, 23 Ind. Cas. 419; 18 C. W. N. 772; 20 C. L. J. 18 ...	891
Baring v. Nash, 1 V. & B. 551; 35 E. R. 214 ...	862
Bartrum v. Caddy, 9 Ad. & E. 275; 1 P. & D. 207; 1 W. W. & H. 724; 8 L. J. (N S.) Q. B. 31; 112 E. R. 1216; 48 R. R. 502 ...	592
Barwell v. Parker, (1751) 2 Ves. Sen. 364; 28 E. R. 233 ...	49
Basaratullah Mundle v. Kasirunnessa Bibi, 11 C. W. N. 190 ...	755
Basdeo, *In the matter of the petition of*, 26 A. 190; A. W. N. (1902) 229 ...	174
Bayley v. Bradley, (1848, 5 C. B. 396; 16 L. J. C. P. 206; 136 E. R. 932; 75 R. R. 764 ...	11
Baynes & Co. v. Lloyd & Sons, (1895) 2 Q. B. 610; 14 R. 678; 73 L. T. 250; 44 W. R. 328; 59 J. P. 710; 64 L. J Q B. 787 ...	260
Bayyana Ramayya v. Nidamarthi Krishnamurthi, 32 Ind Cas. 952; 3 L. W. 186; 19 M. L. T. 124; (1916) M. W. N. 133 ...	624
Bebb v. Law Society, (1914), 1 Ch. D. 286; 83 L. J. Ch 363; 110 L. T. 353; 58 S. J. 153; 30 T. L. R. 179 ...	927
Bechi v. Ahsannullah Khan, 12 A. 461 (F. B.); A. W. N. (1890) 149 ...	890
Behari Lal v. Daud Husain, 18 Ind. Cas. 721; 35 A. 240; 11 A. L. J. 352	149, 686
Behari Lal v. Madho Lal Ahir Goyawal, 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88 ...	682
Behari Lal Pan v. Fakir Chandra Roy, 12 C. W. N. ccxxxi ...	585
Behari Mahton v. Queen-Empress, 11 C. 106 ...	986
Behari Singh v. Mukat Singh, 28 A. 273; A. W. N. (1906) 3; 3 A. L. J. 140 ...	742
Behram Rashid Irani v. Sorabji Rustamji Elavia, 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 35	866
Beja v. Emperor, 26 Ind. Cas. 625; 223 P. L. R. 1915; 13 P. 1914 Cr.; 16 Cr. L. J. 33 ...	1004
Beni Prasad v Hardai Bib, 14 A. 67; A. W. N. (1892) 161 ...	129

B—contd.

Page.

Beni Prosad Sinha v. Rewat Lall, 24 C. 746 ... 586
Beni Ram v. Kundan Lal, 21 A. 496; 23 I. A. 58; 3 C. W. N. 502; A. W. N. (1906) 245 ... 736
Bepin Behari Mitter v. Tinkowri Pathak, 9 Ind. Cas. 374; 13 C. L J. 271; 15 C. W. N. 976 ... 8
Beynon v. Cook, (1875) 10 Ch. App. 389; 23 W. R. 531; 32 L. T. 353 ... 114
Bhagabati Barmanya v. Kali Charan Singh, 10 Ind. Cas 641; 38 C. 468 (P. C.); 15 C. W. N. 393; 9 M. L. T. 411; 21 M. L. J. 387; 8 A. L. J. 433; 13 C. L. J. 434; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295 ... 151
Bhagabati Bewa v. Nanda Kumar Chuckerbutty, 12 C. W. N. 835 ... 350
Bhaghwan Dayal v. Param Sukh Dass, 27 Ind. Cas. 623; 13 A. L. J. 179; 37 A. 179 ... 156
Bhagirathi Dass v. Baleswar Bagarti, 19 Ind. Cas. 686; 41 C. 69; 17 C. W. N. 877; 19 C. L. J. 155 ... 52
Bhagraj Singh v. Methur Singh, 27 Ind. Cas. 424 ... 586
Bhagwan Sahai v. Bhagwan Din, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557 ... 336
Bhagwan Singh v. Bhagwan Singh, 17 A. 294; A. W. N. (1895) 167 ... 129
Bhagwan Singh v. Bhagwan Singh, 26 I. A. 153; 21 A. 412; 3 C. W. N. 454; 1 Bom L. R. 211; 7 Sar. P. C. J. 474 ... 136
Bhagwant Sahai v. Bipin Behary Mitter, 7 Ind. Cas. 549; 37 I. A. 198; 37 C. 918; 12 C. L. J. 240 (P. C.); 14 C. W. N. 962; 8 M. L. T. 228; 7 A. L. J. 1137; 12 Bom. L. R. 997; (1910) M. W. N. 691; 20 M. L. J. 907 ... 863
Bhagwat Dayal Singh v. Debi Dayal Sahu, 35 C. 420; 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.) ... 457
Bhagwat Rajkoer v. Sheo Golam Sahu, 31 C. 1081; 9 C. W. N. 123 ... 443
Bhai Narindar Bahadur Singh v. Achal Ram, 20 I. A. 77 (P. C.); 20 C. 649 ... 959
Bhaiaji Thakur v. Jharula Das, 24 Ind. Cas. 501; 12 A. L. J. 1176; 16 M. L. T. 210; 27 M. L. J. 100; 1 L. W. 549; (1914) M. W. N. 636; 16 Bom. L. R. 845; 20 C. L. J. 360; 42 C. 244; 18 C. W. N. 1020 (P. C.) ... 473
Bhaiganti Bewa v. Himmat Bidyakar, 35 Ind. Cas. 7; 20 C. W. N. 1335; 24 C. L. J. 103 ... 757
Bhaja Chowdhury v. Chuni Lal Marwari, 5 C. L. J. 95; 11 C. W. N. 284 ... 295
Bhajahari Saha Banikya v. Behari Lal Basak, 33 C. 881; 4 C. L. J. 162 ... 711
Bhala Nahana v. Parbhu Hari, 2 B. 67 ... 130
Bharosa v. Sikhdar, 27 Ind. Cas. 97; 12 A. L J. 998 ... 774
Bhaskarappa v. Collector of North Kanara, 3 B. 452 ... 62
Bhaurao Jivaji Tivli v. Radhabai Laxman Jivaji, 2 Ind. Cas. 431; 11 Bom. L. R. 406; 33 B. 401 455
Bhavanishankar Bamrao v. Timmanna Ram Bhatta, 30 B. 508; 8 Bom. L. R. 407 ... 205
Bhawani Kumar v. Mathura Prasad Singh; 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 39 I. A. 228 (P. C.) ... 226

B—contd.

Page.

Bhimal Das v. *Musammat* Ganesha Koer, 1 C. W. N. 658 ... 469
Bhojohuree Bunick v. Aka Golam Ali, 16 W. R. 97 ... 82
Bhugwan Doss v. Upooch Singh, 10 W. R. 185 ... 898
Bhyah Ram Singh v. Bhyah Ugar Singh, 13 M. I. A. 373; 14 W. R. (P. C.) 1; 5 B. L. R. (P. C.) 293; 2 South. P. C. J. 330; 2 Sar. P. C. J. 566; 20 E. R. 591 ... 691
Bibi Khaver Sultan v. Bibi Rukhia Sultan, 29 B. 468; 7 Bom. L R. 443 ... 401
Bijoy Gopal Mukerji v. Girindra Nath Mukerji, 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 12 A. L. J. 711; 16 Bom L. R. 425; (1914) M. W. N. 430; 19 C. L. J. 620; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533 ... 50
Bijoy Gopal Mukerji v. Krishna Mahishi Debi, 34 C. 329 (P. C.); 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 339; 34 I. A. 87 ... 554
Bikani Mia v. Shuk Lal Poddar, 20 C. 116 (F. B.) ... 729
Bindesri Naik v. Ganga Saran Sahu, 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273 ... 702
Bindeswari Prosad Singh v. Lakpat Nath Singh, 8 Ind. Cas. 26; 15 C. W. N. 25 ... 350
Bindoo Bassinee Dossee v. Bolie Chand Sett, 1 W. R. 125 ... 556
Bipin Behari Hati v. Amrita Lal Bhuttacharji, 3 Ind. Cas. 635; 9 C. L. J. 76 ... 758
Bipin Behari Mitter v. Bibi Zohra, 35 C. 1047 ... 615
Birbhadra Rath v. Kalpataru Panda, 1 C. L. J. 388 ... 128
Biseswar Gangooly v. Bhagabati Charan Banerjee, 35 Ind. Cas 26; 24 C. L J. 38 ... 39
Bisheswar Dayal v. Harbans Sahay, 6 C. L J. 659, 3 M. L. T. 38 ... 456
Bishonath Sircar's case, 3 W. R. 63 Cr. ... 168
Bishun Churn Roy Chowdhry v. Jogendra Nath Roy, 26 C. 114 ... 320
Bitto Kunwar v. Kesho Prasad Misr, 24 I. A. 10; 19 A. 277; 7 Sar. P. C. J. 131; 1 C. W. N. 265 ... 300
Board v. Board, (1873) 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206 ... 8
Boddam v. Ryley, (1783) 1 Brown. C. C. 239; (1785) 2 Brown. C. C. 2; (1787) 4 Brown P. C. 561; 28 E. R. 1104 ... 49
Bombay Company Ld. v. National Jute Mills Company, Ltd., 16 Ind. Cas. 153; 39 C. 669 ... 454
Bommidi Boyyan Naidu v. Bommidi Suryanarayana, 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 23 M. L. J. 543, (1913) M. W. N. 1. ... 422
Bonar v. Mitchell, (1850) 5 Exch. 415; 19 L. J. Ex. 302 ... 313
Boston Deep Sea Fishing Company v. Ansell, (1881) 39 Ch. D. 339 at p. 365; 59 L. T. 345 318
Bouwang Raja Challaphroo Chowdhury v. Banga Behary Sen, 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311 ... 114
Boynton v. Richardson, (1862) 31 Beav. 340; 54 E. R. 1170; 135 R. R. 457 ... 85
Bradwell, *In re*, 55 Ill. 535 at p. 539 ... 935

B—concld.

	Page.
Brij Bhookun Lall Awustee v. Mohadeo Dobey, 17 W. R. 422 ...	52
Brijnandan Prasad v. Emperor, 26 Ind. Cas. 633; 16 Cr. L J. 46; 37 A. 33; 12 A. L. J. 1246 ...	175
Bristow v. Cormican, (1878) 3 App. Cas. 641 at p. 668 ...	300
Bristow v. Towers, 6 T. R. 35; 3 R. R. 113n; 101 E. R. 422 ...	498
British Insulated Wire Company v. Prescot Urban District Council, (1895) 2 Q. B. 463; 64 L. J. Q B 811; 15 R. 633; 73 L. T. 383; 44 W. R. 224; 59 J. P. 552 ...	313
Britt v. Ayllet, (1850) 11 Arkansas 475; 52 Am. Dec. 282 ...	317
Brooks v. Tarquay Corporation, (1902) 1 K. B. 601; 71 L. J. K. B. 109; 85 L. T. 785; 66 J. P. 293; 18 T. L. R. 139 ...	313
Brophy v. Connolly, (1857) 7 Ir. Ch. Rep. 173	318
Broucke, W. W. v. Rajah Shaheb Mohan Bikram Shah, 5 Ind. Cas. 20; 14 C. W. N. 12 ...	779
Buckhouse v. Crossby, (1737) 2 Eq. Cases Abr. 32; 22 E. R. 28 ...	318
Buddha Singh v. Lalta Singh, 30 Ind. Cas. 529; 20 C. W. N. 1; 29 M. L. J. 534; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481 (P. C.); (1915) M. W. N. 772; 37 A. 604; 24 I. A. 203 ...	691
Bugata Appala Naidu v. Chengalvala Jogiraju, 32 Ind. Cas 237; (1916) 1 M. W. N. 77 ...	873
Bujha Roy v. Ram Kumar Pershad, 26 C. 529; 3 C. W. N. 374 ...	469
Bulakidas, *In re*, 23 B. 484 ...	972
Burghes v. Attorney-General, (1912) 1 Ch. 173; 105 L. T. 758; 28 T. L. R. 72; 81 L. J. Ch. 105 ...	282
Burjorji Cursetji Panthaki v. Muncherji Kunverji, 5 B. 143 ...	19
Burrows v. Jemino, 93 E. R. 815; 2 Str. 733 ...	920
Burugapalli Sriramulu v. Nandigam Subbarayadu, 10 Ind. Cas. 57; 10 M. L. T. 313 ...	516
Bustard's case, 4 Coke's Reports 121 (*a*); 76 E. R. 1114 ...	93
Butler v. Rice, (1910) 2 Ch. 277; 103 L. T. 94; 79 L. J. Ch. 652 ...	796
Byravalu Naidu, *In the matter of*, 26 M. 127; 2 Weir 321 ...	491

C

Caldow v. Pixell, (1877) 2 C. P. D. 562; 43 L. J. C. P. 341; 36 L. T. 469; 25 W. R. 773 ...	312
Caluram v. Chengappa, 13 M. 351; 1 Weir 691 ...	831
Cameron v. Fraser, (1842) 4 Moore P. C. 1; 13 E R. 200 ...	75
Cariss v. Tattersall, (1840) 2 Man. & G. 890; 3 Scott. (N. R.) 257; 10 L. J. C. P. 187; 133 E. R. 1004 ...	183
Carter v. Ely (Dean), (1853) 7 Sim. 211 at p. 222; 40 R. R. 113 at p. 121; 4 L. J. Ch. 132; 58 E. R. 817 ...	316
Carter v. Wake, (1877) 4 Ch. D 605; 46 L. J. Ch. 841 ...	288
Carton v. Bury, (1860) 10 Ir. Ch. Rep. 387 at p. 400 ...	318

C—contd.

	Page.
Central Transport Company v. Pullman Palace Car Company, (1890) 139 U. S. 24 ...	319
Chairman of the Howrah Municipality v. Khetra Krishna Mitter, 33 C. 1290 at p. 1296; 10 C. W. N. 1044; 4 C. L. J. 343 ...	463
Chairman of the Purnea Municipality v. Siva Sankar Ram, 33 C. 899 ...	360
Chajju v. Umrao Singh, 22 A. 386; A. W. N. (1900) 120 ...	242
Chalavadi Kotiah v. Poloori Alimelammah, 31 M 71; 18 M. L. J. 43; 3 M. L. T. 328 ...	595
Chamanlal v. Ganesh Moti Chand, 28 B. 453; 6 Bom. L. R. 460 ...	691
Chambers v. Betty, (1815) Beatty 488 ...	318
Chandar Sekhar Tewari v. Balakdhari Dubey, 15 Ind. Cas. 611; 10 A. L. J. 149 ...	708
Chandrareka v. Secretary of State for India, 14 M. 163 ...	47
Chandu v. Kunhamed, 14 M. 324; 1 M. L. J. 529 ...	118
Chandulal v. Awad, 21 B. 351 ...	78
Chanmalapa Chenbasapa Tenguikai v. Abdul Vahab Muhamed Hussen, 8 Ind. Cas. 645; 12 Bom. L. R. 977 at p. 982; 35 B. 139 ...	101
Channu Dat Vyas v. Babu Nandan, 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529 ...	89
Chapleo v. Brunswick Building Society, (1881) 6 Q. B D. 696 at p. 711; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529 ...	319
Chasteauneuf v. Capeyron, (1882) 7 App. Cas. 127; 51 L J. P. C. 37; 46 L. T. 65; 4 Asp. M. C. 489 ...	313
Chattar v. Newal Singh, 12. A. 64; A. W. N. (1899) 200 ...	615
Chedambaram Chetty v. Karunalyavalangapuly, Taver, 3 M. H. C. R. 342 ...	20
Chenna Reddi v. Pedda Obi Reddi, 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 135 (F. B.); 19 M. L. J. 388 ...	530
Chettiattil Muhamod v. Kunhi Koru, 29 M. 175 ...	110
Chetwynd v. Allen, (1899) 1 Ch. D. 353; 80 L. T. 110; 63 L. J. Ch. 160; 47 W. R. 200 ...	733
Chhoti Narain Singh v. Musammat Rameswar Koer 6 C. W. N. 796 ...	857
Chidambaram Chetty v. Ayyavu, 32 Ind. Cas. 919; 29 M. L. J. 746 ...	331
Chinnan v. Ramachandra, 15 M. 54 ...	456
Chinniyan's case, 2 Weir 43 ...	168
Chint Ram v. Bakhtawar Rikh, 1 P. L. R. 1902 ...	546
Chinto, *In re*, 2 Bom. L. R. 801 ...	831
Chippendale, *Ex parte*, (1853) 4 De G. M. & G. 19 at p. 36; 18 Jur. 710; 22 L. J. Ch. 926; 2 W. R. 517; 23 L. T. (o. s) 209; 102 R. R. 7; 43 E. R. 415 at p. 421 ...	49
Chorlton v. Lings, 4 C. P. 374 at p. 390; 38 L. J. C. P. 25; 19 L. T. 534; 17 W. R. 284; 1 Hopw. & C. 1 ...	934
Christacharlu v. Karibasayya, 9 M. 399 at p. 410	183
Chubb v. Fuller, (1858) 4 Jur. (N. S.) 153 ...	318
Chuck v. Cremer, 2 Phil. 113 at p. 115; 16 L J. Ch. 92; 1 Coop. C. C. 338 at p 342; 41 E R. 884; 78 R. R. 45 ...	859
Chundi Charan Mandal v. Banke Behari Lal Mandal, 26 C 449; 3 C. W. N. 283 ...	781

C—contd.

	Page.
Chuni Bibi v. Basanti Bibi, 24 Ind. Cas. 661; 12 A. L. J. 969; 36 A. 537 ...	301
Clifford v. Kelly, (1858) 7 Ir. Ch. Rep. 333 ...	318
Cloake v. Hooper, (1673) Freem. (K. B.) 122; 3 Keb. 162; 89 E. R. 90 ...	255
Clough v. Samuel, (1905) A. C. 442 at p. 446; 74 L. J. K. B. 918; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Manson, 347 ...	946
Clydsdale Bank v. Paton, (1896) A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738 ...	287
Coe v. Clay, (1829) 5 Bing. 440; 30 R. R. 699; 3 Moo. & P. 57; 7 L. J. C. P. (o. s.) 162; 130 E. R. 1131 ...	255
Cole v. Green, (1843) 6 M. & G. 872 at p. 890; 7 Scott (N. R.) 682; 13 L. J. C. P. 30, 134 E. R. 1145 ...	312
Collector of Jaunpur v. Bithal Das, 24 A. 291; A. W. N. (1902) 67 ...	181
Collector of Madura v. Moottoo Ramalinga Sathupathy, 12 M. I. A. 397 at p. 436; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389. ...	128
Collector of Maldah v. Nirode Kamini Debya, 15 Ind. Cas. 621; 17 C. W. N. 21 ...	798
Collector of Masulipatam v. Cavaly Vencata Narrainapah, 8 M. I. A. 529; 2 W. R. 61 (P. C.) 1 South. P. C. J. 474; 1 Sar. P. C. J. 820; 19 E. R. 631 ...	682
Collector of Meerut v. Umrao Singh, 29 Ind. Cas. 220; 13 A. L. J. 437 ...	708
Collector of Mirzapur v. Bhagan Prashad, 18 Ind. Cas. 311; 35 A. 164; 11 A. L. J. 141 ...	749
Collector of Poona v. Bai Chanchalbai, 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690 ...	594
Collyer v. Dudley, (1823) T. & R. 421; 2 L. J. (o. s.) Ch. 15; 37 E. R. 1163 ...	85
Commundun Mohideen Saib v. Oree Meerah Saib, 7 M. H. C. R. 271 ...	592
Compton v. Bagley, (1892) 1 Ch. D. 313; 65 L. J. Ch. 113; 65 L. T. 706 ...	374
Concha v. Concha, 11 A. C. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477 ...	757
Cooke v. Benbow, (1863) 3 De G. J. & Sm. 1; 6 N. R. 135; 46 E. R. 538; 142 R. R. 1 ...	49
Cookes v. Cookes, 2 De. G. J. & S. 526 at p. 530; 46 E. R. 479 ...	939
Coomber *In re*, Coomber v. Coomber, (1911) 1 Ch. 174, on appeal page 723; 80 L. J. Ch. 399; 104 L. T. 517 ...	398
Cope v. Thamas Haven Dock Railway Company, (1849) 3 Exch. 841; 77 R. R. 859; 6 Railw. Cas. 83; 18 L. J. Ex. 345 ...	313
Corea v. Appuhamy, (1912) A. C. 230; 81; L. J. P. C. 151; 105 L. T. 836 ...	27
Cornwal Mining Company v. Bennett, (1860) 5 H. & N. 423; 120 R. R. 670; 29 L. J. Ex. 157; 6 Jur. (N. S.) 539 ...	313
Corolan v. Brabazon, (1846) 3 J. & L. 200 at p. 209; 9 Ir. Eq. Rep. 224 ...	318
Cory Brothers & Co., Ltd. v. Owners of the Turkish Steamship "Mecca", (1897) A. C. 286; 66 L. J. P. 86; 76 L. T. 579; 45 W. R. 667 ...	576
Coupland v. Maynard, 12 East 134; 104 E. R. 53 ...	841
Crogan v. San Francisco, (1861) 18 Calf 590 ...	314

C—concld.

	Page.
Crook v. Corporation of Seaford, (1870) 10 Eq. 678 ...	316
Crook v. Morley, (1891) A. C. 316 at p. 323; 65 L. J. Q. B 97; 65 L. T. 389; 8 Morrell, 227 ...	943
Crosskey v. Mills, 1 C. M. & R. 298; 3 L. J. Ex. 297 ...	858
Crow v. Warren County, (1888) 118 Ind. 51; 20 N. E. 642 ...	314
Cubitt v. Blake, (1854) 19 Beav. 454; 105 R. R. 209, 52 E. R. 426; 2 W. R. 604 ...	318

D

DaCosta, J. v. M. M. Hall, 5 W. R. Misc. App. 25	806
Dadd v. Churton, (1897) 1 Q. B. 562; 66 L. J. Q. B. 477; 76 L. T. 438; 45 W. R. 490 ...	317
Daji Himat v. Dhirajram Sadaram, 12 B. 18 ...	155
Dakeshur Pershad Narain Singh v. Rewat Mehton, 24 C. 25 ...	155
Dakhina Mohan Roy v. Saroda Mohan Roy, 21 C. 142 (P. C.); 20 I. A. 160; 6 Sar. P. C. 766 ...	476
Dalgleish v. Damodar Narain Chowdhry, 33 C. 1286 ...	608
Dalip Singh v. Bahadur Ram, 15 Ind. Cas. 435; 9 A. L. J. 550; 34 A. 446 ...	212
Dalton v. Fitzgerald, (1897) 1 Ch. D. 440 on appeal 2 Ch. D. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685 ...	8
Dattaraya Ramachandra Savale v. Ajmuddin, Fakruddin, 33 Ind. Cas. 146; 18 Bom. L. R. 76 ...	874
Dattatraya Rayaji Pai v. Shridhar Narayan Pai, 17 B. 736; P. J. (1892) 348 ...	736
Daulat Singh v. Raghubir Singh, A. W. N. (1894) 141 ...	708
David Yule v. Ram Khelwan Sahai, 6 C. W. N. 329 ...	59
Davidson v. Cooper, (1844) 13 M. & W. 343; 1 D. & L 377; 13 L. J. Ex 276; 153 E. R. 142; 67 R. R. 638 ...	183
Davis v. Barnett, 14 Beav. 542; 51 E. R. 394; 92 R. R. 209 ...	225
Davis v. Town Properties Investment Corporation, Ltd., (1903) 1 Ch. 797; 72 L. J. Ch. 389; 51 W. R. 417; 88 L. T. 665 ...	256
Deare v. Attorney-General, (1835) 1 Y. & C. 197 at p. 208; 41 R. R. 237 ...	382
Debi Pershad Singh v. Joynath Singh, 24 C. 865 (P. C.); 24 I. A. 60; 1 C. W. N. 401 ...	358
Debi Prosad Chowdhry v Golap Bhagat, 19 Ind. Cas. 272; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499 50	682
Debi Singh v. Jai Ram, 25 A. 214 at p. 220; A. W. N. (1903) 21 ...	126
Deivanayagam Pillai, A. T. S. v. Muthukamarasawmy Pillai, 14 Ind. Cas. 560 ...	920
Delhi Cloth and General Mills Company v R. B. Hardhian Singh, 6 Ind. Cas. 939; 72 P. W. R. 1910 ...	609
Deo Sahai Lal v. Queen-Empress, 28 C. 253; 5 C. W. N. 289 ...	813
Deoki Nandan Singh v. Bansi Singh, 10 Ind. Cas. 371; 14 C. L. J. 35; 16 C. W. N. 124 ...	742

D—contd.

Page.

Depuru Kalappa Reddi v. Akkappa Nayanim, 8 Ind. Cas. 392; (1911) 2 M. W. N. 75; 8 M. L. T. 297 ... 226

Devanai v. Raghunatha Row, 18 Ind. Cas. 298; 13 M. L. T. 351; (1913) M. W. N. 886 ... 331

Devkabai v. Jefferson, Bhaishankar and Dinsha, 10 B. 248 ... 859

Dhamoomal Chandiram v. *Musammat* Kiam Khatun, 1 S. L. R. 133 ... 479

Dharam Chand Boid v. Moaji Shahu, 16 Ind. Cas. 440; 16 C. L. J. 436 ... 310

Dhurm Das Pandey v. *Musammat* Shama Soondri Dibiah, 3 M. I. A. 229 at p. 240; 6 W. R. (P. C.) 43; 1 Suth P. C. J. 147; 1 Sar. P. C. J. 271; 13 E. R. 97 ... 570

Dickinson, *In re*, Rosenthal, *Ex parte*, (1882) 20 Ch. D. 315; 51 L. J. Ch. 736; 47 L. T. 266; 30 W. R. 667 ... 312

Diggle v. London and Blackwall Railway Company, (1850) 5 Exch. 442; 19 L. J. Ex. 308; 6 Railw. Cas. 590 14 Jur. 937 ... 313

Diljan Mibha Bibi v. Hemanta Kumar Roy, 29 Ind. Cas. 395; 19 C. W. N. 758 ... 614

Dindayal Mozumdar v. Emperor, 34 C. 935; 11 C. W. N. 1002; 6 Cr. L. J. 230 ... 174

Dinobundhu Saha v. Lolit Mohun Moitra, 2 C. W. N. 595 ... 839

Dinobundhu Shaw Chowdhry v. Jogmaya Dasi, 29 C. 154; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 29 I. A. 9 (P. C) ... 225

Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani, 29 I. A. 24; 6 C. W. N. 286; 29 C. 187 ... 300

Dodge v. Pringle, (1860) 29 L. J. Ex. 115; 121 R. R. 880 ... 183

Doe v. Oliver, (1829) 34 R. R. 358; Smith's Leading Cases, 8th Edition, p. 775; 109 E. R. 418; 5 Man. & Ry. 202; 8 L. J. K. B. (o. s.) 137; 10 Barn. & Cress. 181 [Smith's Leading Cases, Eleventh Edition, Vol. II, p. 724 ... 8

Doe d. Beanland v. Hirst, (1321) 23 R. R. 736; 3 Starkie 69 ... 183

Doe d. Biddulph v. Poole, (1848) 11 Q. B. 713; 75 R. R. 607; 17 L. J. Q. B. 143; 12 Jur. 450; 116 E. R. 641 ... 317

Doe d. Bristow v. Pegge, (1785) 1 T. R. 758*n.*; 4 Dougl 309; 99 E. R. 1362 ... 11

Doe d. Jaun Beebee v. Abdollah Barber, (1838) Fulton 345; 1 Ind. Dec. (o. s) 848 ... 729

Doe d. Joseph Manton v. Austin, (1832) 9 Bing. 41; 2 M. & Scott. 107; 1 L. J. C. P. 152; 131 E. R. 529 ... 9, 29

Doe d. Knight v. Smythe, (1815) 4 M. & S. 347; 16 R. R. 486; 105 E. R. 862 ... 11

Doe d. Pennington v. Taniere, (1848) 12 Q. B. 998 at p. 1013; 18 L. J. Q. B. 49; 13 Jur. 119; 116 E. R. 1144; 76 R. R. 450 ... 315

Doe d. Strode v. Seaton, (1835) 2 C. M. & R. 728; 1 Tyr. & G. 19, 1 Gale. 303; 5 L. J. (N. S.) Ex. 72; 41 R. R. 831 ... 757

Douglass v. Rhyl Urban Council (1913) 2 Ch. 407; 82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 11 L. G. R 1162; 57 S. J. 627; 29 T. L. R. 605 ... 315

Doulat Koer v. Rameswari Koeri, 26 C. 625; 3 C. W. N. 461 ... 808

Dowlat Rai v. Khub Lal Singh, 22 Ind. Cas. 645 457

D—concld.

Page.

Drown v. Forrest, (1891) 63 Vermont 557; 14 L. R. A. 80 ... 317

Drury v. Macnamara, (1855) 5 El. & Bl 612 at p. 617; 25 L. J. Q. B 5; 1 Jur. (N. S) 1133; 4 W. R. 50; 119 E. R. 608; 26 L. T. (O. S.) 74; 103 R. R. 647 ... 260

D'Souza v. Wroughton, (1827) 4 Beng. S. D. A. 225 ... 270

Dungar Mal v. Jai Ram, 24 A. 376; A. W. N. (1902) 90 ... 476

Dunkely, *In re*, Waller, *Ex parte*, (1905) 2 K. B. 68; 74 L. J. K. B 962; 93 L. T. 243; 54 W. R. 171; 12 Manson, 384; 21 T. L. R. 707 ... 949

Durga Baksh Singh v. Fateh Bahadur Singh, 33 Ind. Cas. 30; 14 A. L. J. 425 ... 915

Durga Charan Sarkar v. Jotindra Mohan Tagore, 27 C 493 ... 552

Durga Kunwar v. Balwant Singh, 23 A 478; A. W. N. (1901) 175 ... 473

Dwarka Nath Chowdhury v. Shashti Kinkar Banerjee, 18 Ind. Cas. 869; 17 C. W. N. 595 ... 747

Dyson v. Attorney-General, (1911) 1 K. B. 410; 80 L. J. K. B. 531; 103 L. T. 707; 55 S. J. 163; 27 T. L. R. 143 ... 382

E

Earl of Lindsey v. Great Northern Railway Company, (1853) 10 Hare 664; 22 L. J. Ch. 995; 17 Jur 522; 1 W. R. 257; 68 E. R. 1094; 90 R. R. 515 ... 316

Earl of Rosse v. Sterling, (1816) 4 Dow. 442; 3 E. R. 1221 ... 318

Eaton v. Basker, (1881) 7 Q. B. D. 529; 50 L. J. Q. B. 444; 44 L. T. 703; 29 W. R. 537; 45 J. P. 616 ... 313

Ellis v. McHenry, 6 C. P. 228 at pp. 230, 234; 40 L. J. C. P. 109; 23 L. T. 881; 19 W. R. 503 ... 920

Emanuel v. La Compagnie Fermiere De L'Etablissement Thermal De Vichy, (1839) W. N. 150 ... 626

Emperor v. Abani Bhushan Chuckerbutty, 8 Ind. Cas. 721; 37 C. 815 at p. 847; 11 Cr. L. J. 702 ... 513

——— v. Bapoo Yellappa, 9 Bom. L. R. 244; 5 Cr. L. J. 247 ... 493

——— v. Gangua, 29 Ind. Cas. 323; 37 A. 331; 3 A. L. J. 424; 16 Cr. L. J. 483 ... 513

——— v. Ishri, 29 A. 46; 3 A. L. J. 652; 4 Cr. L. J. 291; A. W. N. (1906) 279 ... 986

——— v. Kothia, 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346 ... 513

——— v. Mata Prasad, 30 A. 351; A. W. N. (1908) 152; 5 A L. J. 450; 8 Cr. L. J. 4 ... 801

——— v. Misri, 3 Ind. Cas. 26; 31 A. 592; 6 A. L. J. 839 ... 963

——— v. Mulla, 29 Ind. Cas. 67; 37 A. 395; 13 A L. J. 625; 16 Cr. L. J. 435 ... 980

——— v. Murli Singh, 13 Ind. Cas. 922; 33 A. 775; 13 Cr. L. J. 170 ... 174

——— v. Raja Mustafa Ali Khan, 8 O. C. 313; 2 Cr. L. J. 653 ... 162

E—concld.

	Page.
Emperor v. Tribhovandas Brijbhukandas, 26 B. 533; 4 Bom. L. R. 271 ...	817
Empress v. Budh Singh, 2 A. 101 ...	518
——— v. Chaitram, 6 A. 103 ...	672
——— v. Rango Timaji, 6 B. 402 ...	488
——— v. Thompson, 2 A. 339 ...	517
Eshan Chunder v. Nund Coomar, 8 W. R. 239 ...	296
Esposito v. Bowden, 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1209; 5 W. R. 732; 119 E. R. 1480; 29 L. T. (O. S.) 295; 110 R. R. 822 ...	498
Eswara Doss v. Pungavanachari, 13 M. 361 ...	903
Essoo Bhayaji v. SS. "Savitri", 11 B. 133 ...	102
Even v. Avon Corporation, 29 Beav. 144 at p. 149; 54 E. R. 581; 30 L. J. Ch. 165; 6 Jur. (N. S.) 1361; 3 L. T. 347; 9 W. R. 84 ...	891

F

Faiz-un-nissa v. Hanif-un-nissa, 27 A. 612; A. W. N. (1905) 129; 2 A. L. J. 360 ...	631
Fakir v. Empress, 17 P. R. 1901 Cr. ...	998
Fanindra Nath Banerji v. King-Emperor, 1 Ind. Cas 970; 36 C. 281; 5 M. L. T. 97; 13 C. W. N. 197; 9 C. L. J. 199; 9 Cr. L. J. 452 ...	659
Fateh Chand v. Narsing Das, 16 Ind. Cas. 988; 22 C. L. J. 383 ...	321
Fateh Singh v. Emperor, 20 Ind. Cas. 140; 41 C. 43; 14 Cr. L. J. 380 ...	824
Firm of Motumal v. Firm of Ruttanji, 24 Ind. Cas. 883; 7 S. L. R. 141 ...	454
Firm of Ruttonji Burjorji v Firm of Motumal Bhagchand, 32 Ind Cas. 720; 9 S. L. R. 160 ...	454
First Assistant Collector of Nasik v. Shamji Dosrath Patil, 7 B. 209 ...	357
Fitzhardinge (Lord) v. Purcell, (1908) 2 Ch. D 139 at p. 166; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564 ...	906
Fleet v. Murton, (1871) 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97 ...	5
Fone Lan v. Ma Gyee, 2 L. B. R. 95 ...	431
Forbes v. Moffutt, 18 Ves. 384, 11 R. R. 222; 34 E. R. 362 ...	225
Francis Legge v. Rambaran Singh, 20 A. 35; A. W. N. (1897) 193 ...	242
Freeth v. Burr, (1874) 9 C. P. 208; 43 L. J. C. P. 91; 29 L. T. 773; 22 W. R. 370 ...	317
French, *In re*, (1905) 37 N. Bruns 359 ...	95
Frend v. Dennett, (1858) 4 C. B. (N. S.) 576; 114 R. R. 859, 5 L. T. 73; 27 L. J. C. P. 314; 4 Jur. (N. S.) 897; 140 E. R. 1217 ...	313
Fukirchand Motichand v. Motichand Hurruckchand, 7 B. 438 ...	923
Fulli Bibi v. Bassirudi Midha, 4 B. L. R. 54 (F. B.) ...	287
Futteh Bahadoor v. Jankee Bibee, 13 W. R. 74; 4 B. L. R. App. 55 ...	296

G

Gadian Chettiar v. Gadian Chettiar, 26 Ind. Cas. 43; 14 L. W. 799 ...	55

G—contd.

	Page.
Ganap v. Subbi, 32 B. 577; 10 Bom. L. R. 927 ...	674
Ganesh v. Thanda, S. A. No. 2246 of 1912 ...	758
Ganesh Bhagat v. Sarada Prasad Mukherjee, 30 Ind. Cas. 111; 42 C. 370; 19 C. W. N. 895 ...	798
Ganga Pershad Sahu v. Gopal Singh, 11 C. 136; 11 I. A. 234; 4 Sar. 572 (P. C.) ...	473
Ganges Manufacturing Co. v. Sourjumull, 5 C. 669; 5 C. L. R. 533 ...	8
Ganpat Pandurang v. Adarji Dadabhai, 3 B. 312	314
Gardiner v. Houghton, 121 E. R. 1247; 2 B. & S. 743; 127 R. R. 544 ...	920
Gardner v. Hodgson's Kingston Brewery Company, Ltd, (1903) A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458 ...	752
Garrett v Besborough, (1839) 2 Dr. & Wal. 441; 2 Ir. Eq. Rep. 180 ...	318
Garuradhwaja Prasad v. Superundhwaja Prasad, 23 A. 37; 27 I. A. 238; 5 C. W. N. 33 (P. C.) ...	387
Gauri Sahai, *In the matter of the petition of*, 6 A. 114; A. W. N. (1883) 240 ...	174
Gavdappa v. Girimallappa, 19 B. 331 ...	552
Gaya Din v. Jhuman Lal, 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510. ...	420
Geereeballa Dabee v. Chunder Kant Mookerjee, 11 C. 213 ...	859
General Bill Posting Company v. Atkinson, (1909) App. Cas. 118 at p. 122; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178 ...	818
General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Singh, 14 M. I. A. 605; 17 W. R. 459; 10 B. L. R. (P. C.) 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912 ...	126
Ghelabhai Gavrishankar v. Uderan Ichharam, 12 Ind. Cas. 577; 36 B. 29; 13 Bom. L. R. 989 ...	594
Ghulam Jelani v. Empress, 16 P. R. 1889 Cr. ...	176
Ghulam Khan v. Muhammad Hassan, 29 C. 167 (P. C.); 29 I. A. 51; 6 C. W. N. 226 ...	260
Ghurbin v. Emperor, 22 Ind Cas. 977; 12 A. L. J. 143; 15 Cr. L. J. 193; 36 A. 132 ...	490
Gibbs v. Guild, (1882) 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; 30 W. R. 591 ...	287
Gifford & Bury Town Council, *In re*, (1888) 20 Q. B. D. 368; 57 L. J. Q. B. 181; 58 L. T. 522; 36 W. R. 465; 52 J. P. 119 ...	313
Gilbert v. Hall, (1831) 1 L. J. Ch. 15 ...	316
Gilbert v. Lewis, (1862) 1 De G. J. & S. 38 at p. 49; 32 L. J. Ch. 247; 7 L. T. 541; 11 W. R. 223; 9 Jur. (N. S.) 187; 2 J. & H. 452; 46 E. R. 15; 137 R. R. 138 ...	286
Gilby v. Subbu Pillai, 7 M. 100; 1 Weir 690 ...	831
Giniapa v. Ningapa, 17 B. 100 ...	128
Giridhari Marwari v. Emperor, 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51 ...	162
Girish Chunder Lahiri v. Sasi Sekhareswar Roy, 27 I. A. 110; 27 C. 951; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. 687 (P. C.) ...	477
Girjashankar Narsiram v. Gopalji Gulabbhai, 30 B. 241; 7 Bom. L. R. 951 ...	938
Girwardhari v. Jai Narain, 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835 ...	541
Gist v. Mason, 1 T. R. 88; 1 R. R. 154; 99 E. R. 987 ...	498

G—contd.

Page.

Glasscock v. Balls, 24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L T. 163; 38 W. R. 155 ... 592
Gnanambal Ammal v. Veerasami Chetty, 31 Ind. Cas. 920; 29 M. L. J. 698 ... 126
Gobind Krishna Narain v. Abdul Qayyum, 25 A. 546; A. W. N. (1903) 137 ... 550
Gobind Krishna Narain v. Khunni Lal; 29 A. 487; 4 A. L. J. 365; A. W. N. (1907) 151 ... 686
Gobind Ram v. Narain Das, 9 A. 394 ... 445
Gobinda Nath Shaha Chowdhry v. Surja Kanta Lahiri, 26 C. 460 ... 63
Gogun Chunder Ghose v. Dhuronidhur Mundul, 7 C. 6 6; 9 C. L. R. 257 ... 183
Gokal Dass v. Eastern Mortgage and Agency Co, 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102 ... 865
Gokaldas Gopaldas v. Puranmal Premsukhdas, 11 I. A. 126; 10 C. 1035; 4 Sar. P. C. J. 543 ... 796
Golab Koer v. Badshah Bahadur, 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197 91, 558
Golab Misser v Kumar Kalanand Singh, 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884 ... 427
Golam Hossein Cassim Arif v. Fatima Begum, 6 Ind. Cas. 300; 16 C. W. N. 394 ... 852
Golla Hanumappa v. Emperor, 10 Ind. Cas. 372; 21 M. L. J. 805; 10 M. L. T. 66; (1911) 2 M. W. N. 106; 35 M 243; 12 Cr. L. J. 269 ... 817
Gomatham Alamelu v. Komandar Krisnamachariu, 27 M. 118 ... 859
Goodell, *In re*, 39 Wis. 232; 20 Am. Rep 42 ... 935
Gooroopersad Khoond v. Juggutchunder, 8 M. I. A. 166; 3 W. R. (P. C.) 14; 13 Moor. (P. C.) 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 463 ... 608
Gooroprasad Jena v. Mudden Mohan Soor, (1856) Beng. S. D. A. 980 ... 674
Gopal Chandra Banerjee v. Purna Chandra Banerjee, 4 C. W. N. 110 ... 188
Gopal Mondal v. Eshan Chunder Banerjee, 29 C. 148 ... 758
Gopal Singh v. Court of Wards on behalf of the Maharajah of Darbhangah, 7 W. R. 430 ... 807
Gopalasami Pillai v. Chidambaram, 29 Ind. Cas. 151; 2 L. W. 411 ... 627
Gopee Nath Acharje v. Achcha Bibee, 7 C. 553; 9 C. L. R. 395 ... 591
Gopeekrist Gosain v. Gungapersaud Gosain, 6 M. I. A. 63 at p. 74; 4 W. R. 46 P. C; 1 Sar. P. C. J. 403; 13 E. R. 603 ... 570
Gopi Nath v. Livierato and Co, 64 P. R. 1905; 101 P. L. R. 1905 ... 609
Gopisetti Narayanaswami Naidu Garu v. Muthyala Venkataratnam, 32 Ind. Cas 816; 2 L. W. 1207 ... 876
Gossami Sri Gridhariji v. Romanlalji Gossami, 17 C. 3; 16 I. A. 137; 5 Sar. P. C. J. 350 ... 620
Gour Chandra Das v. Prasanna Kumar Chandra, 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 788 ... 183
Gour Mohun Gouli v. Dinonath Karmokar, 25 C. 49; 2 C. W. N. 76 ... 798
Gouree Dass Byragee v. Jugurnath Roy Chowdhury, 7 W. R. 25 ... 12
Government of Bengal v. Senayat Ali, 27 C. 317; 4 C. W. N. 348 ... 784

G—concld.

Page.

Governor of Bengal in Council v. Moti Lal Ghose, 20 Ind. Cas. 81; 17 C. W. N. 1253, 14 Cr. L. J. 321; 41 C. 173; 18 C. L. J. 452 (F. B.) ... 927
Govind Atmaram v. Santai, 12 B. 270 ... 428
Govind Pandurang Kamat, *In re*, 8 Ind. Cas. 632; 35 B. 75; 12 Bom. L. R. 936 ... 244
Govinda, *In the matter of*, 26 M. 592; 2 Weir 297 801
Govindaswamy Pillai v. Ramaswami Aiyar, 34 Ind. Cas. 6; 3 L. W. 408; 30 M. L. J. 492 ... 124
Gray v. Haig, 20 Beav. 219; 52 E. R. 587; 109 R. R. 396 ... 853
Great Indian Peninsula Railway Co. v. Hanmandas Ramkison, 14 B. 57 ... 956
Greesh Chunder Lahooree v. Kasheessuree Debia, 8 W. R. 26 ... 807
Gridhari Lall Roy v. Bengal Government, 12 M. I. A. 448; 10 W. R. 31 (P. C.); 1 B. L. R. 44 (P. C.); 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408 ... 690
Gridhari Mondul v. Uchit Jha, 8 C. 435; 10 C. L. R. 46 ... 481
Griffin, *Ex parte*, 71 S. W. 746 ... 935
Grija Kant Lahory v. Hurrish Chunder Chowdhry, 19 W. R. 114 at p. 117 (P. C.) ... 757
Grish Chunder Lahiri v. Shoshi Shareswar Roy, 27 I. A. 110; 27 C. 951; 4 C. W. N. 631 ... 857
Gubby v. Avetoom, 17 C 449 ... 5
Gulzari Lal v. Jai Ram, 24 Ind. Cas. 178; 12 A. L. J. 606; 36 A. 441 ... 612
Gulzari Lal v. Latif Husain, 35 Ind Cas. 27; 14 A. L. J. 84; 38 A. 181 ... 106
Gulzari Mal v. Jai Ram, 21 Ind. Cas. 88; 11 A. L. J. 742 ... 612
Gunga Narain Gupta v. Tiluckram Chowdhary, 15 C 533 (P. C.); 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168 286, 340
Gur Das v. Bhag, 11 Ind. Cas. 231; 96 P. R. 1911; 216 P. L. R. 1911; 143 P. W. R. 1911 ... 609
Gurbasappa Sangappa v Rango Venkatesh, 16 Ind. Cas. 348; 36 B. 539; 14 Bom L. R. 563 ... 44
Gurdeo Singh v. Chandrika Singh, 1 Ind. Cas. 912; 36 C. 193 at p. 220; 5 C L. J. 611 ... 733
Guruvayya v. Dattatraya, 28 B. 11; 5 Bom. L. R. 618 ... 552
Gyanananda Asram v. Kristo Chandra Mukherji, 8 C. W. N. 404 ... 881

H

Habibulla Shah v. Surji, 15 Ind. Cas. 857; 15 O. C. 295 ... 445
Hafizaboo v Mahomed Cassum Murad, 31 B. 105; 8 Bom L. R. 384 ... 794
Hajee Syud Mohomed v. *Musammat* Ashrufoonnissa, 5 C. 759 ... 200
Haji Ajam v. Bombay and Persia S. N. Co. 26 B. 562; 4 Bom. L. R. 447 ... 256
Haji Muhammad Bakhsh v. Bhagwan Das, 3 Ind. Cas. 498; 76 P. R. 1909 (F. B.); 11 P. W. R. 1909; 66 P. L. R. 1910 ... 597

H—contd.

	Page.
Haji Shah Mumtaz Hossain v. Raghu Nandan Sahu, 5 Ind Cas. 153; 14 C. W. N. 231; 11 C. L. J. 216 ...	596
Hall, *In re*, 50 Conn. 131; 47 Am. Rep. 625 ...	925
Halsey v. Lowenfeld, (1916) 1 K. B. 143; 85 L. J. K. B. 323 ...	954
Hamid Ali v. Gayadin, 26 A. 327; A. W. N. (1904) 23 ...	69
Hammerton v. Dysart, (1916) A. C. 57; 85 L. J. Ch. 33 ...	787
Hanif-un nisa v. Faiz un-nisa, 11 Ind. Cas. 398; 33 A. 340; 8 A. L. J. 373; (P. C.); 15 C. W. N. 521; 13 C. L J. 510; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L J. 1126; 13 Bom. L. R. 891; 38 I. A. 85 ...	301
Hanuman Prasad v. Muhammad Ishaq, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229 ...	155
Har Pershad Lal v. Dalmardan Singh, 32 C. 891; 9 C. W. N. 728; 1 C. L J. 371 ...	87
Hari Charan Dutt v Mon Mohan Nandy, 20 Ind. Cas. 874; 18 C. W. N. 27 ...	468
Hari Charan Ghosh v. Manmatha Nath Sen, 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343 ...	338
Hari Kishen Bhagat v. Kashi Parshad Singh, 27 Ind. Cas. 674; 42 C. 876; 42 I. A 64; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R 426; (1915) M. W. N. 511 ...	51
Haridas Roy v. Sarat Chandar Dey, 18 Ind. Cas. 121; 17 C. W. N. 515 ...	596
Harihar Prasad Singh v. Shyam Lal Singh, 21 Ind. Cas. 404; 40 C. 615 ...	798
Harihar Singh v. Moheshwar Proshad, 27 Ind. Cas. 199; 18 C. W. N. 692; 16 Cr. L. J. 135 ...	495
Harish Chandra Roy v. Sheikh Atir Mahmud, 18 Ind. Cas. 474; 40 C. 545; 17 C. W. N. 517 ...	631
Harkishinlal v. Louis Dreyfus, Suit No. 410 of 1912 ...	454
Harnam Singh v. Devi Chand, 107 P. R. 1901; 117 P. L. R. 1901 ...	562
Harnam Singh v. *Musammat* Hardevi, 10 Ind. Cas. 365; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. C. 1911 ...	472
Harripria Debi v. Rukmini Debi, 19 C. 438; 19 I. A. 79 (P C.) ...	329
Harry Van Ingen v. Dhunna Lall Lallah, 5 M. 108 ...	593
Harvans Singh v. Harnam Singh, 84 P. R. 1898 ...	472
Hassan Ali v. Gauzi Ali Mir, 31 C. 179 ...	857
Hatch v. Skelton, 20 Beav. 453; 52 E. R. 678; 109 R. R. 494 ...	225
Hawkes v. Orton, (1836) 5 A. & El. 367; 6 N. & M. 842: 111 E. R. 1204; 44 R. R. 445 ...	255
Hayman v. Governors of Rugby School, (1874) 18 Eq 28; 43 L J. Ch. 834; 30 L. T. 217; 22 W. R. 587 ...	205
Heaton v. Dearden, 16 Beav. 147; 86 R. R. 63; 51 E. R. 733 ...	862
Hedgley, *In re*, Small v. Hedgley, (1887) 34 Ch. D. 379; 56 L. J. Ch. 360; 56 L. T. 19; 35 W. R. 472 ...	225
Helan Dasi v. Durga Das Mundal, 4 C. L. J. 323 ...	214

H—contd.

	Page.
Hemadri Nath Khan v. Ramani Kanta Roy, 24 C. 575; F. B.; 1 C. W. N. 466 ...	862
Hemandas Ramrakhiomal v. Chellaram, 13 Ind. Cas. 264; 5 S. L. R. 184 ...	69
Hemendra Nath Mukerjee v. Kumar Nath Roy, 12 C. W. N. 478 ...	310
Hemendra Nath Mukerjee v. Kumar Nath Roy, 32 C. 169; 9 C. W. N. 96 ...	310
Hemp v. Garland, 4 Q B. 519; 12 L. J. Q B. 134; 7 Jur. 502; 3 G & D. 402; 62 R. R. 423; 114 E R. 994. ...	420
Hickson v. Lombard, (1866) L. R 1 H. L. 324	287
Hill v. King, (1863 3 De G. J. & Sm. 418; 9 Jur. (N. S.) 527; 8 L. T. 220; 1 N R. 341; 32 L. J. Ch. 79: 46 E R. 697; 142 R. R. 118 ...	49
Himatlal Motilal v. Vasudeo Ganesh Mhashar, 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634 ...	898
Hindustan Assurance and Mutual Benefit Society v. Rai Mulraj, 27 Ind. Cas. 455; 27 M. L. J. 645 ...	618
Hira Koer v. Lachuman Gope, 21 Ind. Cas. 959; 19 C. W. N. 1141 ...	77
Hira Lal Mitra v. Uday Chandra Dey, 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103 ...	844
Hira Nand v. Secretary of State, 21 P. R. 1905; 132 P. L. R. 1905 ...	284
Hoare v. Kingsbury Urban Council, (1912) 2 Ch. 452; 81 L. J. Ch. 666; 107 L. T. 492; 76 J. P. 401; 10 L. G. R. 829; 56 S J. 704 ...	316
Holder v. Taylor, (1613) Hob. 12; 80 E. R. 163 ...	255
Homan v. Sketlon, (1850) 11 Ir. Ch. Rep. 75 at p. 97 ...	318
Hookamchand Sarupchand v. Nowroji Sorabji Talati, 10 Bom. L. R. 345 ...	922
Hooper v. Emperor, 21 Ind. Cas. 686; 14 Cr. L. J. 687; 12 A. L. J. 149 ...	659
Hooper v. Keay, (1875) Q. B. D. 178; 34 L. T. 574; 24 W. R. 485 ...	376
Howard v. Bodington, (1877) 2 P. D. 203 at p. 211 ...	312
Howard v. Maitland, 11 Q. B. D. 695; 53 L. J. Q. B. 42; 48 J. P. 164 ...	791
Howgate and Osborn's Contract, *In re*, (1902) 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180 ...	183
Huddersfield Banking Co. v. Lister, (1895) 2 Ch 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567 ...	852
Humfrey v. Dale, (1857) 7 El. & Bl. 226; 119 E. R. 1246; 26 L. J. Q. B. 137; 3 Jur. (N. S.) 213; 110 R. R. 587 ...	5
Hunoomanpersaud Panday v. *Musammat* Babooeé Munraj Koonweree, 6 M. I. A. 393 (P. C.); 18 W. R. 81n; Sevestre 253*n*; 19 E. R. 147; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552	552, 673
Hunt v. South Eastern Railway Company, (1875) 45 L. J. C. P. 87 ...	317
Hunt v. Wimbledon Local Board, (1878) 4 C. P. D. 48; 48 L. J. C. P. 207; 40 L T. 115; 27 W. R. 123 ...	313
Hurbullubh Narain Singh v. Luchmeswar Prosad Singh, 26 C. 188; 3 C. W. N. 49 ...	808

H—concld.

Page.

Hurdwary Mull v. Ahmad Musaji Selaji, 1 Ind. Cas. 871; 13 C. W. 63 ... 454
Hurrinath Rai v. Krishna Kumar Bakshi, 14 C. 147 at p. 159; 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751 ... 85
Hutcheson v. Eaton, (1884) 13 Q. B. D. 861; 51 L. T. 836 ... 4
Hutchins v. Scott, (1837) 2 M. & W. 809; 1 M. & H. 194; 6 L. J. Ex. 186; 1 Jur. 265; 150 E. R. 984; 46 R. R. 770 ... 183
Hutchinson v. Tatham, (1873) 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18 ... 4
Huxley v. West London Extension Railway Company, (1889) 14 A. C. 26 at p. 32; 58 L. J. Q. B. 305; 60 L. T. 642; 37 W. R. 625 ... 85
Hyatt, *In re*, Bowles v. Hyatt, (1888) 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297 ... 225
Hyderman Kutti v. Syed Ali, 15 Ind. Cas. 576; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889; 37 M. 514 ... 244

I

Ibrahim Esmael v. Abdool Carrim Peermamode, 1 Ind. Cas. 314; 35 I. A. 151; 13 C. W. N. 26 (P. C.); 4 M. L. T. Special page 25 ... 35
Iburamsa Rowthan v. Thiruvenkatasami Naick, 7 Ind. Cas. 559; (1910) M. W. N. 380; 20 M. L. J. 743; 34 M. 269; 8 M. L. T. 269 (F. B.) 480, 678
Imam Ali v. Baij Nath Ram Sahu, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 ... 103
Imambandi Begum v. Kamleswari Pershad, 21 C. 1005 at p. 1016 (P. C.); 21 I. A. 118 ... 255
Imandi Appalaswami v. Rajah of Vizianagaram, 20 Ind. Cas. 838; (1913) M. W. N. 806; 25 M. L. J. 50 ... 333
Imdad Ali v. Jagan Lal, 17 A. 478; A. W. N. (1895) 109 ... 858
Imdad Ali v. Nijabat Ali, 6 A. 457; A. W. N. (1884) 188 ... 355
Imperatrix v. Rudra, 25 B. 45 ... 998
Imrit Konwur v. Roop Narain Singh, 6 C. L. R. 76 ... 686
Indar Lal v. Deojit, 4 A. L. J. 1; A. W. N. (1907) 26 ... 613
Inder Pershad Singh v. Campbell, 7 C. 474; 8 C. L. R. 501 ... 627
Indra Kuar v. Lalta Prasad Singh, 4 A. 532; A. W. N. (1882) 133 ... 52
Indra Narain Misser v. Kristo Chunder Mahto, 14 W. R. 362 ... 225
Ingle, Ltd. W. L. v. Mannheim Continental Insurance Co., (1915) 1 K. B. 227; 84 L. J. K. B. 491; 59 S. J. 59; 31 T. L. R. 41 ... 953
Innasi Muthu Udayan v. Upakarath Udayan, 26 I. A. 210; 7 Sar. P. C. J. 620; 23 M. 10 ... 904
Intizam Ali Khan v. Narain Singh, 5 A. 316; A. W. N. (1883) 38 ... 414
Irish Peat Company v. Phillips, (1861) 1 B. & S. 598; 124 R. R. 680; 30 L. J. Q. B. 363; 7 Jur. (N. S.) 1189; 4 L. T. 806; 9 W. R. 873; 121 E. R. 837 ... 313
Ismail Kani Rowthen v. Nazarali Sahib, 27 M. 211; 14 M. L. J. 25 ... 737

I—concld.

Page.

Ismail Khan Mahomed v. Jaigun Bibi, 27 C. 570; 4 C. W. N. 210 ... 756
Ismail Mussajee Mookerdam v. Hafiz Boo, 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.) ... 458
Iswar Pershad Gurgo v. Jai Narain Giri, 12 C. 169 ... 469

J

Jacob v. Down, (1900) 2 Ch. 156; 69 L. J. Ch. 493; 83 L. T. 191; 48 W. R. 441; 64 J. P. 552 ... 261
Jadu Nath v. Hari Kar, 1 Ind. Cas. 783; 36 C. 141; 9 C. L. J. 109 ... 102
Jadu Nath Poddar v. Rup Lal Poddar, 4 C. L. J. 22; 33 C. 967; 10 C. W. N. 650 ... 310
Jadunandan Prosad Singha v. Koer Kallyan Singh, 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612 ... 320
Jag Ram v. Hans Raj, 17 P. R. 1893 ... 546
Jagan Nath v. Chet Ram, 28 A. 470; 3 A. L. J. 318; A. W. N. (1906) 93 ... 625
Jagannath v. Latchman Das, 26 Ind. Cas. 32; 36 A. 549; 12 A. L. J. 859 ... 875
Jagarnath Marwari v. Kartich Nath Pandey, 7 C. L. J. 436 ... 469
Jagat Narain v. Emperor, 18 Ind. Cas. 818; 11 Cr. L. J. 719; 7 A. L. J. 1161 ... 174
Jagat Tarini Dasi v. Naba Gopal Chaki, 34 C. 305; 5 C. L. J. 270 ... 78
Jagattara Dassya v. Daulati Bewa, 2 Ind. Cas. 695; 13 C. W. N. 1110; 37 C. 75 ... 103
Jaggeswar Dutt v. Bhuban Mohan Mitra, 33 C. 425; 3 C. L. J. 205 ... 295
Jagjivan Javherdas v. Gulam Jilani Chaudhri, 8 B. 17 ... 86
Jaharaddi Mandal v. Debnath Nath Chaudhury, 33 Ind. Cas 762; 20 C. W. N. 657 (P. C.) ... 841
Jai Gobind Tiwari v. Patesri Partap Narain Singh, A. W. N. (1907) 286; 4 A. L. J. 765 ... 857
Jainarayan Bose v. Kadambini Dasi, 7 B. L. R. 723 *Note* ... 21
Jaiwanti Kumri v. Gajadhar Upadhya, 10 Ind. Cas. 334; 38 C. 783; 14 C. L. J. 226; 15 C. W. N. 676 ... 402
Jamaitunnissa v. Lutfunnissa, 7 A. 606 (F. B.) ... 837
Jameson v. Stein, 21 Beav. 5; 52 E. R. 759; 25 L. J. Ch. 41; 25 L. T. (o. s) 300; 111 R. R. 2 ... 225
Jamina Bibi v. Seri Chand Bhagat, 2 C. W. N. 693 ... 45
Jamsedji Sorabji v. Lakshmiram Rajaram, 13 B. 323 ... 337
Jan Ali v. Ram Nath Mundal, 8 C. 32; 9 C. L. R. 433 ... 880
Janaki Nath Hore v. Prabhasini Dasi, 30 Ind. Cas. 898; 22 C. L. J. 99; 19 C. W. N. 1077 ... 758
Janardhan Krishna Padhye v. Ramchandra Vithal Ranade, 26 B. 317; 4 Bom. L. R. 23 438, 858
Janga Venkatareddy v. Jamal Ahmed Saheb, 29 Ind. Cas 394; 18 M. L. T. 364; (1915) M. W. N. 422; 29 M. L. J. 122 ... 256
Janki Das v. Ahmad Husain Khan, 25 A. 159; A. W. N. (1902) 218 ... 457

J—concld.

Page.

Janki Kuar v. Lachmi Narain, 30 Ind. Cas. 789; 13 A. L. J. 753; 37 A. 535 ... 849

Jarip Khan v. Durfa Bewa, 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59 ... 756

Jas Ram v. Attar Chand, 30 Ind Cas. 491; 16 P. R. 1916; 178 P. L. R. 1915; 118 P. W. R. 1915 ... 578

Jeevarathnammal v. N. Varada Pillai, 32 Ind. Cas. 111; 3 L. W. 1; 19 M. L. T. 52; (1916) 1 M. W. N. 17 (F. B.) ... 866

Jefferys v. Marshall, (1870) 19 W. R. 94 ... 85

Jellicoe v. Price, (1841) 1 Y. & C. C. C. 74; 62 E. R. 796 ... 85

Jethabhai Nursey v. Chapsey Cooverji, 4 Ind. Cas. 108; 34 B. 467 at p. 483; 11 Bom. L. R. 1014 ... 618

Jharu Sheik v. Emperor, 14 Ind. Cas. 320; 16 C. W. N. 696; 13 Cr. L. J. 224 ... 985

Jijaji Pratapji Raje v. Balkrishna Mahadeo, 17 B. 169 ... 78

Jinks v. Edwards, (1856) 11 Ex. 775; 4 W. R. 303; 105 R. R. 787 ... 255

Jiwan Mal v. Nihalchand Hiranand, 1 S. L. R. 196 ... 683

Jiwan Singh v. Emperor 17 P. R. 1908 Cr; 8 Cr. L. J. 488; 32 P. W. R. 1908 Cr. ... 980

Jogendra Nath Mukerji v. Jugobundhu Mukerji, 14 C. 122 ... 371

Jogendra Nath Rai v. Baldeo Das, 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127 ... 371

Jogendra Nath Roy v. Nagendra Narain Nandi, 11 C. W. N. 1026 ... 564

Jogeswar Atha v. Ganga Bishnu, 8 C. W. N. 473 ... 91

Jolly v. Hancock, (1852) 7 Ex. 820; 22 L. J. Ex. 38; 16 Jur. 550 ... 312

Jones v. Gough, (1865) 3 Moore P. C. (N. s.) 1 at p. 12; 11 Jur. (N. s.) 251; 12 L. T. 31; 13 W. R. 509; 16 E. R. 1; 146 R. R. 1 ... 75

Jones v. St. John's College, Oxford, 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276 ... 627

Judooputtee Chatterjee v. Chunder Kant Bhuttacharjee, 9 W. R. 309 ... 807

Jugal Mohini Dasi v. Sri Nath Chatterjee, 7 Ind. Cas. 477; 12 C. L. J. 609 ... 585

Jugaldas v. Ambeshankar, 12 B. 501 ... 611

Juggomohun Bukshee v. Roy Mothooranath Chowdry, 11 M. I. A. 223 at p. 239; 7 W. R. 18 (P. C.); 1 Suth. P. C. J. 673; 2 Sar. P. C. J. 246; 20 E. R. 85 ... 169

Juggunnath Paul v. Bidianund Dutt, 10 W. R. 172; 1 B. L. R. A. C. 114 ... 630

Jukes, *In re*, Official Receiver, *Ex parte*, (1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Manson, 249 ... 949

Juneswar Dass v. Mahabeer Singh, 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222. ... 420

Junglee Ram v. Ram Heet Sahoy, 19 W. R. 47 ... 362

Jurakhan v. Emperor, 7 C. L. J. 238 ... 518

Jwala Prasad v. Salig Ram, 13 A. 575; A. W. N. (1891) 158 ... 354

Jyotiprokas Nandi v. Jhowmull Johury, 1 Ind. Cas. 784; 36 C. 134; 13 C. W. N. 87 ... 340

K

Page.

Kadir Mohideen Marakkayar v. Muthukrishna Ayyar, 26 M. 230; 12 M. L. J. 368 ... 126

Kadri Pakirappa v. Manki Husan Saheb, 3 Ind. Cas. 19; 19 M. L. J. 650; 6 M. L. T. 155 ... 256

Kaihur Singh v. Roop Singh, 3 N. W. P. H. C. R. 4 ... 674

Kalee Churn Giri v. Golabi, 2 C. L. R. 128 ... 881

Kalee Pudo Banerjee v. Choitun Pandah, 22 W. R. 214 ... 296

Kali Bakhsh Singh v. Ram Gopal Singh, 21 Ind. Cas. 985; 36 A. 81; 18 C. W. N. 282; (1914) M. W. N. 112; 16 O. C. 378; 1 O. L. J. 67; 15 M. C. L. 130; 26 M. L. J. 121; 12 A. L. J. 115; 19 L. T. J. 172; 16 Bom. L. R. 147 (P. C.) ... 398

Kali Churn Dutt v. Jogesh Chunder Dutt, 1 C. L. R 5; 3 C. 30 ... 342

Kali Dutt Jha v. Abdul Ali, 16 C. 627; 16 I. A. 96 ... 244

Kali Kinkar Sett v. Dinobandhu Nandy, 32 C. 379 9 C. W. N. 321 ... 809

Kali Mohan Kar v. Nakari Chandra Das, 5 Ind. Cas. 722; 11 C. L. J. 114; 11 Cr. L. J. 213 ... 971

Kaliappan Servai Karan v. Varadarajulu, 3 Ind. Cas. 737; 33 M. 75; 6 M. L. T. 199; 19 M. L. J. 651 ... 126

Kalidas v. Municipality of Dhanduka, 6 B. 686 355, 463

Kallapa v. Venkatesh Vinayak, 2 B. 676 ... 296

Kallu v. Manni, 23 A. 93; A. W. N. (1900) 212 320

Kally Churn Sahoo v. Secretary of State for India, 6 C. 725; 8 C. L. R. 90 ... 904

Kally Dass Ahiri v. Monmohini Dassee, 24 C. 440; 1 C. W. N. 321 ... 545

Kalu v. Pir Bakhsh, 9 Ind. Cas. 735; 33 P. L. R. 1911; 34 P. W. R. 1911 ... 292

Kamal Dhari Thakur v. Rameshwar Singh, 19 Ind. Cas. 545; 17 C. W. N. 817 ... 839

Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; (1912) M. W. N. 1154; 23 M. L. J. 499; 13 Cr. L. J. 753 ... 822

Kamalakshi v. Ramasami Chetti, 19 M. 127 ... 156

Kamaraju v. Secretary of State for India, 11 M. 309 (F. B) ... 903

Kamini Kant Roy v. Ram Nath Chuckerbutty, 21 C. 265 ... 188

Kamini Sundari Chaodhrani v. Kali Prossunno Ghose, 12 C. 225; 12 I. A. 215; 4 Sar. P. C. J. 652; 9 Ind. Jur. 437 ... 114

Kanakku Nagalinga Naick v. Nagalinga Naick. 4 Ind. Cas. 871; 19 M, L. J. 480; 6 M. L. T. 176; 32 M. 510 ... 361

Kandasami Chetti v. Solai Goundan, 23 M. 540 828

Kanhaiya Lal v. Tirbeni Sahai, 24 Ind. Cas. 827; 36 A. 532 (F. B.) 12 A. L. J. 876 834, 873

Kannu v. Natesa, 14 M. 477 ... 105

Kanwar Singh v. Queen-Empress, 15 P. R. 1893 Cr. ... 976

Karan Singh v. Bakar Ali Khan, 9 I. A. 99; 5 A. 1 (P. C.); 4 Sar. P. C. J. 382 ... 903

Karmali Abdulla Allarkhia v. Bora Karimji, 26 Ind. Cas. 915; 17 M. L. T. 35; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48; 39 B. 261 ... 221

K—contd.

Page.

Karri Peddi Reddy v. Receiver of Nidadavole and Medur Estates, 30 Ind. Cas. 529; 18 M. L. T. 171 ... 331
Kartic Chandra Mondal v. Nilmoni Mondal, 32 Ind. Cas. 931; 20 C. W. N. 686 ... 580
Kartick Nath Pandey v. Juggernath Ram Marwari, 27 C. 285 ... 693
Karupna Goundan v. Kolanthayan, 7 M. 91 ... 89
Karuppana Servagaran v. Sinna Goundan, 26 M. 480; 2 Weir 201 ... 810
Karuppusami v. Pichu, 15 M. 419; 2 M. L. J. 116 ... 712
Kasheenath Roy Chowdhry v. Shabitree Soonduree Dossee, 11 W. R. 402 ... 807
Kashi Kinkar Sen v. Satyendra Nath Bhadro, 7 Ind. Cas. 840; 15 C. W. N. 191; 12 C. L. J. 642 ... 564
Kasi Viswanathan v. Emperor, 30 M. 328, 5 Cr. L. J. 341; 2 M. L. T. 177; 17 M L. J 141 ... 801
Katama Natchier v. Rajah of Shivaganga, 9 M. I. A. 539 at p. 604; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843 ... 52
Kathiresan Chettiar v. Ramasawmy Chettiar, 26 Ind. Cas. 93; 27 M. L. J. 302; (1914) M W. N. 871 ... 531
Kattayat Pathumayi v. Raman Menon, 26 M. 740; 13 M. L. J. 237 295, 468
Kaveri Ammal v. Sastri Ramier, 26 M. 104 at p. 109; 13 M. L. J. 58 ... 188
Kedarnath Dutt v. Sham Lall Khettry, 11 B. L. R. 405 at p. 410; 20 W. R. 150 ... 865
Kehar v. Hasan Ali Khan, 2 A. L. J. 583 ... 252
Kellett v. Kellett, 3 H. L. 160 at p. 167 ... 900
Kesabnath v. Har Gobind, (1853) Beng. S. D. A. 768 ... 296
Ketaboi v Queen-Empress, 27 C. 993 496, 822
Khagaram Das v. Rama Sankar Das Pramanik, 27 Ind Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C W N. 775 ... 115
Khagendra Nath Mahata v. Pran Nath Roy, 29 C. 395; 6 C. W. N. 473; 4 Bom. L. R. 363; 29 I. A 99; 8 Sar. P. C. J. 266 341, 558
Khanchand Javhersingh v. Kodumal Javhersing, 15 Ind. Cas. 819; 5 S. L. R. 240 ... 455
Khankar Abdur Rahman v. Ali Hafez, 28 C. 256; 5 C. W. N. 351 ... 103
Kharda Company, Limited v. Durga Charan; Chandra, 5 Ind. Cas. 187; 11 C. L. J. 45 ... 844
Khetter Chunder Ghose v. Bari Das Bundopadhya, 17 C. 557 ... 621
Khetter Nath Ganguly v. Ushabala Dasi; 22 Ind. Cas. 891; 18 C. W. N. 381 ... 834
Khetturnath Ghose v. Prosunno Ghose Gowalah, 7 W. R. 498 ... 395
Khiarajmal v. Daim, 32 I. A. 23 (P. C.); 32 C. 296 at pp. 313. 315; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 8 Sar. P. C. J. 734 126, 155, 857
Khirodamayi Dasi v. Adhar Chandra Ghose, 21 Ind. Cas. 516; 18 C. L. J. 321 ... 874
Khoodeeram Chatterjee v. Rookhinee Boistobee, 15 W. R. 197 ... 631
Khub Chand v. Harmukh Rai, 12 Ind. Cas. 183; 34 A. 41; 8 A. L. J. 1095 ... 890

K—contd.

Page.

Khunni Lal v. Gobinda Krishna Narain, 10 Ind. Cas. 477; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 21 M. L. J. 645; 33 A. 356; (1911) 2 M. W. N. 432; 10 M. L. T. 25; 38 I. A. 87 686, 706, 773
King v. Plummer, (1902) 2 K. B. 339; 71 L. J. K. B. 805; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647; 20 Cox C. C. 269; 18 T. L. R. 659 ... 997
Kingdon v. Nottle, 4 M. & S. 53; 16 R. R. 379; 105 E. R. 755 ... 791
King-Emperor v. Balu Kuppayyan, 25 M. 525; 2 Weir 670 ... 416
King-Emperor v. Nga Po Min, 2 L. B. R. 186 ... 963
Kinnaird v. Trollope, (1888) 39 Ch. D. 636; 57 L. J. Ch. 905; 59 L T. 433; 37 W. R. 234 ... 409
Kirpa Ram v. Sami-ud-din Ahmad Khan, 25 A. 284; A. W. N. (1903) 44 ... 115
Kishan Lal Atal v. Ummat-ul-Fatima Begam, 25 Ind. Cas. 384; 17 O. C. 207 ... 225
Kishan Singh v. Aman Singh, 17 A. 42; A. W. N. (1894) 198 ... 178
Kishen Singh v. Sardarni Partab Kuar, 81 P. R. 1902 ... 621
Kishori Mohun Roy Chowdhry v. Chunder Nath Pal, 14 C 644 ... 469
Knox v. Gye, (1872) 5 H. L. 656; 42 L. J. Ch. 234 ... 325
Koilash Chandra Chakrabarty v. Queen-Empress, 16 C. 657 989, 987
Koonwur Bijoy Keshub Roy v. Shama Soonduree Dossee, B. L. R. Sup. Vol. 172; 2 W. R. Mis. 30 ... 296
Kopil Pooree v. Manick Sahoo, 20 W. R. 287 ... 395
Kora Rangan, *In re*, 17 Ind. Cas. 413; 13 Cr. L. J. 781; 36 M. 96; 23 M. L. J. 585 496, 822
Kreglinger v. New Patagonia Neat & Cold Storage Co, (1914) A. C. 25 at p. 39; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114 ... 758
Kripa Sindhu Mukerjee v. Annada Sundari Debi, 25 C. 34 (F. B.); 6 C. L. J. 273; 11 C. W. N. 983 ... 758
Krishna Aiyar v. Secretary of State for India in Council, 5 Ind. Cas. 121; 4 Ind. Cas. 1070; 33 M. 173; 6 M. L. T. 306; 20 M. L. J. 71 ... 904
Krishna Ayyangar v. Venkatarama Ayyanager; 29 M. 115 ... 691
Krishna Behari Roy v. Bunwari Lall Roy, 2 I. A. 283; 25 W. R. 1; 1 C. 144; 3 Sar. P. C. J. 559; 3 Suth. P. C. J. 313 ... 189
Krishna Kamini v. Abdul Jubbar, 30 C. 155; 6 C. W. N. 737 (F. B.) ... 803
Krishna Upadya v. Ganpaye Upadye, 28 Ind. Cas. 586 ... 891
Krishnasami v. Sundarappayya, 18 M. 415; 5 M. L J. 164 ... 275
Krishnaswami Iyengar v. Rangasawmy Iyengar, 5 Ind. Cas. 76; 19 M. L. J. 743; 7 M. L. T. 248 ... 89
Kristamma Naidu v. Chapa Naidu, 17 M. 410 (F. B.) ... 808
Kudrutullah v. Emperor, 14 Ind. Cas. 314; 39 C. 781; 13 C. L. J. 218 ... 961

K—concld.

	Page.
Kulada Kinkar Roy v. Danesh Mir, 33 C. 33 at pp. 47, 48; 2 C. L. J. 271; 2 Cr. L. J. 670; 10 C. W. N. 257 (F. B.) ...	804
Kulsom Bibee v. Golam Hossein Cassim Ariff, 10 C. W. N. 449 at p. 484 ...	879
Kunja Behari Das v. Khetra Pal Singh, 29 C. 208; 6 C. W. N. 38 ...	809

L

Labhu v. Hira Singh, 41 P. R. 1890 ...	543
Lachman Das v. Chaturbhuj Das, 28 A. 252; A. W. N. (1906) 16; 3 A. L. J. 49 ...	158
Lachmeswar Singh v. Manowar Hossein, 19 C. 253; 19 I. A. 48 (P. C.) ...	36
Lakhamgavda Basaprabhu v. Keshav Annaji Kulkarani, 28 B. 305; 6 Bom. L. R. 364 ...	860
Lakhatullah v. Bishambar Roy, 6 Ind. Cas. 577; 12 C. L. J. 646 ...	103
Lakhi Narain Ganguli v. Felumani Dasi, 27 Ind. Cas. 11; 20 C. L. J. 131; 18 C. W. N. cxcvi (*Notes*) ...	178
Lakhrani Kuar v. Dhanraj Singh, 32 Ind. Cas. 634; 14 A. L. J. 102 at p. 107 ...	253
Lakshmanaswami Naidu v. Rangamma, 26 M. 31 ...	622
Lakshmi v. Marudevi, 12 Ind. Cas. 664; 37 M. 29; 10 M. L. T. 457; 21 M. L. J. 1063 ...	874
Lakshmi Doss v. Roop Laul, 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4 ...	611
Lakshmibai v. Ganpat Moroba, 5 Bom H. C. R. 128 ...	773
Lal Gajendra Nath Sahi Deo v. Lal Mathurlal Nath Sahi Deo, 35 Ind. Cas. 382; 1 P. L. J. 109; 20 C. W. N. 876 ...	393
Lal Mahmud Shaik v. Satcowri Biswas, 28 C. 164 ...	491
Lal Mahomed v. Kallanus, 11 C. 519 ...	8
Lal Mohan Chowbey v. Hari Charan Das Bairagi, 25 C. 637 ...	485
Laldas Jibhai v. Bai Lala, 1 Ind. Cas. 105; 11 Bom. L. R. 20; 5 M. L. T. 226 ...	455
Lalit Mohan Singha Roy v. Kunja Behari Ghose, 22 Ind. Cas. 726; 18 C. W. N. 702; 15 Cr. L. J. 150 ...	491
Lalje Ram v. Queen-Empress, 12 P. R. 1898 Cr ...	987
Lall Jha v. Negroo, 7 C. 717 ...	109
Lalla v. Emperor, 24 Ind. Cas. 975; 17 O. C. 92; 15 Cr. L. J. 567 ...	517
Lalla Nowbut Lall v. Lalla Jewan Lall, 4 C. 831; 2 C. L. R. 319 (F. B.) ...	871
Lalli v. Ram Prasad, 9 A. 74 ...	115
Lalta Prosad v. Emperor, 17 Ind. Cas. 799; 34 A. 654; 10 A. L. J. 294; 13 Cr. L. J. 863 ...	163
Lalubhai Surchand v. Bai Amrit, 2 B. 299 ...	838
Langford v. Selmes, 3 Kay. & J. 220; 3 Jur. (N. S.) 859; 69 E. R. 1089 ...	757
Lani Mia v. Muhammad Easin Mia, 33 Ind. Cas. 448; 20 C. W. N. 948 ...	758
Law Guarantee Trust and Accident Society Ltd., *In re*, 83 L. J. Ch. 25; (1913) 2 Ch. D. 604; 109 L. T. 152; 29 T. L. R. 776 ...	791
Lawford v. Billericay Rural Council, (1903) 1 K. B. 772 at p. 780, 786; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535; 19 T. L. R. 322 ...	315

L—contd.

	Page
Lawrance, W. B., *In re*, 9 Ind. Cas. 255; 9 M. L. T. 322; (1911) 2 M. W. N. 199; 12 Cr. L. J. 42; 34 M. 346 ...	166
Lawrance v. Norreys, (1890) 15 A. C. 210 at p. 221; 59 L. J. Ch. 681; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708 ...	287
Laycock v. Pickles, 33 L. J. Q. B. 43; 4 B & S. 497; 10 Jur. (N. S.) 336; 9 L. T. (N. S.) 378; 12 W. R. 76; 122 E. R. 546; 129 R. R. 827 ...	578
Le Feuvre v. Miller, (1857) 8 El. & Bl. 321; 112 R. R. 582; 26 L. J. M. C. 175; 3 Jur. (N. S.) 1255; 120 E. R. 120 ...	313
Le Neve v. Le Neve, Wh. & Tu. Eq. Cas. 7th Ed. 197, (8th Ed Vol p. 187); Amble, 436 ...	644
Leach, *In re*, 134 Ind. 655 at p. 671; 21 L. R. A. 701 ...	935
Leech v. Schweder, (1874) 9 Ch. 463; 44 L. J. Ch. 487; 30 L. T. 586; 22 W. R. 633 ...	256
Lekhrajram v. Debi Pershad, 12 C. W. N. 678; 7 Cr. L. J. 499 ...	806
Leonard, *In re*, 12 Oreg. 93; 53 Am. Rep. 323 ...	935
Lever v. Koffler, (1901) 1 Ch. 543; 70 L. J. Ch. 395; 84 L. T. 584; 49 W. R. 506 ...	256
Lickbarrow v. Mason, 2 T. R. 63 at p 70; 1 H. Bl. 357; 6 East 21*n*; 1 R. R. 425; 5 T. R. 367, 683; 2 H. Bl. 211; 4 Bro P. C. 57; 6 T. R. 131; 1 Sm. L. C. (11th Ed.) 693; 100 E. R. 35 ...	592
Lilabati Misrain v. Bishun Chobey, 6 C. L. J. 621 at p. 627 ...	757
Lingam Krishna Bhupati Devu Garu v. Jogam Venkataswamy, 33 Ind. Cas. 235; (1916) 1 M. W. N. 109; 3 L. W. 105 ...	180
Linton v. Linton, (1885) 15 Q. B. D. 239; 54 L. J. Q. B. 529; 52 L. T. 782; 2 Morrell 179 ...	541
Liverpool Borough Bank v. Turner, (1860) 1 Johns. & Hem. 159; 29 L. J. Ch. 827; affirmed in (1860) 2 De. G. F. & J. 502 at p. 507; 13 L. T. 494; 9 W. R 292; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150 70 E. R. 703; 128 R. R. 315 ...	312
Lloyd v. Collett, (1793) 4 Brown. C. C. 469; 29 E. R. 992 ...	318
Lloyd v. Jhones, (1803) 9 Ves. 37 at p. 57; 7 R. R. 147; 32 E. R. 514 ...	52
Lock v. Furze, (1866) 1 C. P. 441; 1 H. & R. 397; 35 L. J. C. P. 141; 148 R. R. 724; 15 L. T. (N. S.) 161; 14 W. R. 403 ...	255
Lockwood, *In re*, V. U. S. 9 Ct. C. 346 ...	935
Lockwood, *In re*, 154 U. S. 116; 38 L. E. 116 ...	935
Lodai Mollah v. Kally Dass Roy, 8 C. 228 at pp. 240, 241; 10 C. L. R. 581 ...	837
Loghan v. Romer, 12 Ind. Cas 303; 34 M. 343; (1911) 2 M. W. N. 196; 12 Cr. L. J. 535 ...	165
Lokenath Singh v. Dhwakeshwar Prosad Narayan Singh, 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51 ...	27, 36, 73
London & Birmingham Railway Company v. Winter, (1840) Cr. & Ph. 57 at p. 63; 41 E. R. 440; 54 R. R. 201 ...	316
London & Provincial Bank v. Roberts, (1874) 22 W. R. 402 ...	183
Lord Advocate v. Clyde Navigation Trustees, (1891) 19 Rettie 174 ...	907
Lord Advocate v. Wemyss, (1900) A. C. 48 ...	907
Loyd v. Langford, 2 Mod. 174; 86 E. R. 1008 ...	841

L—concld.

	Page.
Luchmi Chand Jhowar v. Hemendra Prasad Ghosh, 26 Ind Cas. 935; 18 C. W. N. 1260 at p. 1263 ...	432
Luchmiput Singh v. Amir Alum, 9 C. 176; 12 C. L. R. 22 ...	881
Ludwell v. Newman, (1795) 6 Term. Rep. 453; 3 R. R. 231; 101 E. R. 647 ...	255
Lutawan Kubar v. Lechiya, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57 ...	361
Lutifunnissa Bibi v. Nazirun Bibi, 11 C. 33 ...	880

M

Ma Leik v. Maung Nwa, 4 L. B. R. 110 ...	424
Ma Min Tha v. Ma Naw, U. B. R. (1892-96) Vol. II, 581 ...	13
Ma Tin v. Doop Raj Barua, 1 Chan. Toon's L. C. 370; U. B. R. (1892-96) II, 603 ...	431
Macfarlane v. Leclarie, 15 Moore. P. C. 181; 8 Jur. (N. S.) 267; 10 W. R. 324; 15 E. R. 462 ...	607
Machana Ujjhala Dikshatulu v. Gorugantulu Yaggamma, 8 Ind. Cas. 1066; 9 M. L. T. 463; (1910) M. W. N. 783 ...	186
Madan Chandra Kapali v. Jaki Karikar, 6 C. W. N. 377 ...	758
Madan Mohan Gossain v. Kumar Rameswar Malia, 7 C. L. J. 615 ...	28
Madan Mohan Singh v. Gaja Prosad Singh, 11 Ind. Cas. 228; 14 C. L. J. 159 ...	275, 321
Maddox, *In re*, (1901) 93 Md. 727; 53 L. R. A. 298 ...	935
Madhab Moni Dasi v. Pamela Lambert, 6 Ind. Cas. 537; 37 C. 793; 12 C. L. J. 528; 15 C. W. N. 337 ...	951
Madhavan v. Keshavan, 11 M. 191 ...	118
Madhu Sudan Pal v. Parbati Sundari Dassya, 29 Ind. Cas. 496; 19 C. W. N. 760 ...	644
Madhusudan Das v. Gobinda Pria Chowdhurani, 27 C. 34; 4 C. W. N. 417 ...	468
Magaluri Garudiah v. Narayana Rungiah, 3 M. 359 ...	226
Maganlal v. Doshi Mulji, 25, B. 631; 3 Bom. L. R. 255 ...	181
Magdalen Hospital v. Knotts, (1878) W. N. 296; 4 App. Cas. 324; 48 L. J. Ch. 573; 40 L. T. 433; 27 W. R. 602 ...	420
Mahabir Prasad v. Partab Chand, 22 A. 450; A. W. N. (1900) 171 ...	180
Mahadei v. Baldeo; 30 A. 75; 5 A. L. J. 43; A. W. N. (1908) 16 ...	696
Mahammad Aznat Ali Khan v. Lalli Begam, 8 C. 422; 9 I. A. 8 ...	78
Maharaja of Bobbili v. Narasaraju Peda, 15 Ind. Cas. 733; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 246 ...	218
Maharaja of Burdwan v. Apurba Krishna Roy, 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50 ...	853
Maharaja Jagatjit Singh Bahadur v. Suraj Bakhsh Singh, 8 O. C. 145 ...	442
Maharaja Koowar Baboo Nitrasur Singh v. Baboo Nund Loll Singh, 8 M. I. A. 199; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 19 E. R. 503; 1 W. R. (P. C.) 51 ...	903

M—contd.

	Page.
Maharaja Luchmissur Singh v. Musammat Dakho, 7 C. 708; 10 C. L. R. 127 ...	109
Maharaja Parbhu Narain Singh v. Baldeo Prasad, 8 Ind. Cas. 817; 8 A. L. J. 36 ...	740
Maharaja Radha Rishore Manikya Bahadur v. Umed Ali, 12 C. W. N. 904 ...	427
Maharaja of Venkatagiri v. Ambarkana Srinivasa Row, 29 Ind. Cas. 321; 17 M. L. T. 392; 16 Cr. L. J. 481 ...	508
Maharanee Brojosoondery Debea v. Ranee Luchmee Koonwaree, 20 W. R. 95; 15 B. L. R. (P. C.) 176 note; 4 Sar. P. C. J. 810 ...	143
Mahesh Narain v. Nawbut Pathak, 1 C. L. J. 437; 32 C. 837 ...	26
Mahipat Shamla v. Nathu Vithoba, 4 Ind. Cas. 252; 33 B 722 at p. 726; 11 Bom. L. R. 1109 ...	844
Mahomed Ahsanulla Chowdhry v. Amarchand Kundu, 17 C. 493; 17 I. A. 28; 5 Sar. P. C. J. 476 ...	880, 881
Mahomed Akbar Zaman Khan v. Sakhdeo Pande, 10 Ind. Cas. 51; 13 C. L. J. 467 ...	469
Mahomed Ali Hossein v. Nazar Ali, 28 C. 289; 5 C. W. N. 326 ...	103
Mahomed Ali Khan v. Khaja Abdul Gunny, 9 C. 744 (F. B.); 12 C. L. R. 257 ...	555
Mahomed Buksh Khan v. Hosseini Bibi, 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175 ...	286, 403
Mahomed Golab v. Mahomed Suliiman, 21 C. 612 ...	340
Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh, 14 Ind. Cas. 496; 39 C. 527; (1912) M. W. N. 367; 11 M. L. J. 265; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 463; 39 I. A. 68 ...	225
Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar, 23 M. 247; 27 I. A. 17; 4 C. W. N. 228; 10 M. L. J. 1; 2 Bom. L. R. 640; 7 Sar. P. C. J. 651 ...	531
Mahomed Mosraf v. Habil Mia, 6 C. L. J. 749 ...	469
Mahomed Mozuffer Hossein v. Kishori Mohun Roy, 22 C. 909; 22 I. A. 123; 5 M. L. J. 101; 6 Sar. P. C. J. 583 ...	898
Mahomed Sayad Phaki v. Navroji Bhalabhai, 10 B. 214 ...	102
Mahoram Sheikh Chaprasi v. Telamuddin Khan, 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567 ...	608
Mahtab Rai v. Kaman Lal, 51 P. R. 1899 ...	609
Makin v. Attorney General, (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox. C. C. 704 58 J. P. 148 ...	982
Malcomson v. O'Dea, (1864) 10 H. L. C. 593; 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178; 11 E. R. 1155; 138 R. R. 317 ...	300
Malhar Bhagvant Kulkarni v. Narsinh Krishna Majli, 17 Ind. Cas. 655; 37 B. 95; 14 Bom. L. R. 941 ...	594
Malik Protap Singh v. Khan Mahomed, 3 Ind. Cas. 861; 36 C. 994; 10 Cr. L. J. 385; 11 C. L. J. 50; 13 C. W. N. 1221 ...	808, 989
Malkarjun v. Narhari, 25 B. 337 (P. C.); 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10 ...	125

M—contd.

Page.

Mallisheri Heath Vasudevan Nambudin v. Kovoor Chathath Kannan Nambiar, 4 M. L. T. 90 ... 272
Mancharam Pranjivan v. Bai Mahali, 18 B. 315 ... 712
Manchester Brewery Co. v. Coom's (1901) 2 Ch. 608; 70 L. J. Ch. 814 ... 256
Mangal Sen v. *Musammat* Naoli, 9 Ind. Cas. 478 ... 715
Mangal Sen v. Shankar Sahai, 25 A. 580; A. W. N. (1903) 122 ... 183
Mangalathammal v. Narayanswami Aiyar, 30 M. 461; 17 M. L. J. 250 ... 273
Mangapathi Naidu, *In re*, 2 Weir 221 ... 827
Mangun Jha v. Dolhin Galab Koer, 25 C. 692; 2 C. W. N. 265 ... 102
Manickka Odayan v. Raja Gopala Pillai, 30 M. 507; 3 M. L. T. 347; 17 M. L. J. 291 ... 469
Manik Borai v. Bani Charan Mondal, 10 Ind. Cas. 469; 13 C. L. J. 649 ... 758
Maniram Seth v. Seth Rupchand, 33 C. 1047; 33 I. A. 165; 10 C. W. N. 874; 4 C. L. J. 94; 8 Bom. L. R. 501; 3 A. L. J. 525; 1 M. L. T. 199; 16 M. L. J. 300, 2 N. L. R. 130 256, 576
Manisha Eradi v. Siyali Koya, 11 M. 220 (F. B.) 808
Mannada Mudali v. Nallayya Goundan, 4 Ind. Cas. 870; 32 M. 527; 6 M. L. T. 285; 19 M. L. J. 467 ... 462
Mare v. Gauri Sahai, A. W. N. (1905) 46 ... 42
Markham v. Paget, (1908) 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605; 24 T. L. R. 426 ... 260
Marshall v. Queenborough Corporation, (1823) 1 Sim. & St. 520; 24 R. R 220; 57 E. R. 206 ... 316
Maruti v. Rama, 21 B. 333 ... 91
Master v. Miller, Smith's Leading Cases, 11th Ed., Vol. I, 767; 4 T. R. 320; 2 H. Bl. 141; 2 R. R. 399; 100 E. R. 1042 ... 182
Mata Din v. Sheikh Ahmad Ali, 13 Ind. Cas 976; 14 Bom. L. R. 192; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49 244, 552
Maung Kan v. Maung Myat Thaing, 11 Ind. Cas. 850, 4 Bur. L. T. 182 ... 20
Maung Naw v. Ma Shwe Hmat, 30 Ind. Cas. 772; 8 Bur. L. T. 191; 8 L. B. R. 227 ... 277
Maxwell v. Jameson, 106 E R. 286; 2 Barn. & Ald. 51 ... 440
Maxwell v. Dulwich College, (1783) 4 L. J. Ch. 138 ... 316
Maynard v. Eaton, (1874) 9 Ch. A. 414; 43 L. J. Ch. 641; 30 L. T. 241; 22 W. R. 457 ... 251
Mayor of Drogheda v. Holmes, (1855) 5 H. L. C. 460; 101 R. R. 251; 10 E. R. 979 ... 316
Mazhur Husain Khan v. Abdul Hadi Khan, 9 Ind. Cas. 753; 33 A. 400; 8 A. L. J. 162 ... 881
McCartney v. Londondery and Lough Swilly Railway Co, (1904) A. C. 301; 73 L. J. P. C. 72; 91 L. T. 105; 53 W. R. 385 ... 357
McCraken v. San Francisco, (1860) 16 Calf. 591 314
McDeniels v. Robinson, (1854) 26 Vermont 316; 62 Am. Dec. 574 ... 317
Meeyappa Chetty v. Maung Ba Bu, 8 Ind. Cas. 450; 3 Bur. L. T. 62 ... 13
Megh Raj Vaish v. Abdullah Khan, 25 Ind. Cas. 208; 12 A. L. J. 1034 ... 231

M—contd.

Page.

Melbourne Banking Corporation v. Brougham, (1878) 4 App. Cas. 156; 48 L. J. P. C. 12; 48 L. T. 1 ... 315
Merchant Banking Co. of London v. Phoenix Bessemer Steel Co., (1877) 5 Ch. D. 205; 46 L. J. Ch. 418; 36 L. T. 895; 24 W. R. 457 ... 956
Mersey Steel & Iron Company v. Naylor Benzon & Company (1884) 9 App. Cas. 434 at pp. 438 442; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989 ... 317
Messrs. Burn & Co. v. Rusho Moyee Dossee, 14 W. R. 85 ... 12
Meugens v. Sutlej Flour Mills Ferozepur, 27 Ind. Cas. 625; 30 P. R. 1915; 25 P. W. R. 1915; 42 P. L. R. 1915 ... 68
Milch v. Coburn, (1911) 27 T. L. R. 372; 55 S. J. 441 ... 255
Millar v. Craig, (1843) 6 Beav. 433; 49 E. R. 893; 63 R. R. 134 ... 49
Mina Kumari Bibee v. Jagat Sattami Bibee, 10 C. 220 ... 342
Minakshi Naidu v. Subramanya Sastri, 14 I. A. 160; 5 Sar. P. C. J. 54; 11 M. 26 (P. C.) 354, 903
Mir Sarwarjan v. Fakhruddin Mahomhd Chowdhuri, 13 Ind. Cas. 331 (P C.); 9 A. L. J. 33; 39 C. 232; 16 C. W. N. N 74; 21 M. L. J. 1156 11 M. L. T. 8; (1912) M. W. N. 22; 15 C. L. J. 69; 14 Bom. L. R 5; 39 I. A. 1 ... 23
Mir Sarwarjan v. King-Emperor, 3 C. L. J. 303; 3 Cr. L. J. 304 ... 511
Mirza Muhammad Ahmad Shah v. Saiyed Muhammad Taqi, 30 Ind. Cas. 281; 2 O. L. J. 285 ... 716
Moazzim Hussein Khan v. Raphael Robinson, 28 C. 641; 5 C. W N. 741 ... 741
Modhu Sudan Singh v. E. G Rooke, 24 I. A. 164; 25 C. 1 (P. C.); 1 C. W. N. 433; 7 M. L. J. 27; 7 Sar. P. C. J. 222 ... 959
Mohabir Pershad Chowdhury v. Chandra Shekar Sahai, 28 Ind Cas. 301; 19 C. W. N. 1021 ... 618
Mohamaya Proshad Singh v. Ram Khelawan Singh Thakur, 15 Ind. Cas. 911; 15 C. L. J. 684 ... 273
Mohammad Azmat Ali Khan v. *Musammat* Lalli Begum, 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310 ... 721
Mohanund Mondul v. Nafur Mondul, 26 C. 820; 3 C. W. N. 770 ... 674
Moharani Beni Pershad Koeri v. Goberdhan Koeri, 6 C. W. N. 823 ... 82
Mohendro Narain Chatturaj v. Gopal Mondul, 17 C. 769 ... 473
Mohesh Chandra Saha v. Emperor, 35 C. 457; 12 C. W. N. 416, 7 Cr. L. J. 220; 7 C. L. J. 488 ... 961
Mohesh Chunder Biswas v. Gooroopershad Bose, (1863) Marsh. 277; 2 Hay. 473 ... 12
Mohesh Lal v. Mohant Bawan Das, 9 C. 961 (P C.); 13 C L R. 221; 10 I. A. 6; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424 ... 225
Mohideen Hadjiar v. Pitchery, (1893) A. C. 193; 62 L. J. P. C. 96 ... 607
Mohima Chunder Mozoomdar v. Mohesh Chundar Neogi, 16 I. A. 23 at p. 26; 16 C. 473; 5 Sar. P. C. J. 321 ... 904

M—contd.

Page.

Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry, 23 W. R. 174 ... 52
Mohori Bibee v. Dharmodas Ghose, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.) ... 23
Mollett v. Robinson, (1870) 5 C. P. 646 ... 4
Moolla Cassim v. Moola Abdul Rahim, 4 L. B. R. 77; 2 C. L. J. 236; 15 M. L. J. 317, 7 Bom. L. R. 8?2; 2 A. L. J. 79?; 10 C. W. N. 33; 33 C. 173; 32 I. A. 177; 8 Sar. P. C. J. 893 ... 951
Moore v. Crofton, (1846) 3 J. & L. 438 at p. 445; 7 Ir. Eq. Rep. 344 ... 318
Moos v. Smith, 9 C. B. 94; 19 L. J. C. P. 225; 14 Jur. 1002; 137 E. R 827; 82 R. R. 307 ... 627
Moothetuth Kanari v. Hari Shenoy, 34 Ind. Cas. 482; 3 L. W. 301; (1916) 1 M. W. N. 237; 19 M. L. T. 245 ... 156
Moran v. Mittu Bibee. 2 C. 58 ... 649
Morgan v. Fernandez, 33 Ind. Cas. 439; 3 L. W. 370; (1916) 1 M. W. N. 373; 19 M. L. T. 377; ?0 M. L. J. 519 ... 20
Mostyn v. West Mostyn Coal and Iron Co., (1876 1 C. P. D. 145; 45 L. J. C. P. 401; 34 L. T. 325; 24 W. R. 401 ... 260
Moti Lal Roy v. Kalu Mandar, 19 Ind. Cas. 853; 19 C. L. J. 321 at p. 323 ... 28
Motichand v. Ganga Prasad Singh, 29 I A. 40; 24 A. 174; 6 C. W. N. 362 (P C.) ... 608
Moulvie Sayyud Uzhur Ali v. *Mu-ammat* Bebee Ultaf Fatima, 13 M. I. A. 232; 13 W. R. (P. C.) 1; 4 B. L. R. (P. C.) 1; 2 Sar. P. C. J. 522; 15 E. R. 87 ... 570
Mubarak Husain v. Bihari, 16 A. 306; A. W. N. (1894 , 97 ... 572
Muddun Mohun Ghosal v. Muboram Chuckerbutty, 2 W. R. 69 ... ?46
Mufazzar Hosain v. Basid Sheikh, 34 C. 36; 4 C. L. J. 485; 11 C. W. N 71 ... 58
Mugun Chunder Chuttoraj v. Surbessur Chuckerbutty, 8 W. R. 479 ... 476
Muhammad Aziz-ud-din Ahmad Khan v. Legal Remembrancer, 15 A. 321; A. W. N. (1893) 109 728, 879
Muhammad Hasan Askari v. Niaz Husain, 29 Ind. Cas. 213; 13 A. L J. 428 ... 152
Muhammad Imam Ali Khan v. Husain Khan, 25 I A. 161; 26 C. 81; 2 C. W. N. 737 ... 244
Muhammad Mumtaz Ahmad v. Zubaida Jan, 11 A. 460; 16 I. A. 205; 5 Sar. P. C. J 433 ... 402
Muhammad Newaz Khan v. Alam Khan, 18 C. 414; 18 I. A. 73; 6 Sar. P C. J. 26 ... 711
Muhi-ud-din Ahmad Khan v. Majlis Rai, 6 A. 231; A. W. N. (1884) 42 ... 276
Mukhi Haji Rahmuttulla v. Coverji Bhuja, 23 C. 546 (F. B.) ... 376
Mukunda Lal Pal Chowdhry v. Lehuraux, 20 C. 379 ... 862
Mulcahy v. Queen, 3 English and Irish Appeals 206 at p. 317 ... 996
Mulji Jetha & Co, v. Macleod, 5 Bom. L. R. 991 ... 898
Mullapali Taravathil v. Gopala Menon, 30 Ind. Cas. 383; 18 M. L. T. 127 ... 225
Munawar Husain v. Jani Bijai Shankar, 27 A. 619; 2 A. L. J. 376; A. W. N. (1905) 132 ... 615

M—contd.

Page.

Mungul Pershad Dichit v. Grija Kant Labiri, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249 ... 557
Municipal Commissioner of Bombay v Mathurabai, 30 B. 558; 8 Bom. L R 457; 4 Cr. L. J. 23 ... 462
Municipal Commissioner for the City of Madras v. Major Bell, 25 M. 15 ... 827
Municipal Corporation of Toronto v. Virgo, (1896) App. Cas. 88; 65 L. J. P. C. 4; 73 L. T. 449 ... 311
Muniya Konan v. Perumal Konan, 18 Ind. Cas. 963; 24 M. L. J. 352; 13 M L. T. 311 ... 25
Munni Koer v. Madan Gopal, 31 Ind. Cas. 792; 13 A L. J. 1084; 38 A. 62 ... 25
Munshi Tuljaram v. Chutal Khan, 1 S. L. R. 142 ... 479
Murray v. East India Company, (1821) 5 B. & Ald. 204; 24 R. R. 325; 106 E. R. 1167 ... 325
Musammat Amir Begam v. Sardar Muhammad Ismail Khan, 25 Ind. Cas. 72?; 150 P. L. R. 1914; 65 P. W. R. 1914 ... 617
Musammat Bano v. Fateh Khan, 48 P. R. 1903; 111 P. L R. 1903 ... 326
Musammat Bhag Bhari v. Wazir Khan, 14 Ind. Cas 45; 70 P R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912 ... 547
Musammat Bhagwati v. Banwari Lal, 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185 ... 468
Musammat Deokali Koer v. Babu Kedar Nath, 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C. 704 ... 798
Musammat Golab Koonwur v. Collector of Benares, 4 M. I. A. 246; 7 W. R. 47 (P. C.); 1 Suth P. C. J. 186; 1 Sar. P. C. J. 343; 18 E. B. 693 ... 169
Musammat Hiran Bibi v. *Musammat* Sohan Bibi, 24 Ind. Cas ?00; 13 C. W. N. 929; 27 M. L. J. 149, 1 L. W. 648 ... 149
Musammat Hussaina v. *Musammat* Sahib Nur, 22 Ind. Cas. 7?5; 208 P. W. R. 1913; 103 & 197 P. L. R 1914 ... 343
Musammat Kokla v. Pearey Lal, 21 Ind. Cas. 29; 35 A. 502; 11 A. L. J 765 ... 705
Musammat Mahadei Kuar v. Sant Bakhsh Singh; Oudh and Agra Law Reporter, Vol, IV, p. 453 445
Musammat Misri v. *Musammat* Chauli, 27 Ind. Cas 640; 10 P. L. R. 1915 ... 609
Musammat Munifa Bibi v. Fateh Ali, 23 Ind. Cas. 453; 17 O C. 60; 1 O L. J. 133 ... 402
Musammat Pal Devi v. Fakir Chand, 60 P. R. 1895 ... 562
Musammat Prab Devi v. Harkishn Das, 47 P. R. 1884 ... 556
Musammat Rabban Bibi v. *Musammat* Bibi Sohadra, 20 Ind. Cas. 758 ... 618
Musammat Raj Kunwar v. *Musammat* Indirjit Kunwor, 5 B. L. R. 585; 13 W. R. 52 ... 686
Muthammal v. Secretary of State for India, 26 Ind. Cas. 817; 27 M. L. J. 529; 16 M. L. T. 432. ... 422
Muthialu Chetty v. Bapun Sahib, 2 M. 140 ... 107
Muthu Sastrigal v. Visvanatha Pandara Sannadhi, 21 Ind. Cas. 864; 26 M. L. J. 19; 14 M. L. T. 520; (1914) M. W. N. 58; 38 M. 650 ... 220

M—concld.

Page.

Muthunaiyan v. Sinna Samavaiyan, 28 M. 526; 15 M. L. J. 419 ... 8

Muthusami Mudaliyar v. Simamhedu Muthukumaraswami Mudaliyar, 19 M. 405; 23 I. A. 83; 6 M. L. J. 113; 7 Sar. P. C. J. 45 ... 690

Muthusami Naidu v. Emperor, 14 Ind. Cas. 757; 37 M. 110 at p. 111; 11 M. L. T. 431; 13 Cr. L. J. 293 ... 814

Muttia v. Virammal, 10 M. 283 (F. B.) ... 857

Muttukaruppa Kaundan v. Rama Pillai, 3 M. H. C. R. 158 ... 20

Muzhurool Huq v. Puhraj Ditarey Mohapattur, 13 W. R. 235 at p 237 879, 883

Mylam v. Annavi Madan, 29 M. 234; 16 M. L. J. 99 ... 480

Myra Bradwell v. State of Illinois, 16 Wallace. 130; 21 L. E. 442 ... 935

N

Nagendra Lal Chowdhury v. Nazir Ali, 10 C. W. N. 503 ... 886

Naginbhai v. Abdulla, 6 B. 717 14, 570

Nagindas Bhugwandas v. Bachoo Hurkissondas, 32 Ind. Cas 403; 23 C. L. J. 395; 20 C. W. N. 702. 30 M. L. J. 19; 14 A. L. J. 185; 3 L. W. 259; 19 M. L. T. 193; 18 Bom. L. R. 172; (1916) 1 M. W. N. 258; 40 B. 270 ... 136

Nairn v. St. Andrews University, (1909) A. C. 147 at p. 160; 78 L. J. P. C. 54; 100 L T. 9e; 53 S. J. 161; 25 T. L. R. 169 ... 936

Namuna Bibi v. Roshun Meah, 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621 ... 241

Nand Kishore Singh v. Ram Gulam Sahu, 17 Ind. Cas. 221; 39 C. 1057; 16 C. W. N. 1089 ... 608

Nanda Kumar Howladar v. Ram Jiban Howladar, 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457 ... 849

Nandkumar Dubey v. Ajodhya Sahu, 11 Ind. Cas. 465; 16 C. W. N. 351 at p. 353; 14 C. L. J. 292 ... 8 8

Nanhe Mal v. Harjas, 5 A. L. J. 295; A. W. N. (1908) 141 ... 625

Nanjaya Mudali v Shanmuga Mudali, 22 Ind. Cas. 555; 26 M. L. J. 576 at p. 581; 15 M. L. T. 186; (1914) M. W. N. 356; 38 M. 684 ... 678

Nannhi Jan v. Bhuri, 30 A. 321; A. W. N. (1908) 125; 5 A. L. J. 601 .. 428

Naqi Ahmad v Emperor, 18 Ind. Cas. 270; 11 A. L. J. 13; 14 Cr L. J. 46 ... 517

Narak Lal v. Thagoo Lal, 13 Ind. Cas. 455; 22 C. L. J. 380 ... 310

Narasimha Chetti v. Vijapala Nainar, 27 Ind. Cas. 944 at p. 945; 2 L. W. 206 ... 322

Narasimha Rao v. Gangaraju, 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 590 .. 99

Narayan *bin* Babaji v. Nathaji Durgaji Marwad, 28 B. 201; 5 Bom. L. R 945 ... 479

Narayan Vithe Parab v. Krishnaji Sadashiv, 10 B. 233 ... 89

Narayana Chetty v. Muthiah Servai, 8 Ind. Cas. 520; 55 M. 63; 21 M. L. J. 44; 9 M. L. T. 142 .. 20

Narayanan Chetty v. Kannammai Achi, 28 M. 338 .. 423

N—contd.

Page.

Narayanaswami Naidu Garu v. Kovvidi Gantayya, 32 Ind. Cas. 691; (1915) M. W. N. 865 ... 876

Narayanaswamy Naidu, *In re*, 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233 (F. B.); 9 Cr. L. J. 192; 19 M. L. J. 157 ... 525

Narendra Lal Khan v. Jogi Hari, 32 C. 1107; 2 C. L. J. 107 ... 423

Narindra Bahadur Pal v. King-Emperor, 1 A. L. J. 419; 1 Cr. L. J. 696 ... 174

Narsing Das v. Bibi Rafikan, 5 Ind. Cas. 198; 37 C 197; 11 C. L. J. 250; 14 C. W. N. 507 ... 310

Nash v. De Freville, (1900) 2 Q. B. 72; 69 L. J. Q. B. 484; 82 L. T. 642; 48 W. R. 434; 16 T. L. R. 268 ... 592

Natchappa Chetty v. Mohamed Jan, 8 Bur. L. R. 91 ... 470

Natesan Chetty v. Vengu Nachiar, 3 Ind. Cas. 701; 33 M. 102; 20 M. L. J. 20; 6 M. L. T. 313 ... 273

Navakoti Narayana Chetty v. Loyalinga Chetty, 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233 ... 25

Nawab Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan, 15 I. A. 12 at p. 15; 10 A. 166; 5 Sar. P. C. J. 129 ... 342

Naylor v. Winch, 24 R. R. 227; 1 Sim. & S. 555; 2 L. J. (o. s) Ch 132; 57 E R. 219 ... 244

Nemai Chand Kanji v. Deno Nath Kanji, 2 C. W. N. 691 ... 241

Nettakaruppa Goundan v. Kumarasami Goundan, 22 M. 20. 8 M. L. J. 167. ... 420

Nga La v. Nga Than, 14 Ind. Cas. 837; 5 Bur. L. T. 57 ... 343

Nga San Bwin v. Queen-Empress, U. B. R. (1892-96), I, 83 ... 963

Nga San Ya v. Emperor, 4 Ind Cas. 459; U. B. R. (1907-09), Evidence, 3; 11 Cr. L. J. 41 ... 963

Nga To Gale v. Emperor, 20 Ind. Cas 225; 7 L. B. R. 1; 14 Cr. L. J. 401; 6 Bur L T. 95 ... 513

Niadar Mal v. Raunak Husain, 29 A. 608; A. W. N. (1907) 19 ; 4 A. L. J. 668 ... 558

Nibaran Chandra Banerjee v. S. C. Mukherjee, 6 Ind. Cas. 637 ... 596

Nidhan Singh v. King-Emperor, 67 P. L. R. 1904; 1 Cr. L. J. 509 ... 517

Nihala Mall v. Bagu Ram, 11 Ind. Cas. 880; 243 P. L. R. 1911; 164 P. W. R. 1911 ... 609

Nilkanth Ramchandra Kulkarni, *In re*, 19 Ind. Cas. 333; 15 Bom. L. R. 175; 14 Cr. L. J. 237 977

Nilmoni Singh Deo v. Taranath Mukerjee, 9 C. 295; 4 Ind. Dec (N. S.) 946; 12 C. L. R. 361; 9 I. A. 174; 4 Sar. P. C. J. 392; 5 Shome L. R. 130; 6 Ind. Jur. 547 ... 803

Nirodbarani Dassi v. Shiba Das Pal Dewasin, 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084 ... 621

Nistarini Dassi v. Nundo Lall Bose, 26 C. 891; 3 C. W. N. 670 ... 295

Nistarini Dassi v. Nundo Lal Bose, 30 C. 269; 7 C. W. N. 353 ... 295

Nistarini Debee v. Rai Mohun Biswas, 20 Ind. Cas. 576; 18 C. L. J. 214 ... 873

Nityanund Roy v. Banshi Chandra Bhuiyan, 3 C. W. N. 341 ... 886

Noble v. Ward, (1867) 4 H. & C. 149; L. R. 1 Exch. 117; 143 R. R. 534; 35 L. J. Ex. 81; 15 L. T. 672; 15 W. R. 520 ... 317

N—concld.

	Page.
Nobokishore Sarma Roy v. Hari Nath Sarma Roy, 10 C. 1102 ...	692
Noor Mahomad Cassum v. Kaikhosru Maneckjee, 4 Bom. L. R. 268 ...	162
North-Western Rubber Company and Huttenbach & Co., *In re*, (1908) 2 K. B. 907; 78 L. J. K. B. 51 ...	5
Nowell v. Mayor of Worcester, (1854) 9 Exch. 457; 96 R. R. 793; 2 C. L. R. 981; 23 L. J. Ex. 139; 18 Jur. 64; 22 L. T. (o. s.) 244 ...	313
Nuffur Chunder Paul v. Nadiroonissa Beebee, 9 W. R 387 ...	807
Nugenderchunder Ghose v. Sreemutty Kamineé Dossee, 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth, P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R 92	52, 96
Nunda Lal Gossami v. Atarmoni Dassi, 12 C. W. N. 432; 35 C. 763 ...	427
Nundo Lall Bhuttacharjee v. Bidhoo Mookhy Debee, 13 C. 17 ...	422
Nunna Brahmayya Setti v. Chidaraboyina Venkitaswamy, 26 M. 214 ...	925
Nur Ali v. Imaman, A. W. N. (1884) 40 ...	705
Nur Muhammad v. Ghulam Habib, 106 P. R. 1892 ...	621
Nursey Virji v. Alfred H. Harrison, 21 Ind. Cas. 7; 37 B. 511; 15 Bom. L. R. 781 ...	320

O

Oman Prasad v. Jani Durlab Shankar, 23 Ind. Cas 286; 12 A. L. J. 203 ...	234
Omychund v. Barker, (1744) 1 Atk. 21; 2 Eq. Ab. 397: Willes 538; 26 E. R. 15 ...	49
Oo Naung v. Moung Htoon Oo, 13 C. 322	288, 865
Oochi v Ulfat, 20 A. 234; A. W. N. (1898) 23 ..	347
Oodiut Zaman, *In the petition of*, 8 W. R. 109 ...	807
Oudh Beharee Lall v. Ranee Mewa Koonwer, 3 Agra H. C. R. 82 ...	778
Oxenham v. Ellis, (1854) 18 Beav. 593; 52 E. R. 233; 104 R. R. 540 ...	96

P

Padmanund Singh v. Anant Lal Misser, 34 C. 20; 4 C. L. J. 421; 11 C. W. N. 38; 1 M. L. T. 355 ...	79
Palani Koravan v. Emperor, 17 M. L. J. 248; 5 Cr. L. J. 496 ...	171
Palaniandy Gounden v. Emperor, 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146 ...	961
Palaniandy Pillai v. Arunachellum Pillai, 3 Ind. Cas. 387; 32 M. 255; 4 M. L. T. 373; 9 Cr. L. J. 80 ...	827
Panchu Das v. Emperor, 34 C. 698; 11 C. W. N. 666; 5 Cr. L. J. 427 ...	659
Pandab Dowari Das v. Ananda Kishun Chakravarti, 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897 ...	697
Pandharinath Sakharam v. Shankar Narayan Joshi, 25 B. 586; 3 Bom. L. R. 244 ...	233

P—contd.

	Page.
Parbati v. Ram Prasad, 5 A. L. J. 511, A. W. N. (1908) 239 ...	747
Parbati Churn Deb v. Ainud-Deen, 7 C. 577; 9 C. L. R. 170 ...	546
Parker v. McKenna, (1874) 10 Ch. App. 96 at p. 120; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271 ...	85
Parthasaradhi Appa Rao v. Maka Venkatadri Appa Rao, 27 Ind. Cas 88; (1914) M. W. N. 896 ...	239
Parthasaradi Ayyangar v. Chinnakrishna Ayyangar, 5 M. 304 ...	273
Parthasarathi Appa Row v. Narasayya 6 Ind. Cas 988: 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233 (1910) M. W. N. 466; 12 Bom. L. R. 648 ...	903
Parumeshraya v. Seshagiriappa, 22 M. 564 ...	348
Pasumarti Payidanna v. Ganti Lakshminarasamma, 29 Ind. Cas. 314; 28 M. L. J. 525; 38 M. 1076	155, 858
Patch v. Ward, (1867) 3 Ch. App. 203; 18 L. T. 134; 16 W. R 441 ...	849
Pateswari Pratap Narain Singh v. Rudra Narain Singh, 1 A. L. J. 543; A. W. N. (1904) 119; 26 A. 528 ...	148
Patiram Banerjee v. Kankinarra Company Limited, 31 Ind. Cas. 607; 19 C. W. N. 622; 42 C. 1050 ...	4
Patmore v. Colburn, (1834) 1 Cr. M. & R. 65; 4 Tyr. 840; 3 L. J. Ex. 314; 149 E. R. 996 ...	317
Paykat Manakkal v. Theyyankaran, 32 Ind Cas. 624; (1916) 1 M. W. N. 171 ...	187
Pearee Mohun Roy v. Chunder Nath Roy, 18 W. R. 408 ...	911
Pearey Lall v. *Musammat* Kokla Kunwar, 18 Ind. Cas. 766; 11 A. L. J. 157 ...	705
Peary Mohun Mukerjee v. Ambica Churn Bandopadhya, 24 C. 900 ...	272
Periasami v. Krishna Ayyan, 25 M. 431; 12 M. L. J. 166 ...	157
Periasami Mudaliar v. Seetharama Chettiar, 27 M. 243 (F. B.); 14 M. L. J. 84 ...	924
Perkash Lal v. Rameshwar Nath Singh, 31 C. 569 ...	387
Perumal Ayyan v. Alagirisami Bhagavathar, 20 M. 215; 7 M L. J. 222. ...	420
Philips v. Halliday, (1891) A. C. 228; 61 L. J. Q. B. 210; 64 L. T. 745; 55 J. P. 741 ...	751
Phillips v. Allan, 108 E. R. 1120; 8 B. & C. 477; 2 Man. & Ry. 576; 7 L. J. K. B. (o. c.) 2; 32 R. R. 450 ...	921
Phoolbas Koonwur v. Lalla Jogeshur Sahoy, 1 C. 226 at p. 235; 25 W. R. 285; 3 I. A. 7; 3 Sar. P. C. J. 573 ...	621
Phul Chand Ram v. Nursingh Pershad Misser, 28 C. 73 ...	408
Pickard v. Sears, (1837) 6 A. & E. 469; 2 N. & P. 488; 112 E. R. 179; 45 R. R. 538 ...	8
Pim v. Harris, (1876) Ir. R. 10 Eq. 442 ...	49
Pimental v. San Francisco, (1863) 21 Calf. 351	314
Pitam Singh v. Tota Singh, 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74 ...	693
Pitambar Mahapatra v. Bhagabat Lal, 24 Ind. Cas. 860 ...	838

P—concld.

Page.

Pitt v. Pitt, 22 Beav. 294; 52 E. R. 1121; 2 Jur. (N. S.) 1010; 27 L. T. (O. S.) 257; 111 R. R. 372 ... 225

Platter v. Elkhart County, (1885) 103 Ind. 360; 2 N. E. 544 ... 314

Pokhar Das v. Kaka Ram, 31 P. R. 1902; 8 P. L. R. 1902 ... 609

Ponnuswamy Padayachi v. Karupudayan, 24 Ind. Cas. 217; 38 M. 843; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299 ... 123

Poresh Nath Sircar v. Emperor, 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153 ... 986

Porter v. Freundenberg, 19 C. W. N. lxxviii; (1915) 1 K. B. 857; 84 L. J. K. B. 1001 ... 953

Potter v. Brown, 102 E. R. 1016; 7 R. R. 663; 1 Smith 351; 5 East 124 ... 920

Potts v. Bell, 8 T. R. 548; Esq. 612; 5. R. R. 452; 101 E. R 1540 ... 498

Potts v. Smith, (1868) 6 Eq. 311 at p. 317; 38 L. J. Ch. 58; 18 L. T. 629; 16 W. R. 891 ... 256

Pran Nath Roy v. Mohesh Chandra Moitra, 24 C. 546 ... 558

Pranjivandas Jagjivandas Mehta v. Chan Mah Phee, 35 Ind. Cas. 190; (1916) 1 M. W. N. 443. 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 18 Bom. L. R. 664; 20 M. L T. 242; 20 C. W. N 925 (P. C.) ... 866

Prasanna Kumari Debi v; Sris Chandra Majumdar, 33 Ind Cas. 344; 22 C. L. J. 561 ... 857

Prem Chand Dey v. Mokhoda Debi, 17 C. 699 ... 293

Premanundo Shaha v. Brindabun Chung, 22 C. 994 981,987

Price v. Assheton, (1834) 1 Y. & C. Exch. 82; 41 R. R. 222; 4 L. J. Ex. 3 ... 319

Price v. Dyer, (1810) 17 Ves. 356; 11 R. R. 102; 34 E. R. 137 ... 319

Prosunno Kumar Sanyal v. Kali Das Sanyal, 19 C. 683 (P. C.) 19 I. A. 166; 6 Sar. P. C. 209 181, 469

Public Prosecutor v. Sunku Seethaiah, 6 Ind. Cas. 774; 7 M. L. T. 430; 21 M. L. J. 71; 11 Cr. L. J. 400; 34 M. 92 ... 107

Punch Cowrie Mull v. Chunnoo Lall, 2 C. L. R. 121 ... 881

Pundi Doraisami Tever v. Lakshmanan Chetty, 14 M. L. J. 285 ... 790

Puran Chand v. Sheodat Rai, 29 A. 212; A. W. N. (1907) 31; 4 A. L. J. 51 ... 558

Purna Chandra Kumar v. Bejoy Chand Mahatap, 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549 ... 157

Putti Narayanamurthi Ayyar v. Marimuthu Pillai, 26 M. 322 ... 790

Q

Queen v. Manning, 12 Q. B. D. 241 ... 997

Queen-Empress v. Abdul Kadir, 9 A. 452; A. W. N. (1887) 111 174, 832

——— v. Baba Ratanlal, Bom. Cr. Cas. 293 ... 986

——— v. Bisheshar, 9 A. 615 ... 979

——— v. Nathu, 6 A. 214; A. W. N. (1884) 51 ... 174

Q—concld.

Page.

Queen-Empress v. Nga Po Min, U. B. R. (1897-01), I, 87 ... 961

——— v. Nimchand Mookerjee, 20 W. R. 41 ... 664

——— v. Ram Partab, 6 A. 121 ... 978

——— v. Rayapadayachi, 19 M. 240; 1 Weir 537 ... 980

——— v. Subbarayar, 19 M. 3; 2 Weir 40; 1 Weir 86 ... 976

Quelin v. Moisson, (1828) 1 Knapp. P. C. C. 266; 12 E. R. 320 ... 920

Quinn v. Leatham, (1901) A. C. 495; 70 L. J. P. C. 76; 85 L T. 289; 50 W. R. 139; 65 J. P. 708. ... 986

R

R. v. Dixon, 3 M. & S. 11 at p. 15; 4 Camp. 12; 15 R. R. 381; 105 E. R. 5 6 ... 987

R. v. Hadger, Starkie on Evidence p. 132 (1852) 1000

Radha Gobind Roy Saheb v. Inglis, 7 C. L. R. 364 (P. C.); 3 Suth P. J. 809 ... 904

Radha Pershad Singh v. *Musammat* Talook Raj Kooer, 20 W. R. 38 ... 674

Radha Prasad Singh v. Lal Sahib Rai, 17 I. A. 150; 13 A. 53; 5 Sar. P. C. J 600 ... 857

Radha Raman Shaha v. Pran Nath Roy, 28 C. 475 (P. C.); 5 C. W. N 757 341, 558

Radha Shyam Sircar v. Joy Ram Senapati, 17 C. 896 ... 682

Radhabai v. Chinnaji, 3 B. 27 ... 846

Radhe Shiam v. Chunni, 35 Ind. Cas. 192; 14 A. L. J. 361 ... 572

Radhika Nath Sarkar v. Rakhal Raja Gayen, 3 Ind. Cas. 835; 13 C. W. N. 1175; 10 C. L. J. 473 ... 585

Raghubanund Doss v. Sadhu Churn Doss, 4 C 425; 3 C. L. R. 534 ... 128

Raghubar Dayal v. *Musammat* Kaniz Husain, 2 Ind. Cas 258; 12 O. C. 74 ... 428

Raghubar Dayal Sahu v. Bhikya Lal Misser, 12 C. 69 ... 64

Raghunath Bakhsh v. Muhammad Bakhsh, 30 Ind. Cas. 200; 18 O. C 115; 2 O. L. J. 200 ... 25

Rahimbhoy Habibbhoy v. Charles Agnew Turner, 20 I. A. 1; 17 B. 241 ... 287

Rahimtolla v. Murray, 11 Ind. Cas. 870; 4 Bur. L. T. 171 ... 20

Rahimuddi v. Asgar Ali, 27 C. 990; 5 C. W. N. 31 ... 986

Rai Budreedas Mukim Bahadur v. Chuni Lal Johurry, 0 C. W. N. 581; 33 C. 789 ... 881

Rai Charan Purkait v. Amrita Lal, 5 Ind. Cas. 98; 11 C. L. J 131 ... 261

Rai Kishori Ghose v. Kumudini Kanta Ghose, 14 Ind. Cas. 377; 15 C. L. J. 138 ... 344

Raj Chunder Sen v. Ganga Das Seal, 31 C. 487 at p. 488; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71 (P. C.); 14 M. L. J. 147 ... 808

Raj Coomar Lall v. Bissessur Dyal, 10 C. 688 at p. 694 ... 132

Raj Lukhee Dabea v. Gokool Chunder Chowdhry, 13 M. I. A. 209; 12 W. R. (P. C.) 47; 3 B. L. R. (P. C.) 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529 ... 682

R—contd.

	Page.
Raja v. Subbaraya, 7 M. 253 ...	136
Raja Bhagwan Bakhsh Singh v. Mazhar Husain, 9 O. C. 167 ...	443
Raja Kishendatt Ram v. Raja Mumtaz Ali Khan, 5 C. 198; 5 C. L. R. 213; 6 I. A. 145 ...	44
Raja Lackhi Ghosh v. Debendra Chundra Mojumdar, 24 C. 668; 1 C. W. N. 444 ...	779
Raja Parthasarathi Appa Row v. Chevendra China Sundara Ramayya, 27 M. 543 ...	332
Raja Ram Rao, T. V. v. Arumugam Karuputti, 28 Ind. Cas. 377; 17 M. L. T. 224 ...	891
Raja Sree Nath Roy v. Gadadhar Das, 1 C. W. N. 225; 24 C. 348 ...	288
Rajah of Kalahasti v Achigadu, 30 M 454; 17 M. L. J. 367 ...	226
Rajah Kishen Dutt Ram Pandey v. Narendra Bahadoor Singh, 3 I A. 85 at p. 88; 3 Sar, P. C. J. 570 ...	903
Rajah Makund Deb v. Gopi Nath Sahu, 25 Ind. Cas 286; 21 C. L. J. 45 ...	608
Rajah Srinath Roy v. Dinabandh Sen, 25 Ind. Cas. 467; 20 C. L. J. 385; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733 16 M. L. T. 319; 12 A. L. J. 1193; 16 Bom. L. R. 901; 41 I A. 221; 42 C. 489 at p. 525 (P. C.) ...	953
Rajah of Venkatagiri v. Isakapalli Subbiah, 26 M. 410	508, 647
Rajah of Venkatagiri v. Narayana Reddi, 17 M. 456; 4 M. L. J. 198	20, 109
Rajanikanth Biswas v. Ram Nath Neogy, 10 C. 244 ...	296
Rajendra Narain Roy v Mahomed Arzumand Khan, 9 C. W. N. 887; 1 C. L. J. 331; 2 Cr. L. J. 408 ...	525
Rajib Panda v. Lakhan Sendh Mahapatra, 27 C. 11; 3 C. W. N. 660 ...	295
Rajlakshmi Dasee v. Kātyayami Dasee, 12 Ind. Cas. 464; 38 C. 539 ...	686
Rajmohun Gossain v. Gourmohun, 4 W. R. 43 (P. C); 8 M. I. A 91; 1 Suth. P. C. J. 378; 1 Sar. P. C. J. 723; 19 E. R. 464 ...	143
Raju Balu v. Krishnarav Ramchandra, 2 B. 273 at pp. 292, 293 ...	255
Rajwant Prasad Pande v. Mahant Ram Ratan Gir, 30 Ind. Cas. 849; 13 A. L. J. 937; 29 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 754; 37 A. 485; 20 C. W. N. 35; (1915) M. W. N. 736; 23 C. L. J. 55; 42 I. A. 171 (P. C.) ...	558
Rakhit Mahanta v. Pudde Bauri, 9 C. W. N. 54 ...	838
Rakhohari Chattaraj v. Bipra Das Dey, 31 C. 975	96
Ralambal Ammal v. Arunachala Chetti, 18 M. 255 ...	779
Ram Bahadur Singh v. Ajodhya Singh, 34 Ind. Cas. 370; 20 C. W. N. 699; 1 P. L. J. 129 ...	748
Ram Chandra v. Emperor, 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247 ...	517
Ram Charan v. Ajudhia Prasad 28 A. 50; A. W. N. (1905) 174 ...	480
Ram Charan Sanyal v. Anukul Chandra Acharjya, 34 C. 65; 11 C. W. N. 160; 4 C. L. J. 578 ...	58
Ram Ghulam v. Manohar Das, A. W. N. (1887) 59 ...	715
Ram Ghulam Singh v. Ram Behari Singh, 18 A. 90; A. W. N (1895) 234 ...	550
Ram Gopal Majumdar v. Prasanna Kumar Samad, 2 C. L. J. 508; 10 C. W. N. 529 ...	557
Ram Gulam Singh v. Bishun Pargash Narain Singh, 11 C. W. N. 48 ...	434
Ram Kirpal v. Rup Kuari, 6 A. 269; 11 I. A. 37; A. W. N. (1886) 283 (P. C.) ...	575
Ram Narain v. Muhammad Hadi, 26 I. A. 38; 26 C. 227; 3 C. W. N. 113, 7 Sar. P. C. J. 425 ...	570
Ram Narain v. Umrao Singh, 29 A. 615; A. W. N. (1907) 194; 4 A. L. J. 548 ...	102
Ram Narain Sahoo v. Bandi Porshad, 31 C. 737 ...	468
Ram Narayan Singh v. Krishna Chandra Ghose, 17 Ind. Cas. 490; 17 C. L. J. 239; 17 C. W. N. 403 ...	78
Ram Nath v. Bindraban, 18 A. 369; A. W. N. (1896 106 ...	423
Ram Nath Singh v. Basanta Narain Singh (Ugra Narain Singh v. Basan Narain Singh), 19 Ind. Cas. 630; 18 C. L. J. 209; 17 C. W. N 868 857,	873
Ram Pershad v Harbans Singh, 6 C. L. J. 158	200
Ram Pershad Koeri v. Jawahir Roy, 7 C. L. J. 72; 12 C. W. N 899 ...	28
Ram Pershad Singh v. Lakhpati Koer 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L R. 103 ...	55
Ram Piyari v. Emperor, 5 Ind. Cas. 696; 32 A. 153; 11 Cr. L. J. 203, 7 A. L. J. 103 ...	517
Ram Rang v. Emperor, 18 P. R. 1905 Cr.; 127 P. L. R. 1905; 2 Cr. L. J. 279 ...	987
Ram Ranjan Chakerbati v. Ram Narain Singh, 22 C. 533; 22 I. A. 60 ...	300
Ram Ratan Sahu v. Mohant Sahu, 6 C. L. J. 74 at p. 78; 11 C. W. N. 732 ...	342
Ram Saran Pande v. Janki Pande, 18 A. 106; A. W. N. (1895) 240 ...	180
Ram Sarup v. Bindeshuri, 27 Ind. Cas. 939; 18 O. C. 51; 2 O. L. J. 67 ...	772
Ram Sarup v. Emperor, 7 Ind. Cas. 539; 13 O. C. 161; 11 Cr L. J. 496 ...	547
Ram Taran Goswami v. Rameswar Malia, 11 C. W. N. 1078; 6 C. L. J. 719 ...	410
Rama v. Varada, 16 M. 142 ...	876
Rama Prasad Roy Chowdhury v. Anukal Chandra Roy Chowdhury, 27 Ind. Cas. 444; 20 C. L. J. 512 ...	857
Ramalingathudayan v. Unnamalai Achi, 24 Ind. Cas. 877; 38 M. 791 ...	791
Raman Behary Das v. Emperor, 22 Ind. Cas. 729; 41 C. 722; 15 Cr. L. J. 153; 18 C. W. N. 1152 ...	801
Ramanadhan Chetti v. Narayanan Chetty, 27 M. 602 ...	530
Ramasami Naidan v. Ulaganatha Goundan, 22 M. 49 (F. B.); 8 M. L. J. 312 ...	934
Ramasamy Chetti v. Bank of Madras, 30 Ind. Cas 839 ...	495
Ramasawmi Chettiar v. Oppilamani Chetti, 4 Ind. Cas. 1059; 33 M. 6; 6 M. L. T. 269; 19 M. L. J. 671 ...	126
Ramasamy Kon v. Bhavani Ayyar, 3 M. H. C. R. 247 ...	183

R—contd.

	Page.
Ramaswami Ayyar v. Vythinatha Ayyar, 26 M. 760; 13 M. L. J. 448 ...	188
Ramaswami Chettiar v. Sundara Reddia, 23 Ind. Cas. 805 ...	456
Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar, 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1231; 20 C. L. J. 573 (P. C.); 41 I. A. 290 ...	690
Ramchandra Mukerjee v. Ranjit Singh, 27 C. 242 at p. 251; 4 C. W. N. 405 ...	879
Ramchurn Singh v. Raniganj Coal Association, Limited, 26 C. 29 at p. 36 (P. C.); 25 I. A. 210; 2 C. W. N. 697; 7 Sar. P. C. J. 399 ...	841
Ramcoomar Koondoo v. McQueen 11 B. L. R. 46 (P. C.); 18 W. R. 166; 1 A. Sup. Vol. 40; 3 Sar. P. C. J. 160 ...	898
Ramdas v. Vazirsaheb, 25 B. 589; 3 Bom. L. R. 179 ...	543
Ramesh Chandra Dhar v. Karunamoyi Dutt, 33 C. 498 ...	361
Rameshwar Singh Bahadur v. Rateshwar Singh, 18 Ind. Cas 841; 17 C. L. J. 125 at p. 130 ...	580
Rameswar Koer v. Gobardhan Lal, 7 C. L. J. 202 ...	28
Rameswar Mandal v. Provabati Debi, 25 Ind. Cas. 84; 20 C. L. J. 23 at p. 31; 19 C. W. N. 313 ...	52
Rameswar Pershad Singh v. Ram Bahadur Singh, 34 C. 70; 11 C. W. N. 178; 5 C. L. J. 175; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.) ...	582
Ramgopal Jhoonjhoonwalla v. Joharmall Khemka; 15 Ind. Cas. 547; 39 C. 473 ...	693
Ramisden v. Dyson, (1865) L. R. 1 H. L. 129; 12 Jur (N. S.) 506; 14 W. R. 926 ...	736
Ramphal Rai v. Ram Baran Rai, 5 A. 53; A. W. N. (1882) 151 ...	857
Ramphal Rai v. Tulakuari, 6 A. 116; A. W. N. (1883) 243 ...	682
Ramrup Das v. Mohunt Sujiram Das, 7 Ind. Cas. 92; 14 C. W. N. 932; 12 C. L. J. 211 ...	798
Ramtonoo v. Gobind, (1857) Beng. S. D. A. 1585	296
Ramyad Sahu v. Bindeswari Kumar Upadhay, 6 C. L. J. 102 ...	342
Rana Ganpat Singh v. Kangra Vallay Slate Company, 62 P. R. 1893 ...	462
Ranchode Das Govardhana Das v. Krishna Das Vittal Das, 12 Ind. Cas. 253; 21 M. L. J. 1096; 10 M. L. T. 272; (1911) 2 M. W. N. 271 ...	226
Rangasawmy Padayachi v. Narayanasawmy Padayachi, 7 Ind. Cas 417; 34 M. 247; 8 M. L. T. 120; (1910) M. W. N. 695 ...	922
Rangayya Chetti v. Thanikachalla Mudali, 19 M. 74 ...	923
Rangoon Botatoung Co, Ltd. v. Collector of Rangoon, 16 Ind. Cas. 188; 16 C. W. N. 961; (1912) M. W. N 781; 12 M. L. T. 195; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 832; 10 A. L. J. 271; 39 I. A 197; 5 Bur. L. T. 205, 207; 6 L. B. R. 150; 40 C. 21 (P. C.) ...	903
Rani Kanno Dai v. Lacy, 19 A. 235; A. W. N. 1897) 38 ...	225
Rani Veeraraghavula v. Bomma Devara Venkata Narasimha, 25 Ind. Cas. 305; 41 I A. 258; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 45; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom L. R. 853 ...	903
Raniganj Coal Association, Limited v. Judoonath Ghose, 19 C. 489 ...	545
Ranjit Misser v. Ramudar Singh, 16 Ind. Cas. 940; 16 C. L. J. 77 ...	354
Rankin v. Emigh, (1910) 215 U. S. 27 ...	319
Rash Behari Roy, Bhugwan Chunder Roy, *In the matter of*, 17 C. 209 ...	495
Rashbihari Singh v. Thakur Joyananda Singh, 4 C. L. J. 475 ...	857
Rashid-un-nisa Muhammad Ismail Khan, 3 Ind. Cas. 864; 31 A. 572; 19 M. L. J. 631; 6 M. L. T. 279 (P. C.); 13 C. W. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L R. 1225; 36 I. A. 168 ...	155, 857
Ratan Lal Gir v. Farshi Bibi, 34 C. 396; 11 C. W. N. 824 ...	8
Redgrave v. Hurd, (1881) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 483; 30 W. R. 251 ...	236
Reeves v. Butcher, (1891) 2 Q. B. 509; 65 L. T. 329; 39 W. R. 626; 60 L. J. Q B 619 ...	420
Reference by the Collector and Superintendent of Stamps, Bombay, 20 B. 210. ...	417
Reg. v. Govindas Haridas, 6 B. H. C. R. Cr. Cas. 76 ...	986
Reg. v. Griffiths, (1891) 2 Q. B. 145; 60 L. J. M. C. 93; 39 W. R. 719; 56 J. P. 87 ...	499
Reg. v. Keyn, 2 Ex. D. 63; 46 L. J. M. C. 17; 13 Cox. C. C. 403 ...	906
Reg. v. Murphy, 8 Car. & P. 297 ...	996
Reg. v. Ring, 61 L. J. (N. S.) M. C. 116; 66 L. T. 300; 17 Cox. C. C 491; 56 J. P. 552 ...	501
Reg. v. Vine, 10 Q. B. 195; 44 L. J. M. C. 60; 31 L. T. 842; 23 W R. 643; 13 Cox. C. C. 43 ...	500
Regina v. Duffield, 5 Cox, C. C. 404 at p. 434 ...	937
Rendall v. Blair, (1890) 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689 ...	78
Reynolds v. Nelson, (1821) 6 Madd. 290; 22 R. R. 225; 56 E R. 1101 ...	318
Rex v. Brissac, 4 East. 164 at. p. 171; 102 E. R. 792 ...	996
Rex v. Oppenheimer and Colbeck, (1915) 2 K. B. 755; 84 L. J. K. B. 1760 ...	501
Rhodes v. Chesapeake Railway Company, (1901) 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170 ...	317
Rhodes v. Rhodes, (1850) 6 Jur. (N. S.) 600; Johns. 653; 119 R. R. 1058 ...	49
Richardson v. Horton, 7 Beav. 112; 49 E. R. 1006; 64 R. R. 28; 13 L. J. Ch. 186; 7 Jur. 1144 ...	225
Ridgway v. Wharton, (1857) 6 H. L. C. 238 at p. 264; 27 L. J. Ch. 46; 4 Jur. N. S.) 173; 5 W. R. 804; 10 E. R. 1287; 29 L. T. (o. s.) 390; 108 R. R. 88 ...	19
Rishton v. Grissell. (1868) 5 Eq 326. ...	49
River Steamer, Co., *In re*, Mitchell, *Ex parte*, 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130 ...	576

R—concld.

Page.

Robert Watson v. Ram Chand Dutt, 23 C. 799 ... 430
Robert Watson & Co. v. Collector of Zillah Rajshahye, 13 M. I. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. (P. C.) 48; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 158 ... 844
Robertson, *Ex parte*, Morton, *In re*, 20 Eq. 733 at p. 737; 44 L. J. Bk. 99, 32 L. T. 697; 23 W. R. 906 ... 921
Robinson, *In re*, 131 Mass. 376; 41 Am. Rep. 239 935
Robinson v. Page, (1826) 3 Russell 114; 27 R. R. 26; 38 E. R. 519 ... 318
Robinson v. Palmer, (1901) 2 Ir. R. 489; 6 Ir. L. R. 230 ... 325
Robinson & Co. v. Manheim Insurance Co., (1915) 1 K. B. 155; 84 L. J. K. B. 238; 50 S. J. 7; 31 T. L. R. 20; 19 C. W. N. viii ... 952
Ruckmaboye v. Lulloobhoy Mottichund, 5 M. I. A. 234; 8 Moo. P. C. 4; 1 Sar. P. C. J. 423, 13 E. R. 480 ... 741
Rudra Narain Maity v. Natabar Jana, 21 Ind. Cas. 431; 41 C. 52 at p. 56; 18 C. W. N. 353; 18 C. L. J. 89 ... 839
Rukhab v. Chunilal Ambushet, 16 B. 347 ... 128
Rukmani Ammal v. Advocate-General of Madras, 31 Ind. Cas. 908; (1916) 1 M. W. N. 10 ... 939
Rung Lal v. Annu Lal, 22 Ind. Cas; 349; 10 A. L. J. 968; 36 A. 21 ... 712
Rung Lall v. Heera Narain Gir, 11 C. 166 ... 72
Rungama v. Atchama, 4 M. I. A. 1; 7 W. R. 57 (P. C.); 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 312; 18 E. R. 600 ... 130
Rup Chand Ghose v. Sarbessur Chandra Chunder, 3 C. L. J. 629; 33 C. 915; 10 C. W. N. 747 ... 8
Rup Narain v. Maha Dyal, 28 Ind. Cas. 336; 4 P. R. 1915 Cr.; 22 P. L. R. 1916; 16 Cr. L. J. 288 ... 977
Ruppell v. Ponnusami Tevan, 22 M. 488; 1 Weir 821 ... 671

S

Sadagopa Chariar v. Krishnamoorthy Rao, 30 M. 185; 17 M. L. J. 240; 2 M. L. T. 204, 4 A. L. J. 333, 11 C. W. N. 585; 5 C. L. J. 566; 9 Bom. L. R. 663 ... 108
Sadashiv Mahadu v. Narayan Vithal, 11 Ind. Cas. 987; 35 B. 452; 13 Bom L. R. 661 295; 468
Sadhu Chaoan Datta v. Hara Nath Datta, 27 Ind. Cas. 135 ... 874
Safdar Husain, *In the matter of the complaint of*, 25 A. 315 ... 490
Sagaji v. Namdev, 23 B. 525; 1 Bom. L. R. 5 ... 458
Sahdeo Singh v. Kuldip Singh, 18 C. W. N. ccxix ... 587
Sakharam Krishnaji v. Madan Krishnaji, 5 B. 232 ... 774
Saluk Singh v. Ajudhya Pershad, 15 Ind. Cas. 121; 10 A. L. J. 108 ... 457
Samaram Singarachariar v. Krishnaswami Iyengar, 4 Ind. Cas. 874; 19 M. L. J. 513 ... 89
Samban v. Queen, 1 Weir 533 ... 987
Sami Sastri, *In re*, 2 Weir 598 ... 423

S—contd.

Page.

Samia Pillai v. Chockalinga Chettiar, 17 M. 76; 4 M. L. J. 8 ... 615
Saminatha Ayyar v. Venkatasubba Ayyar, 27 M. 21; 13 M. L. J. 300 ... 889
Samiya Mavali v. Minammal, 23 M. 490; 10 M. L. J. 240 ... 455
Sandhu Taraganar v. Husain Sahib, 28 M. 87; 14 M. L. J. 474 ... 468
Sankar Rangayya v. Sankar Ramayya, 31 Ind. Cas. 350; 29 M. L. J. 521; 16 Cr. L. J. 750; 18 M. L. T. 381 ... 516
Santappayya v. Rangappayya, 18 M. 397 at p. 398; 5 M. L. J. 66 ... 135
Sarat Chandra Banerjee v. Apurba Krishna Roy, 11 Ind. Cas. 187; 14 C. L. J. 55; 15 C. W. N. 925 78, 314
Sarat Chunder Dey v. Gopal Chunder Laha, 20 C. 296; 19 I. A. 203 ... 8
Sardar Arur Singh v. Bua Ditta, 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911 ... 609
Sardar Singh v. Maharaj Das, 3 Ind. Cas. 603; 79 P. R. 1909; 126 P. L. R. 1909; 127 P. W. R. 1909 ... 472
Sardari Sha v. Hukum Chand, 22 Ind. Cas. 818; 41 C. 876; 18 C. W. N. 662 ... 808
Sariatoolla Molla v. Raj Kumar Roy, 27 C. 709; 4 C. W. N. 681 ... 468
Sarju Missir v. Bandesri Pershad, 20 Ind. Cas. 917; 11 A. L. J. 691 ... 42
Sarman Lal v. Khuban, 17 A. 422; A. W. N. (1895) 112 ... 693
Sarwan v. Emperor, 33 Ind. Cas. 647; 14 A. L. J. 279; 17 Cr. L. J. 67 ... 486
Sashi Bhusan Hazra v. Aswini Comar Samanta; 28 Ind Cas. 981; 19 C. W. N. 637*n* ... 697
Sashi Rajbanshi v. Emperor, 26 Ind. Cas. 657; 42 C. 856; 19 C. W. N. 295; 16 Cr. L. J. 65 ... 514
Sasibhusan Mookerjee v. Radhanath Bose, 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433 295, 469, 618
Satish Chandra Guha v. Chander Kant Pyne, 3 C. W. N. 278 ... 554
Satya Kumar Banerjee v. Satya Kirpal Banerjee, 3 Ind. Cas. 247; 10 C. L. J. 503 ... 251
Satyesh Chunder Sircar v. Dhunpul Singh, 24 C. 20 ... 314
Savile v. Couper, (1887) 36 Ch. D. 520; 56 L. J. Ch. 980; 56 L. T. 907; 35 W. R. 829 ... 881
Sawyer, H. v. Louis Dreyfus & Co., 20 Ind. Cas. 504; 7 S. L. R. 1 ... 536
Secretary of State v. Balwant Ganesh, 28 B. 105 at p. 118; 5 Bom. L. R. 790 ... 357
Secretary of State for India v. Bavotti Haji, 15 M. 315 ... 908
Secretary of State v. British India Steam Navigation Company, 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848. ... 516
Secretary of State v. Karuna Kanta Chowdhry, 35 C. 82 (F. B.); 11 C. W. N. 1053; 6 C. L. J. 342 ... 545
Secretary of State v. Kota Bapanamma Garu, 19 M. 165 ... 904
Secretary of State v. Krishnamoni Gupta, 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 ... 904

S—contd.

Page.

Secretary of State for India in Council v. Vera Rayan, 9 M. 175 at p. 184 ... 904
Segu Rowthen v. Alagappa Chetty, 22 Ind. Cas. 334; 26 M. L. J. 269; (1914) M. W. N. 340 ... 332
Sellar v. Griffin, (1863) 11 W. R. 583 ... 85
Sennava Reddiar v. Venkatachala Reddiar, 28 Ind. Cas. 91; 2 L. W. 177 ... 186
Seru Mohun Bania v. Bhagoban Din Pandey, 9 C. 602 ... 469
Seshadri Ayyangar v. Nataraja Ayyar, 21 M. 179 at p. 186 ... 205
Set Umedmal v. Srinath Ray, 27 C. 810; 4 C. W. N. 692 ... 342
Seth Chitor Mal v. Shib Lal, 14 A. 273; A. W. N. (1892) 117 (F. B.) ... 649
Shabiuddin v. Deomoorat Koer, 30 C. 655 ... 320
Shadi v. Saindittа, 77 P. R. 1887 ... 546
Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib, 8 M. H. C. R. 63 at p. 67 ... 34
Shah Hamid Ahmad v. Baijnath, Rent Act Ruling 1893, No. 66 ... 445
Shahazadee Hazara Begum v. Khaja Hussein Ali Khan, 12 W. R. 498; 4 B. L. R. A. C. 86 ... 727
Shaikh Khoda Buksh v. Shaikh Tajuddin, 8 C. W. N. 359 ... 751
Sham Chandra Dafadar v. Godadhar Mandal, 9 Ind. Cas. 377; 13 C. L. J. 277 ... 554
Sham Soonder Bhuttacharjee v. Monee Ram Doss, 25 W. R. 233 ... 463
Shama Purshad Roy Chowdery v. Hurrew Purshad Roy Chowdery, 10 M. I. A. 203 at p. 212; 3 W. R. 11 (P. C.); 19 E. R. 918; 2 Suth. P. C. J. 103 ... 342
Shamu Patter v. Abdul Kadir Rowthan, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1003; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.) ... 572, 748
Shankar Venkatesh Karguppi v. Sadashiv Mahadji Kulkarni, 21 Ind. Cas. 39; 38 B. 21; 15 Bom. L. R. 817 ... 225
Shapurji Hormasji v. Monosseh Jacob, 4 Ind. Cas. 107; 34 B. 374; 11 Bom. L. R. 1011 ... 156
Shashi Bhusan Hazrah v. Sheikh Esabar, 29 Ind. Cas. 122; 19 C. W. N. 636 ... 697
Shaw v. Foster, (1872) 5 Hud. & Ir. App. 321 at p. 340 ... 191
Shears v. Goddard, (1893) 1 Q. B. 406; 74 L. T. 128; 65 L. J. Q. B. 344; 44 W. R. 492; 3 Manson, 24 ... 949
Sheikh Budan v. Ramchandra Bhunjgaya, 11 B. 537 ... 857
Sheikh Hedayet Ali v. Kumar Kalanand Singh, 20 Ind Cas. 332; 17 C. L. J. 411 ... 515
Sheodhani Pandey v. Moharani Beni Pershad Koeri, 16 Ind. Cas. 935; 16 C. L. J. 67 ... 695
Sheodihal Singh v. Badri Narain, 8 Ind. Cas. 1038; 7 A. L. J. 1198; 33 A. 61 ... 740
Sher Shah v. Sher Jang, 21 P. R. 1889 ... 364
Sher Singh v. Empress, 14 P. R 1883 Cr. ... 986
Shib Dit Singh v. Devindar Singh, 7 Ind. Cas. 710; 70 P. R 1910; 94 P. W. R, 1910; 123 P. L. R. 1910 ... 609
Shib Lakshan Bhakat v. Srimati Tarangini Dasi, 8 C. L. J. 20 ... 857

S—contd.

Page.

Shib Lal v. Bhagwan Das, 11 A. 244; A. W. N. (1889) 96 ... 24
Shilabati Debi v. Roderigues, 35 C. 547; 12 C. W. N. 448 ... 353
Shimen v. Phillipsberg, (1896) 58 N. J. L. 506; 33 Atl. 852 ... 314
Shirin Begam v. Agha Ali Khan, 18 A. 141; A. W. N. (1896) 9 ... 742
Shiva Nathaji v. Joma Kashinath, 7 B. 344 at p. 363 (F. B.) ... 803
Shivram v. Bal, 26 B. 519; 4 Bom. L. R. 310 ... 94
Shrimant Sagajirao Khanderar Naik Nimbalkar v. Smiths, 20 B. 726 ... 798
Shwe Ein v. King-Emperor, 3 L. B. R. 122 ... 512
Shyam Chunder Mardraj v. Secretary of State, 35 C. 525; 12 C. W. N. 569; 7 C. L. J. 445 ... 98
Silajit Mahoto v. Emperor, 4 Ind. Cas. 19; 36 C. 865; 13 C. W. N 801; 10 Cr. L. J. 471 ... 286
Siliman Sahib v. Bontala Haman Sahib, 20 Ind. Cas. 418; 25 M. L. J. 125; (1913) M. W. N. 554; 38 M. 247 ... 188
Simpson v. Hornbeck, 3 Lans. 53 ... 341
Sir Rameswar Singh v. Jaideb Jha, 6 Ind. Cas. 387; 12 C. L. J. 591 ... 564
Sisram v. Asghar Ali, 16 Ind. Cas. 422; 35 A. 19; 10 A. L. J. 416 ... 209
Sita Ram v. Amir Begam, 8 A. 324; A. W. N. (1886) 101 ... 244
Sita Ram v. Subhedar Kuar, 24 Ind. Cas. 695 ... 473
Sita Ram Tiwari v. Sukhdeo Kunbi, 6 A. L. J. 88 (*Notes*) ... 202
Sitab Chand Nahar v. Hydermala, 24 C. 281; 1 C. W. N. 229 ... 421
Sitarama Chetty v. Cotta Krishnasami Chetty, 21 Ind. Cas 24; 38 M. 374; (1913) M. W. N. 676; 25 M. L. J. 264 ... 577
Sitaramji v. Jadunath Singh, 24 Ind. Cas. 72; 1 O. L. J. 204 ... 387
Sivagami Achi v. Subrahmania Ayyar, 27 M. 259; 14 M. L. J. 57 ... 231, 742
Sivanupandia Thevan, *In re*, 23 Ind. Cas. 503; 38 M. 793; 15 Cr. L. J. 295 ... 492
Slobodinsky, *In re*, Moore, *Ex parte*, (1903) 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 10 Manson, 341 ... 949
Smart v. Jones, (1861) 15 C. B. (N. S.) 717; 33 L. J. C. P. 154; 12 W. R. 430; 143 E. R. 966; 10 Jur (N. S.) 678; 10 L. T. 271; 137 R. R. 733 ... 285
Sodhi Kartar Singh v. Sher Singh, 50 P. R 1895 472
Somana Basappa v. Gadigeya Kornaya, 35 B. 231; 13 Bom. L. R. 113 ... 631
Somasundara Mudali v. Kulandaivelu Pillai, 28 M. 457 at p. 464; 14 M. L. J. 404 ... 118
Somasundaram v. Krishnamurti, 17 M L.J. 126 220
Sona Ram R. Sangma v. King-Emperor, 3 C. L. J. 195; 3 Cr. L. J. 246 ... 496
Sonet Kooer v. Himmut Bahadoor, 1 C. 391; 25 W. R. 239; (P. C.); 3 I. A. 92 ... 63
Soper v. Arnold, (1889) 14 A. C. 429; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449 ... 94
Sorabji Jamsetji v. Ishwardas Jugjiwandas, 20 B. 664 ... 160
Spoer v. Green, (1874) 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 293; 22 W. R. 547 ... 256
Sreenath Chowdhry v. John James Grey, 13 W. R. 114 ... 548

S—contd.

	Page.
Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma and Radha Mohan v. Hardai Bibi, 26 I. A. 113; 21 A. 469; 22 M. 398; 3 C. W. N. 427; 1 Bom. L. R. 226; 9 M. L. J. 67; 7 Sar. P. C. J. 350 ...	129
Sri Maharani Beni Pershad Koeri v. Ramdahin Pandey, 10 C. W. N. 216 ...	82
Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa H. V. Ramchandra Razu, 23 I. A. 32; 19 M. 249; 6 M. L. J. 53 ...	857
Srimath Kidambi Jagannatha Charyulu Ayyavarlu v. Pidipiti Kutumbarayudu, 25 Ind. Cas. 891; 39 M. 21; 27 M. L. J. 233 ...	122
Srimohan Thakur v. Macgregor, 28 C. 769 ...	372
Srinath Dass v. Hari Pada Mitter, 3 C. W. N. 637 ...	52
Srinath Roy v. Aindai Halder, 24 C. 395; 1 C. W. N. 217 ...	970
Srinivasa v. Tiruvengada, 11 M. 450 ...	90
Srinivasa Chariar v. Raghava Chariar, 23 M. 28 at p. 32; 7 M. L. J. 281 ...	118
Sripat v. Ram Saran, 2 O. C. 137 ...	444
Sripati Chinna Sanyasi Razu v. Sripati Suriya Razu, 5 M. 196 ...	678
Sristeedhur Paroee v. Indrobhoosun Chuckerbutty, 9 B. L. R. App. 19; 18 W. R. 25 Cr. ...	518
Stapilton v. Stapilton, (1739) 1 Wh. & Tu. L. C. 313 (7th Ed.); 8th Ed., 234; 1 Atk. 2	251, 591
Stapleton v. Haymen, (1864) 2 H. & C. 918; 133 R. R. 858; 33 L. J. Ex. 170; 10 Jur. (N. S.) 497; 9 L. T. 655; 12 W. R 317 ...	313
Stevens v. Cook, (1859) 5 Jur. (N. S.) 1415; 115 R. R. 1066 ...	49
Stock v. McAvoy, (1872) 15 Eq. 55; 42 L. J. Ch. 230; 27 L. T. 411; 21 W. R. 521 ...	570
Stone v. Wishart, 2 Madd. 64; 56 E. R. 258 ...	939
Subba Reddi v. Chengalamma, 22 M. 126; 9 M. L. J. 19 ...	556
Subbaraya Mudaliar v. Vedantachariar, 28 M. 23; 14 M. L. J. 171 ...	89
Subbiah Naicker v. Ramanathan Chettiar, 22 Ind. Cas. 899; 37 M. 462 at p. 473; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251	238, 297
Subbraya v. Krishnappa, 12 M. 422 ...	9
Subjaun Ostagar v. Premothonath Ghose, 6 W. R. Misc. Rul. 77 ...	806
Subramania Aiyar v. Vaithinatha Aiyar, 31 Ind. Cas. 198; 38 M. 682 ...	858
Subramania Ayyan v. Krishna Ayyan, 23 M. 137	183
Subramaniah Aiyar v. Savitri Ammal, 3 Ind. Cas. 321; 19 M. L. J. 228; 4 M. L. T. 354 ...	20
Subramaniya Ayyar v. Ramchandra Rau, 1 M. 335 ...	395
Suchand Ghosal v. Balaram Mardana (Mohendra Ghoshal v. Bhuban Mardana), 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566 ...	796
Sudaman Jamadar v. Behari Mahton, 10 Ind. Cas. 456; 15 C. W. N. 953 ...	82
Sudarsanam Maistri v. Narasimhulu Maistri, 25 M. 149 at p. 156; 11 M. L. J. 353 ...	54
Sukh Lal Sheikh v. Tara Chand Ta, 33 C. 68; 2 C. L. J. 241; 2 Cr. L. J. 618 ...	803
Sukhamoni Chowdhrani v. Ishun Chunder Roy, 25 C. 844; 25 I. A. 95; 2 C. W. N. 402 ...	256

S—concld.

	Page.
Suleiman Kadr Bahadur v. Mehndi Begum, 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254 ...	570
Sultan Moideen v. Savalayammal, 15 M. 343; 11 M. L. J. 50 ...	158
Sumar v. Amaldas, First Appeal No. 59 of 1905 ...	655
Sundar Kuar v. Chandeshwar Prasad Narain Singh, 34 C. 293; 11 C. W. N. 501 ...	938
Sundar Singh v. Daya Singh, 13 Ind. Cas. 853; 35 P. L. R. 1912; 2 P. W. R. 1912 ...	546
Sundara Gopalan v. Venkatavarada Ayyangar, 17 M. 228 ...	473
Sundram Chetti v. Queen and Ponnusami Chetti v. Queen, 6 M. 203; 2 Weir 77 ...	107
Suppammal v. Collector of Tanjore, 12 M. 387 at p. 392 ...	879
Suraj Bansi's case, 5 C. 148; 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1 (P. C.) ...	479
Surajmal Chunilal v. Manekchand Kapurchand, 6 Bom. L. R. 704 at p. 707 ...	101
Surendro Keshub Roy v. Doorgasoondery Dossee, 19 C. 513 at p. 526 (P. C.); 19 I. A. 103 ...	130
Surjug Saran Lal v. Dukhit Mahto, 18 Ind. Cas. 899; 17 C. W. N. 496 ...	446
Swami Chetty C. B. v. S. T. Ethirajulu Naidu, 34 Ind. Cas. 853; 3 L. W. 585; (1916) 2 M. W. N. 84 ...	866
Syed Amin Sahib v. Ibram Sahib, 4 M. H. C. R. 112 ...	90
Syed Sufdar Reza v. Amzad Ali, 7 C. 703; 10 C. L. R. 21 ...	109
Symmons, *Ex parte*, Jordon, *In re*, (1880) 14 Ch. D. 693; 42 L. T. 106; 28 W. R. 803 ...	946
Syud Reza Ali v. Bhikun Khan, 7 W. R. 334 ...	20

T

Tadman v. Henman, (1893) 2 Q. B. 168; 5 R. 479; 57 J. P. 664 ...	11
Talagapu Tavudu v. Zamindar of Tarla, 32 Ind. Cas. 706 ...	642
Tamijuddi v. Asgar Howladar, 1 Ind. Cas. 942; 36 C. 256; 13 C. W. N. 183 ...	758
Tamman Singh v. Lachhmin Kunwari, 23 A. 318; A. W. N. (1904) 22 ...	158
Tanjore Palace Estate v. Andi Ramiah Chetty, 11 Ind. Cas. 339; (1911) 2 M. W. N. 364 ...	889
Tara Chand v. Baldeo, 117 P. R. 1890 ...	305
Tarak Das Pal Chowdhry v. Harish Chandra Banerjee, 16 Ind. Cas. 977; 17 C. W. N. 163; 16 C. L. J. 548 ...	586
Tasadduq Husain v. Hayat-un-nissa, 25 A. 280; A. W. N. (1903) 39 ...	210
Taylor v. Higgins 102 E. R. 552; 3 East 169 ...	440
Taylor v. Oldham, (1882) 1 Jac. 527; 37 E. R. 949 ...	939
Taylor v. St. Helens Corporation, (1877) 6 Ch. D. 264; 46 L. J. Ch. 157; 37 L. T. 253; 25 W. R. 885 ...	357

T—contd.

	Page.
Teeluck Chunder v. Shama Churn Prokash, 1 W. R. 209 ...	630
Tehilram Girdharidas v. Kashibai, 1 Ind. Cas. 614; 33 B. 53; 10 Bom. L. R. 403 ...	291
Tej Ram v. Harsukh, 1 A 101 ...	807
Telam Pramanik v. Adu Shaikh, 18 Ind. Cas. 791; 17 C. W. N. 468 ...	756
Tepu Khan v. Rajani Mohun Das, 25 C. 522; 2 C. W. N. 501 ...	300
Thackur Chundra Paramanik, *In the matter of the petition of*, B. L. R. Sup. Vol. (F. B.) 595; 6 W. R. 228 ...	738
Thakoor Pershad v. Musammat Bashmutty Koer, 24 W. R. 428 ...	300
Thakur Kopilnauth Sahi Deo v. Government, 22 W. R. 17; 13 B. L. R. 445; 1 C. 142 ...	384
Thakur Madan Mohan Nath Sahi Deo v. Bhikhar Shahu, 15 Ind. Cas. 719; 16 C. L. J. 517 ...	857
Thakur Magundeo v. Thakur Mahadeo Singh, 18 C. 647	422, 837
Thakur Prasad v. Fakir Ullah, 17 A. 107; 5 M. L. J. ?; 22 I. A. 44; 6 Sar. P. C. J. 526 ...	338
Thakur Prosad v. Punkal Singh, 8 C. L. J. 485 ...	798
Thakur Singh v. Bhogeraj Singh, 27 C. 25 ...	555
Thakurani Tara Kumari v. Chaturbhuj Narayan Singh, 20 Ind. Cas. 833; 19 C. W. N. 1119; 20 M. L. J. 371; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1034; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M. W. N. 717; 42 C. 1179; 42 I. A. 192 ...	288
Thanakoti v. Muniappa, 8 M. 496 ...	120
Tharnhill v. Weeks, (1915) 1 Ch. 106; 84 L. J. Ch. 282 ...	321
The Andalusian, (1878) 3 P. D. 182; 47 L. J. Adm. 62; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. C. 22 ...	313
"The Anna", 5 C. Rob. 373 ...	907
The Hoop, 1 C. Rob. Adm. Reports 196 ...	498
Thiruvambala Desikar v. Chinna Pandaram, 34 Ind. Cas. 57; 30 M. L. J. 274 at p. 280; (1916) 2 M. W. N 43 ...	205
Thiruvenkatachariar v. Venkatachariar, 23 Ind. Cas. 621; 26 M. L. J. 218 ...	898
Tholappala Charlu v. Venkatacharlu, 19 M. 62; 5 M. L. J. 209 ...	89
Thomas, *In re*, 16 Colo. 441; 13 L. R. A. 538 ...	935
Thomas v. Thomas, (1855) 2 K. & J. 79; 110 R. R. 107; 25 L. J. Ch 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E R. 701 ...	27
Thompson v. Cohen, 7 Q. B. D. 527 at p. 532; 41 L. J. Q. B. 221; 26 L. T. 693 ...	920
Thompson v Reynolds, (1827) 3 Cr. & P. 123 ...	324
Thornhill v. Neats, (1860) 18 C. B. (N. S.) 831; 125 R. R. 902; 2 L. T. 539; 141 E R 1392 ...	317
Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed, 4 M. 308 ...	189
Toolsa Goolal v John Antone, 11 B. 448 ...	470
Trevivan v. Lawrence, 1 Salk. 276; 6 Mod. 256; 91 E. R. 241 ...	757
Trimbak Ramchandra Pandit v. Ghulam Zilani Waiker, 5 Ind. Cas. 965; 34 B. 329; 12 Bom. L. R. 208 ...	12
Tukaram v. Babaji, 21 B. 122 ...	178

T—concld.

	Page.
Tukaram Gopal v. Pandurang Sadaram, 25 B. 581; 3 Bom. L. R. 143 ...	233
Tulsa Kunwar v. Gajraj Singh, 25 A. 71; A. W. N. (1902) 203 ...	69
Tulsiram v. Murlidhar, 26 B. 750 at p. 754; 4 Bom. L. R. 571 ...	255
Turner v. Moon, (1901) 2 Ch. 825; 70 L J. Ch. 822; 85 L. T. 90; 50 W. R. 237 ...	255

U

Ubilack Rai v. Dallial Rai, 3 C. 557 ...	300
Udaram v. Sitaram Ranu Panduji, 11 B. H. C. R. 76 ...	479
Udayal v. Arunachala Chettiar, 27 Ind. Cas. 872; (1915) M. W. N. 190; 2 L. W. 145 ...	233
Udit Chobey v. Rashika Prasad Upadhya, 6 C. L. J. 662; 3 M. L. T. 41 ...	342
Uggrakant Chowdhury v. Huro Chunder Shickdar, 6 C. 209 ...	300
Ugrah Lall v. Radha Pershad Singh, 18 C. 255 ...	781
Ujalbi Bibee v. Umakanta Karmokar, 31 C. 970; 9 C. W. N. 32 ...	747
Ulfat Rai v. Gouri Shanker, 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670 ...	24
Umaid Bahadur v. Udoi Chand, 6 C. 119; 6 C. L. R. 506 ...	697
Umed Ali v. Abdul Karim Chaprashi, 35 C. 106; 8 C. L. J. 193 ...	393
Upendra Chandra Mitter v. Tara Prosanna Mukerjee, 30 C. 794; 7 C. W. N. 609 ...	96
Upendra Nath Mandal v. Rampal, 4 Ind. Cas. 436, 10 C. L. J. 482; 11 Cr. L. J. 1 ...	970

V

Vaidianatha Thambiran v. Chandrasekara Dikshitor, 15 M. L. J. 458 ...	89
Vaidiswara Ayyar v. Siva Subramania Mudaliar, 31 M. 66; 3 M. L. T. 250 ...	160
Vallabhdas Jairam, Khimiji Jairam, *In re*, 27 B. 394; 5 Bom. L. R. 313 ...	495
Varadiah T. v. Rajakumara Venkata Perumal, 21 Ind. Cas. 782; (1914) M. W. N. 157; 14 M. L. T. 530; 26 M. L. J. 83 ...	616
Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi, 2 M. 328 ...	118
Vardon Seth Sam v. Luckpathy Royjee Lallah, 9 M. I. A. 303; Marsh 431; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756 ...	898
Vasudev v. Vamnaji, 5 B. 80 ...	89
Vasudev Daji v. Babaji Ranu, 8 B. H. C. R. A. C. J. 175 ...	9
Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu, 28 I. A. 81; 24 M. 387; 5 C. W. N. 545; 3 Bom. L. R. 303 ...	287
Vedanayaga Mudaliar v. Vedammal, 27 M. 591 ...	18
Vedanta v. Kanniyappa, 9 M. 14 ...	271

V—concld.

	Page.
Veerabadra Aiyar v. Marudaga Nachiar, 8 Ind. Cas. 1072; 34 M. 188; 21 M. L. J. 320; 9 M. L. T. 235; (1910) M. W. N. 799 ...	52
Veerasekkaraju v. Papiah, 26 M. 792; 13 M. L. J. 258 ...	225
Velayutha Chetty v. Govindasawmi Naiken, 30 M. 524; 17 M. L. J. 450; 3 M. L. T. 10 ...	24
Velchand Chhaganlal v. Lieut. A. Flagg, 13 Ind. Cas. 853; 26 B. 164; 14 Bom. L. R. 18 ...	114
Vencatrama Aiyar v. Secretary of State for India, 5 Ind. Cas. 118; 20 M. L. J. 74; 7 M. L. 139; 33 M. 362 ...	63
Vengamuthu v. Pandaveswara, 6 M. 151 ...	8
Venkata Chandraskhara Raz v. Alakarajamba, Maharani, 22 M. 187 ...	156
Venkatachala Reddi v. Venkatarama, Reddi, 24 M. 665 ...	857
Venkatanarasimha v. Kotayya, 12 M. 374 ...	815
Venkatanarayana Pillay v. Subbammal, 29 Ind. Cas. 298; 38 M. 406; 21 C. L. J. 515; 28 M. L. J. 525; 17 M. L. T. 435; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125	52, 188
Venkatarama v. Meera Labai, 13 M. 275 ...	678
Venkatarao Krishnappa v. Mahableshwar, 26 B. 241; 3 Bom. L. R. 876 ...	566
Venkatesha Mallia v. Bammampalli Ramayya, 26 Ind. Cas. 202; 27 M. L. J. 241; 38 M. 1192 ...	89
Venku v. Mahalinga, 11 M. 393 ...	273
Vibudapriya Thirthaswami v. Esoof Sahib, 8 Ind. Cas. 175; 20 M. L. J. 179; (1910) M. W. N. 779; 35 M. 28; 9 M. L. T. 44 ...	462
Vinayak Vithal Bhange v. Govind Venkatesh Kulkarni, 25 B. 129; 2 Bom. L. R. 820 ...	682
Viraraghava Ayyangar v. Venkatacharyar, 5 M. 217 ...	473
Virupakshappa v. Nilgangava, 19 B. 309 ...	17
Virupakshappa v. Shidappa, 26 B. 109; 3 Bom. L. R. 565 ...	72
Visvanathan Chetti v. Ramanathan Chetti, 24 M. 646 ...	891
Vithal Janardan v. Vithojirav Putlajirav, 6 B. 586 ...	951

W

	Page.
Walayat Husain v. Ram Lal, 25 Ind. Cas. 643; 12 A. L. J. 1113 ...	354
Wali Ahmed Chowdhry v. Tota Meah Chowdhry, 31 C. 397 ...	28
Wali Muhammad Khan v. Surji, 76 P. R. 1888 ...	292
Walian v. Banke Behari Pershad Singh, 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512	156, 407, 708
Wallingford v. Mutual Society, (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81	286, 340
Wallis v. Hands, (1893) 2 Ch. 75 at p. 85; 62 L. J. Ch. 586; 3 R. 351; 68 L. T. 428; 41 W. R. 471 ...	255

W—concld.

	Page.
Walls v. Atcheson, 11 Moore 379 3 Bing. 462; 2 Cr. & P. 268; 4 L. J. (o. s.) C. P. 154; 23 R. R. 657; 130 E. R. 591 ...	426
Waman Raghupati Bova v. Krishnaji Kashiraj Bova, 14 B. 249 ...	130
Ward v. Beck, (1863) 13 C. B. (N. S.) 668; 134 R. R. 691; 32 L. J. C. P. 113; 9 Jur. (N. S.) 912; 143 E. R. 265 ...	313
Warrington v. Early, (1853) 2 El. & Bl. 763; 2 C. L. R. 398; 23 L. J. Q. B. 47; 18 Jur. 42; 2 W. R. 78 118 E. R. 953; 95 R. R. 789 ...	182
Watson and Co. v. Ramchund Dutt, 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535	36, 879
Webb v. Macpherson, 30 I. A. 238; 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389 (P. C.) ...	220
Wenlock Baroness v. River Dee Company, (1887) 19 Q. B. D. 155; 56 L. J. Q. B. 589; 57 L. T. 320; 35 W. R. 822 ...	733
Wentworth v. Bullen, 9 B. & C. 840; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313 ...	852
Whalen v. Stuart, (1909) 194 N. Y. 495; 87 N. E. 819 ...	319
Whicker v. Hume, 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 31 L. T. (o. s.) 319; 115 R. R. 70; 11 E. R. 50 ...	855
Whiteley v. Delaney, (1914) A. C. 132 at p. 144; 83 L. J. Ch. 349; 110 L. T. 434; 58 S. J. 218 ...	225
Wigglesworth v. Dallison, Smith's Leading Cases Eleventh Ed., Vol. 1, 545; 1 Dougl. 201; 99 E. R. 132 ...	5
Wilde v. Gibson, (1848) 1 H. L. C. 605; 12 Jur. 527; 9 E. R. 897; 73 R. R. 191 ...	287
Wilkes v. Spooner, (1911) 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 55 S. J. 479; 27 T. L. R. 726 ...	898
Williams v. Williams, 2 Ch. A. C. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657 ...	773
Wilson v. West Hartlepool Harbour & Railway Company, (1864) 34 Beav. 187; 2 De G. J. & S. 475; 34 L. J. Ch. 241; 11 Jur. (N. S.) 124; 11 L. T. 692; 13 W. R. 361; 55 E. R. 606; 145 R. R. 476 ...	316
Wise v. Bhooban Moyee Debia Chowdrainee, 10 M. I. A. 165 at p. 174; 3 W. R. 5 (P. C.); 1 Suth. P. C. J. 563; 2 Sar. P. C. J. 91; 19 E. R. 934 ...	299
Woodyer v. Hadden, 5 Taunt 125; 14 R. R. 706; 128 E. R. 684 ...	462
Woolley v. Clark, (1822) 5 B. & Ald. 744; 1 D. & R. 409; 24 R. R. 516; 106 E. R. 136 ...	324
Wright, *In re*, Arnold, *Ex parte*, (1876) 3 Ch. D. 70; 45 L. J. Bk. 130; 35 L. T. 21; 24 W. R. 977	945

Y

	Page.
Yakub Ali v. Lethu Thakur, 30 C. 288 ...	817
Yellammal v. Ayyappa Naick, 22 Ind. Cas. 870; 26 M. L. J. 166; (1914) M. W. N. 348; 1 L. W. 162; 38 M. 972 ...	100

Y—concld.

	Page.
Yellava Sakreppa Barki v. Bhimappa Gireppa Desai, 28 Ind. Cas. 12; 39 B. 68; 17 Bom. L. R. 128 ...	860
Yeshwadabai v. Ramchandra Tukaram, 18 B. 66 ...	736
Young v. Corporation of Leamington, (1882) 8 Q. B. D. 579 at p. 585; 51 L. J. Q. B. 292; 46 L. T. 555; 30 W. R. 500; 46 J. P. 516 ...	316
Young v. Mayor of Leamington Corporation, (1883) 8 App. Cas. 517 at p. 522; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660	313

Z

	Page.
Zahur Ali v. Sher Ali, 28 A. 283; A. W. N. (1906) 5; 3 A. L. J. 20 ...	106
Zaman Ali v. Manji, 60 P. R. 1894 ...	543
Zemindar of Karvetnagar v. Trustee of Tirumalai, 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401 ...	225
Zamindar of Vizianagram v. Behara Suryanarayana Patrulu, 25 M. 587; 12 M. L. J. 249 ...	256
Zeya v. Mi On Kra Zan, 2 L. B. R. 333 ...	426
Zinc Corporation, Lim. v. Hirsch, (1916) 1 K. B. 541; 85 L. J. K. B. 565 ...	498
Zinnatunnesa Khatun v. Govindra Nath Mukerjee, 30 C. 788 ...	798

INDIAN CASES.

1916.

VOLUME XXXV.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

February 21, 1916.

Present:—The Lord Chancellor, Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

SUNA ANA ARUNACHELLAM CHETTY AND OTHERS—APPELLANTS

versus

S. R. M. RAMASWAMI CHETTY—RESPONDENT.

Will—Genuineness proved—Testator in disposing state—Will not conforming to reason and justice, whether ground for discrediting—Medical evidence—Disposing power ascertainable from eyes and expression.

When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice. [p. 3, cols. 1 & 2.]

There are many signs by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression [p. 2, col. 2.]

Appeal from a judgment and decree of the Madras High Court, dated September 12, 1911, reversing those of the District Judge of Madura, dated August 30, 1909.

FACTS.—One Suna Ana Subramanian Chettiar, who was a Nattukottai Chetty, died after having undergone an operation for carbuncle. Dr. Van Allen had performed the operation in the American Mission Hospital at Madura and was hopeful the first day. The condition of the patient grew worse and he asked a relation of the deceased to get him to see to his affairs. Accordingly a Will was prepared and signed by the deceased. Dr. Van Allen was one of the attesting witnesses. The Will was written on several sheets of paper, the concluding portion being rather too crowdedly written. Certain persons were appointed as executors of the Will, but they were alleged to have been rivals in business. The genuineness of the Will was contested and it was alleged that the signature of the testator was obtained on blank sheets of paper and the Will written out afterwards. The condition of the Will was regarded as lending colour to the allegation. The mother of the testator claimed to have power by custom to adopt a son with the concurrence of the widow of the deceased and in fact did adopt. Dr. Van Allen, however, deposed that he had signed a completed Will and that the testator was capable of making a Will at the time he signed the same. The District Judge held that the Will was not validly executed. On appeal the High Court believed in the evidence of Dr. Allen and reversed the judgment of the lower Court. The objectors to the grant of Probate then appealed to the Judicial Committee.

Mr. *De Gruyther*, *K. C.* (with him Mr. *Dube*), for the Appellants, contended that the respondent had not proved that the testator executed the Will and that he had a sound disposing mind at the time of its execution. The burden of proof lay upon the respondent and it had not been discharged (Indian Evidence Act, sections 101—5). The District

Judge who saw and heard the witnesses did not believe the execution of the Will. The findings of fact by him should not be disturbed on appeal. The findings of the High Court were opposed to the weight of evidence and the probabilities of the case. Large sums were given by way of charity. Persons who were rivals in trade were appointed executors. The evidence of the mother who was at his bedside was that the testator was not in a sound state of mind and capable of making a Will.

Sir *Robert Finlay*, *K. C.*, and Mr. *Brown* appeared for the Respondent, but were not called upon.

JUDGMENT.

LORD CHANCELLOR.—Two questions are raised in this appeal: the *one* is whether the appeal is competent to the appellants, and the *other* whether a Will, which was executed on the 10th November 1904, by one Subramanian Chetty, is or is not a good and valid testamentary document.

With regard to the *first* point, their Lordships desire to express no opinion. In the view that they take of this case its decision is not material, and their opinion must not be taken to involve an assumption that the appellants have a sufficient interest to enable them to maintain the appeal.

With regard to the *other* question, it is clear that the judgment of the Judge of the District Court, which was in the appellants' favour, can only be supported if the evidence of a doctor, Dr. Van Allen, be disqualified, because either it is untrustworthy owing to faulty recollection, or, if accepted, does not go far enough to establish the validity of the Will. If, therefore, their Lordships considered the doctor's evidence accurate and adequate, it would be unavailing for Counsel to ask the Board to examine the detailed story of the other witnesses who were called before the District Court.

Their Lordships have given careful and close attention to the evidence of Dr. Van Allen, and are clearly of opinion that reliance can safely be placed on it in all material respects, and that it does fully and sufficiently establish the validity of the Will that is in dispute.

From this evidence it appears that the deceased was operated on by Dr. Van Allen on the 9th November 1904 in the American Hospital at Madura. He was operated on for a carbuncle, but he was, and he had for some time past to the doctor's knowledge been, suffering from diabetes. On the day following the operation the doctor observed from certain symptoms that there was a prospect of the patient sinking under the shock. He accordingly, at noon on the 10th November, told him or his friends that he had better see to his affairs, and accordingly Vakils were called in, who prepared the document which is in dispute. The doctor says that he saw the Will signed by the testator. He says that he was with him for half an hour, during which he signed and he (the doctor) attested. The doctor also saw a man taking notes, apparently at the dictation of the testator, though he did not hear what passed between them, and at 9 or 10 in the evening, after the signature of the document, the deceased left the hospital in a state of great weakness, and within a few hours died.

Now the doctor's evidence is quite clear that, in his opinion, the deceased was perfectly capable of understanding a business transaction, and understood what he was doing at the time when he executed the Will. He gives several reasons, the chief of which, repeated from time to time, is that he could tell by the appearance of the face and eyes of the patient; this appears to have been regarded as unsatisfactory by the District Judge, who thought that it was not a means by which the doctor could ascertain the strength and intelligence that was left to the dying man.

Their Lordships are quite unable to accept the view of the learned Judge in the matter. There are many sings by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression.

But the matter does not rest there, because the doctor says himself that he was talking to the patient throughout the day trying to cheer him up, though whether he spoke to him at the moment when his Will was executed or immediately afterwards is not made plain.

Their Lordships think that the real fact that explains the judgment of the District Judge is this: When the Will is examined it appears that the last page has the writing inconveniently crowded above the signature of the testator, and the last page but one has also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. It goes no further than that; but upon that it appears that the learned Judge has built up a theory of a dishonest conspiracy with regard to the preparation of this Will, which their Lordships are clear Dr. Van Allen's evidence completely destroys. If the view were right that this Will had been written on blank pages over signatures of the testator previously obtained, it would have been quite impossible for Dr. Van Allen to have said, as he did again and again, that he saw the deceased execute the Will, and it would have been equally impossible for Dr. Van Allen to have attested on the last page of the Will the signature of the deceased without noticing that there was no writing whatever over it. Remembering his responsibilities, as he clearly did, as an attesting witness, he would have been quite unable, if the paper was blank, to have come and said, in the plain words which he used, that he saw the signature of the deceased attached to this document.

These are the reasons that convince their Lordships that, whatever may be the true cause of the inconvenient way in which some of this writing appears, the explanation is not and cannot be the one that the learned Judge has assigned; it would indeed be most unsafe and most undesirable in circumstances such as these to try to spell out from the peculiar form in which a document written in the vernacular appears, a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor who witnessed the Will.

Their Lordships only desire to add, in conclusion, this: When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice.

Their Lordships see no reason whatever to doubt that the view that has been taken by the High Court of Judicature at Madras is correct, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Mr. *Douglas Grant.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.*

January 10, 1916.

Present:—Mr. Justice Chaudhuri.

In the matter of THE INDIAN ARBITRATION ACT (IX OF 1899)

AND

In the matter of JOY LAL AND CO.—DEFENDANTS—PETITIONERS

versus

MONMOTHA NATH MULLIK AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Broker liable as principal—Custom and usage of Calcutta Gunny Market—Evidence Act (I of 1872), s. 92, Prov. (5)—Evidence of custom or usage incidental to contract—Contract Act (IX of 1872), ss. 230, 236—Arbitration and award by Bengal Chamber of Commerce—Jurisdiction.

An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court, on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plaintiffs, disregarding the fact that the contract in question was made by plaintiffs as brokers, although in fact the plaintiffs had no principals and the contract was not, therefore, enforceable. The plaintiffs alleged that there was a custom in the market in respect of gunny, hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well-known to the Chamber, the award was properly made and valid.

The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it.

---

*The report of this case has been taken from the Calcutta Weekly Notes with permission—*Ed.*

In the matter of JOY LAL & CO. *v.* MONMOTHA NATH MULLIK.

Patiram Banerjee v. *Kankinarra Company Limited*, 3 Ind. Cas. 607; 19 C. W. N. 623; 42 C. 1050, distinguished.

Held, that sections 230 and 236 of the Indian Contract Act, the former of which deals with undisclosed principals and the latter with persons falsely contracting as agents, were not applicable to this case. [p. 5, col. 2.]

Held, also, that evidence of usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent. [p. 5, col. 2.]

Fleet v. *Murton*, (1871) 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97, followed

That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made. [p. 5, col. 2.]

The facts of the case as also the argument at the Bar are fully set out in the judgment.

Mr. *S. R. Dass*, Counsel, for the Defendants-Petitioners.

Messrs. *N. Sarkar* and *P. N. Chatterji*, Counsel, for the Plaintiffs-Opposite Party.

JUDGMENT.—This is an application to set aside an award made by the Bengal Chamber of Commerce. Joy Lall and Company entered into a contract "for principals" for the sale of certain goods to the Mulliks hereinafter referred to as plaintiffs and defendants respectively. The defendants did not take delivery of the goods and the plaintiffs referred the matter of their dispute to the Bengal Chamber of Commerce under a clause in the contract. The defendants thereupon took a plea before the Chamber that it had no jurisdiction (1) inasmuch as the plaintiffs were merely brokers in the transaction and the contract was "for principals," (2) there were fraud and misrepresentation when the contract was entered into, that is to say, in fact Joy Lall and Company had no principals at all, although the contract purported to be by them as brokers on behalf of principals. The Chamber has made an award in favour of the plaintiffs. In answer to the application now made the plaintiffs alleged that there was a custom in the market by which brokers are held liable upon such contracts and that such custom being well-known to the Chamber it is submitted that they have properly made their award and it is accordingly valid. Upon that an issue was framed for trial before me as to whether there was such a custom. Learned Counsel appearing for the defendants submitted that no evidence of that kind could be taken inasmuch as it would contradict the terms of the contract. I have, however, allowed evidence to be taken subject to such objection. The evidence is that brokers in such contracts in Calcutta, in gunny, hessian and other manufactured jute goods, are held by custom responsible by both buyers and sellers for the performance of the contract. Such evidence has been given on behalf of the plaintiffs and has not been contradicted by any one on the side of the defendants. Inasmuch as learned Counsel for the defendants also contended that his clients, if there was such a custom, were unaware of it, he was allowed to call one of the defendants. It appears that he had previous dealings with the plaintiffs and I may say at once that I am not all satisfied with his evidence. The custom pleaded by the plaintiffs has been proved and I am not satisfied that the defendants did not know it. I think they knew. The question, therefore, is, can evidence of such custom be taken, or its existence considered by the Chamber.

It is urged that it has been decided in *Patiram Banerjee* v. *Kankinarra Company Limited* (1) that a broker on such a contract is not liable. It is to be noticed that Woodroffe, J., guarded his decision in that case, by stating that it was said that there was a custom in Calcutta that such contracts were regarded as principal contracts, but that there was no such evidence before them.

Mollett v. *Robinson* (2) has been relied upon as having held "It is also an elementary proposition, that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character. No usage unknown to the principal can justify a broker in converting himself into a principal seller." It is argued that the contract itself cannot be contradicted.

In *Hutchinson* v. *Tatham* (3) Brett, J., laid down "that though you cannot contradict a written document by evidence of custom you may add a term not inconsistent with any term of the contract."

In *Hutcheson* v. *Eaton* (4) it was held

(1) 31 Ind. Cas. 607; 19 C. W. N. 623; 42 C. 1050.

(2) (1870) 5 C. P. 646.

(3) (1873) 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18.

(4) (1884) 13 Q. B. D. 861; 51 L. T. 846.

that the arbitrator had no jurisdiction to decide on custom inconsistent with the terms. In that particular transaction the plaintiffs alleged that the goods were of inferior quality. This case was discussed and followed in *North-Western Rubber Company* and *Huttenbach & Co., In re* (5). The cases dealing with this point are to be found in Smith's Leading Cases under the head "*Wigglesworth* v. *Dallison*" (6) and were referred to. There is no doubt that with respect to commercial contracts it has been long established that evidence of a usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent: that with regard to particular commercial usages evidence is admissible either to engraft terms with the contract or to explain its terms. In *Humfrey* v. *Dale* (7) it was held that not merely a term but a party on oral evidence of custom may be added to a contract in writing.

On behalf of the plaintiffs *Fleet* v. *Murton* (8) has been relied upon. It is very similar to *Humfrey* v. *Dale* (7). In *Fleet* v. *Murton* (8) evidence was adduced on behalf of the plaintiff that in the London Fruit Trade if the brokers did not name their principals in the contract note itself, the brokers are held personally responsible on the contract. Cockburn, C. J., held that evidence of the custom was admissible on the ground that "although when a party professes to contract as broker, it might *prima facie* be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract (which if written into the contract *in extenso*, would undoubtedly bind him), that qualification might, he thought, be imported into the contract by evidence of the custom." Blackburn, J., was of the same opinion. The custom sought to be proved in that case was that if the broker did not disclose his principal's name on the contract, he was personally liable.

Fleet v. *Murton* (8) was followed in this Court in *Gubby* v. *Avetoom* (9). It is difficult to distinguish the point arising in *Fleet* v. *Murton* (8) from that in the matter before me. It appears from the correspondence relating to the matter which was placed before the Chamber that the plaintiffs were not being addressed as agents or brokers: the plaintiffs were demanding fulfilment of the contract and the defendants were asking for extension of time. It also appears from some of the letters that they held the plaintiffs responsible to them upon the contract and, upon the evidence before me, I am of opinion that the defendants knew of the alleged custom. There is a clear distinction between sections 230 and 236 of the Contract Act. The latter section deals with the case of a person falsely contracting as agent. He is not entitled to performance: the former, with the case of undisclosed principals. The agent in such cases is not personally bound unless he does not disclose the name of the principal. It does not appear that the plaintiffs were ever asked to disclose the name of their principals. I think that in a contract of the character in suit evidence can be taken about the custom alleged. It does not cease to make the principal liable, but makes the agent also liable. It does not, therefore, appear to me to contradict the terms of the contract or to change the intrinsic character of it. It is a matter essentially fit for the Chamber, being within their knowledge. The gunny business in Calcutta is very extensive and of daily occurrence and contracts of the nature in suit are usual. I think the Chamber had jurisdiction in this matter and properly made the award. The Rule is, therefore, discharged with costs.

Rule discharged.

Messrs. *Mukherjee* and *Dutt*, Attorneys, for the Defendants-Petitioners.

Messrs. *Mitter* and *Boral*, Attorneys, for the Plaintiffs-Opposite Party.

(5) (1908) 2 K. B. 907; 78 L. J. K. B. 51.

(6) Smith's Leading Cases, Eleventh Ed., Vol. I, 545; 1 Dougl. 201; 99 E. R. 132.

(7) (1857) 7 El. & Bl. 266; 119; E. R. 1246; 26 L. J. Q. B. 137; 3 Jur. (N. S.) 213; 110 R. R. 587.

(8) (1871) 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97.

(9) 17 C. 449.

SANTI LAL *v.* INDIAN EXCHANGE BANK, LAHORE.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 33 OF 1916.
May 31, 1916.
Present:—Mr. Justice Piggott and
Mr. Justice Lindsay.
SANTI LAL—APPELLANT
versus
THE INDIAN EXCHANGE BANK, LAHORE, THROUGH *Rai Sahib Lala* MURLIDHAR AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Companies Act (*VI of* 1882), *s.* 169—*Appeal, right of, extent of—Civil Procedure Code* (*Act V of* 1908), *O. XXI, r.* 63.

A right of appeal under the provisions of section 169 of the Companies Act, 1882, is co-extensive with the right of appeal conferred by the Code of Civil Procedure, 1908.

One *L* was ordered to pay a certain sum as contributory towards the fund of a Bank in liquidation. In the liquidation proceedings and in the order which was issued to another Court for execution, *L* was described as the proprietor of a firm styled Nand Lal-Santi Lal. On the attachment of certain goods one *S* filed an objection that *S* and not *L* was the sole proprietor of the firm. The execution Court refrained from inquiry as the order contained an express statement that *L* was the proprietor:

Held, that the order of the execution Court was not appealable inasmuch as it must be taken to be an order under Order XXI, rule 63 of the Civil Procedure Code, 1908.

First appeal from the order of the District Judge, Agra, dated the 8th January 1916.

Mr. *Damodar Das*, for the Appellant.

The Hon'ble Mr. *Narain Prasad* and Mr. *Girdharilal Agarwala*, for the Respondent.

JUDGMENT.—This is a first appeal against an order of the District Judge of Agra passed under the following circumstances. It appears that liquidation proceedings in the matter of the Indian Exchange Bank were pending in the Court of the Additional Judge of Lahore. Under the old Companies Act (Act VI of 1882) the Additional Judge of Lahore passed an order directing one Lachmi Narain as a contributory to pay a sum of Rs. 2,475 towards the funds of the Bank in liquidation. This order was sent down to be executed in the Court of the District Judge of Agra. In the liquidation proceedings and in the order which was issued from the Court at Lahore, Lachmi Narain was described as being the proprietor of a firm styled Nand Lal-Santi Lal. Certain goods were attached by the District Judge of Agra in execution of the order received by him and on this having been done, the present appellant Santi Lal filed an objection in which he stated that he and not Lachmi Narain was the sole proprietor of the firm in question. The learned District Judge was of opinion that he had no power to entertain a petition of this kind. The order was issued from the Lahore Court with an express statement that Lachmi Narain was proprietor of the firm. The Judge, therefore, refrained from enquiry as to whether Santi Lal was or was not the proprietor of the firm. We may note here that the petition of objection which was filed by Santi Sal purported to be under Order XXI, rule 58 of the Civil Procedure Code and that being so, the order passed by the learned District Judge must be taken to be an order under Order XXI, rule 63. A preliminary objection has been raised that no appeal lies and we think that the objection must prevail, if the order of the Agra Court is treated as having been made under rule 63 of Order XXI. The matter is clear enough.

The only remedy of a person whose objection has been dismissed is by bringing a suit for declaration.

Moreover, it is clear that an order of this kind is not appealable under Order XLIII of the Code of Civil Procedure. The learned Counsel for the appellant has drawn our attention to the provisions of sections 166, 167 and 169 of the Companies Act (Act VI of 1882). He relies upon the provisions of section 169 for the purpose of showing that an appeal lies in the present case. But we are unable to entertain this argument. It appears to us that section 169 of the Companies Act (Act VI of 1882) merely provides for a right of appeal in the case of orders which would have been appealable had they been passed by the Court in the exercise of its ordinary jurisdiction. This brings us back again to the provisions of the Code of Civil Procedure, which regulate cases in which appeals from orders in Civil Courts lie. It appears to us quite clear, therefore, that the right of appeal under the provisions of section 169 of the old Companies Act is co-extensive with the right of appeal conferred by the Code of Civil Procedure; and as we have already men-

tioned, an appeal in a case of this sort would not lie under the Code. We are satisfied that the preliminary objection is sound and must prevail. We dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 93 OF 1913.

May 11, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

BHAIGANTI BEWA—PLAINTIFF—APPELLANT

versus

HIMMAT BIDYAKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 115, 116, 117—Landlord and tenant—Denial of landlord's title after expiry of term and before surrender—Estoppel, whether ends with the term.

Sections 115, 116 and 117 of the Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections. [p. 10, col. 1; p. 12, col. 2.]

Ganges Manufacturing Co. v. *Sourujmull*, 5 C. 669; 5 C. L. R. 533; *Rup Chand Ghose* v. *Sarbessur Chandra Chunder*, 10 C. W. N. 747; 3 C. L. J. 629; 33 C. 915, relied on.

Ammu v. *Ramakishna Sastri*, 2 M. 226; and *Subbaraya* v. *Krishnappa*, 12 M. 422, distinguished.

Per *Sanderson, C. J.*—A person let into possession of a land as a tenant for a term is not entitled, on the expiry of the term, to set up his title to the land against that of the landlord without in the first instance going out of possession and restoring possession to the landlord. [p. 9, col. 2.]

Per *Mookerjee, J.*—A person who has been let into possession as tenant is estopped from denying his lessor's title even after the expiration of the tenancy without first surrendering possession. [p. 11, col. 1.]

Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises and the estoppel prevails so long as such possession continues. [p. 11, col. 2; p. 12, col. 1.]

Doe d. *Joseph Manton* v. *Austin*, (1832) 9 Bing. 41; 2 M. & Scott. 107; 1 L. J. C. P. 152; 131 E. R. 529; *Doe* d. *Knight* v. *Smythe*, (1815) 4 M. & S. 347; 16 R. R. 486; 105 E. R. 862; *Doe* d. *Bristow* v. *Pegge*, (1785) 1 T. R. 758*n*; 4 Dougl. 309; 99 E. R. 1326; *Alchorne* v. *Gomme*, (1824) 2 Bing. 54; 2 L. J. (o. s.) C. P. 118; 9 Moore 130; 130 E. R. 225; *Bayley* v. *Bradley*, (1848) 5 C. B. 396; 19 L. J. C. P. 206; 136 E. R. 932; 75 R. R. 764; *Accidental Death Insurance Co.* v. *Mackenzie*, (1861) 5 L. T. (N. S.) 20; 9 W. R. 783; 122 R. R. 964; *Mohesh Chunder Biswas* v. *Gooroopersad Bose*, (1863) Marsh. 377; 2 Hay 473; *Vasudev Daji* v. *Babaji Ranu*, 8 B. H. C. R. A. C. J. 175; *Banee Madhub Ghose* v. *Thakoor Doss Mundal*, (1886) B. L. R. Supp. Vol. 588; 6 W. R. Act X 71; *Gouree Dass Byragee* v. *Jugunath Roy Chowdhry*, 7 W. R. 25; *Messrs. Burn and Co.* v. *Rusho Moyee Dossee*, 14 W. R. 85; *Jainarayan Bose* v. *Kadambini Dasi*, 7 B. L. R. 723 *note*; *Muthunayyan* v. *Sinna Samayaiyan*, 28 M. 526; 15 M. L. J. 419; *Trimbak Ramchandra Pandit* v. *Ghulam Zilani Waikar*, 5 Ind. Cas. 965; 34 B. 329; 12 Bom. L. R. 208, referred to.

Appeal under the Letters Patent against the judgment of Mr. Justice Mullick, dated the 24th of June 1913.

FACTS.—This appeal arose out of a suit for recovery of possession of about $1\frac{1}{2}$ *karnis* of land after declaration of plaintiff's title thereto.

The material facts appear from the following judgment of

MULLICK, J.—The plaintiff claims the disputed land as part of a holding which she inherited from her mother and which she leased to the defendant in 1316 for one year by a *burga* settlement. The tenancy expired on the 30th *Pous* 1317. On the 20th *Magh* 1317, the plaintiff brought the present suit to eject the defendant. The defendant pleaded that the holding was the property of the plaintiff's husband who was his brother and that by right of inheritance he had a share in it. He denied that it was the property of plaintiff's mother. The Munsif decreed the suit. On appeal the Subordinate Judge found that the holding was not the property of the plaintiff's mother but the property of the plaintiff's husband. The Subordinate Judge also found that the defendant had been let into the land in 1316 by the plaintiff as alleged, but that as the period of this lease had expired the defendant was not estopped from setting up his own adverse title by right of inheritance. The Subordinate Judge, therefore, dismissed the suit. The plaintiff appeals. The only point is, whether under section 116 of the Evidence Act the defendant is estopped from denying the plaintiff's title. I think the answer is in the negative. In England the tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without actually and openly surrendering possession to him or being evicted by title permanent or at least giving notice to his landlord that he shall claim under another and valid title. But in India the expression "holding over" means that the relation of landlord and tenant

continued with the assent of both parties, and the overt acts by which the relation might be continued are either the receipt of rent by the landlord or his assenting to the continuance of the tenancy by either acts or words: *Ratan Lal Gir* v. *Farshi Bibi* (1). In the present case the learned Vakil for the appellant cannot state what overt acts denoting the assent of the landlord have been done and indeed the Subordinate Judge by implication finds that there has not been any such assent on the part of the landlord. In these circumstances the appeal fails and is dismissed with costs.

Babu *Prokash Chandra Pakrasi* (with him Bayu *Tarakessur Pal Chaudhuri*), for the Appellants.—Section 116 of the Evidence Act is not exhaustive. Estoppels are of infinite varieties and are by no means confined to the subjects dealt with in Chapter VII of the Evidence Act. [See *Ganges Manufacturing Co.* v. *Sourujmull* (2), per Garth, C. J.]

The terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel. [See *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3).]

The same view has often been repeated in later cases. Sections 116 and 117 are not exhaustive. Such matters must be dealt with on the broad ground of legal principles, irrespective of whether a reported decision in point may or may not be found: per Rampini and Woodroffe, JJ., in *Rup Chand Ghose* v. *Sarbessur Chandra Chunder* (4). The same view is expressed again in *Bepin Behari Mitter* v. *Tinkowri Pathak* (5) by Mookerjee and Teunon, JJ.

The English Law on the point is perfectly clear and unambiguous. There the tenant in possession cannot, even after the expiration of the lease, deny his landlord's title without actually surrendering possession to the landlord or being evicted by title paramount or at least giving notice to his landlord that he shall claim under another title.

(1) 34 C. 396; 11 C. W. N. 826.
(2) 5 C. 669; 5 C. L. R. 533.
(3) 20 C. 296; 19 I. A. 203.
(4) 3 C. L. J. 629; 33 C. 915; 10 C. W. N. 747.
(5) 9 Ind. Cas. 374; 13 C. L. J. 271; 15 C. W. N. 976.

This is a very old principle, never dissented from. *Board* v. *Board* (6) is the leading case on the subject, decided in 1873. The principle was in existence even before that time. It is needless to refer to the various cases on the point as there has never been any dissent from it. We may mention *Pickard* v. *Sears* (7); *Doe* v. *Oliver* (8); *Dalton* v. *Fitzgerald* (9).

In India also this very principle has often been acted on.

Tenant must give up possession into which he was let by landlord before he can assert title against landlord: *Bankala Vittil Usman Koya* v. *Chidriamokkunsa Akoth* (10), per White, C. J., and Subramaniya Aiyar, J. The same principle was laid down in *Muthunaiyan* v. *Sinna Samavaiyan* (11)—a tenant let into possession by the plaintiff is estopped from denying the latter's title without first surrendering possession.

The above principle is in perfect accordance with our sense of fairness. Casperz in his work on Estoppel and Bigelow take the same view. See Casperz on Estoppel, page 239 *f*, 4th Edition; Bigelow, page 570, 6th Edition.

In the present case all the Courts below have found in favour of the *burga* settlement.

Babu *Rajendra Chandra Guha*, for the Respondents.—Though there was no doubt a *burga* settlement, the finding as to that is not inconsistent with my having been previously in possession. In that case I am not estopped. Refers to *Lal Mahomed* v. *Kallanus* (12).

The Legislature in India made a deliberate departure from the law of England on this point. Our Evidence Act is the work of F. Stephen, who in article 103 of his Digest of the Law of Evidence, which article corresponds to our section 116, used the words,

(6) (1873) 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206.
(7) (1837) 6 A. & E. 469; 2 N. & P. 488; 112 E. R. 179; 45 R. R. 538.
(8) (1829) 34 R. R. 358; Smith's Leading Cases, 8th Edition, p. 775; 109 E. R. 418; 5 Man. & Ry. 202; 8 L. J. K. B. (o. s.) 137; 10 Barn. & Cress. 181 [Smith's Leading Cases, Eleventh Edition, Vol. II, p. 724—*Ed.*]
(9) (1897) 1 Ch. D. 440 on appeal 2 Ch. D. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.
(10) 15 M. L. J. 368.
(11) 28 M. 526; 15 M. L. J. 419.
(12) 11 C. 519.

"till he has given up possession," but those words are wanting in section 116. The Legislature here intends estoppel of a tenant to terminate with the termination of the tenancy, and not with that of possession as in England. In England the former law was —Estoppel arises with the lease and terminates with the lease. Section 116 provides only for the period during which the tenancy continues. It by implication leaves the tenant free to deny the title of the landlord after the cessation of the tenancy. There is a canon of interpretation that if there is a statutory provision on a subject it is to be looked upon as exhaustive unless it leads to incongruities. Considering the differences that exist in the mode of administration of justice in England and in India, namely, in India Judges are masters of both law and fact whereas in England facts are always left to the Jury, it is better to view leases in such cases only as an admission than as estoppel. Moreover, in England a tenant can always bring a separate suit after parting with possession but in India, if there is a suit between landlord and tenant during the tenancy, there is every chance of the decision being *res judicata* against him in further proceedings.

[MOOKERJEE, J.—The fact that certain issues arise will not itself make them *res judicata*; there need be a decision on them: *Vasudev Daji* v. *Babaji Ranu* (13)]

It will be an important piece of evidence, no doubt.

A tenant may question the title of the landlord when the tenancy ceases: *Ammu* v. *Ramakishna Sastri* (14), *Subbaraya* v. *Krishnappa* (15).

JUDGMENT.

SANDERSON, C. J.—In this case the suit was brought for ejectment.

In the first Court the plaintiff was successful and obtained a decree.

In the first Appellate Court, however, the plaintiff's suit was dismissed on the ground that the defendant had succeeded in proving that he was entitled to the land. The learned Subordinate Judge further found, on my reading of his judgment, on the second issue which was whether the land was settled with the defendant by the plaintiff in *burga*,' that the plaintiff had settled the land with the defendant as alleged by the plaintiff, but that inasmuch as the tenancy had come to an end, section 116 did not apply and, therefore, the defendant was entitled to set up his own title against that of the plaintiff.

It appears that the plaintiff alleged that the land was hers and she had obtained it by succession and settled it with defendant on the 14th of January 1910 for a year's tenancy which would, of course, come to an end on the 14th of January 1911. The rent was payable in kind, being half share of the profits of the land. The half share of the jute cultivated on the land was delivered to the plaintiff, but the half share of the other crop was not so delivered and, on the 24th of February 1911, after the tenancy had expired, this suit was instituted.

Now, in my judgment, the plaintiff was entitled to obtain a decree for possession of the land, because the learned Subordinate Judge had found in favour of the plaintiff in respect of the tenancy of 1910; and, in view of that finding, in my judgment, the defendant was not entitled to set up his title against that of the plaintiff without in the first instance going out of possession and restoring possession which the plaintiff had delivered to him by means of the tenancy of 1910. This principle was laid down so long ago as 1832 by Chief Justice Tindal in the case of *Doe* d. *Joseph Manton* v. *Austin* (16) in these words: "The principle is that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession"

Now, this was the law of India before the Evidence Act was passed. It is contended, however, that by reason of section 116 of the Evidence Act, this principle of law

(13) 8 B. H. C. R. A. C. J. 175.
(14) 2 M. 226.
(15) 12 M. 422.

(16) (1832) 9 Bing. 41; 2 M. & Scott. 107; 1 L. J. C. P. 152; 131 E. R. 529.

to which I have referred does not apply. Section 116 says: "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

It is argued on behalf of the respondent in this case that that section is exhaustive with regard to the point with which it deals and that the intention of the Legislature was to alter the law to which I have just referred. In my judgment, that is clearly not so. It has been decided by this Court in *Ganges Manufacturing Co.*, v. *Sourujmull* (2) that sections 115 to 117, of the Evidence Act are not exhaustive; and the judgment of the late Chief Justice Sir Richard Garth to which I wish to draw attention is at page 678. There he is reported to have said: "It has been further contended by the appellants that sections 115 to 117 contained in Chapter VIII of the Evidence Act lay down the only rules of estoppel which are now intended to be in force in British India; that those rules are treated by the Act as rules of evidence; and that by section 2 of the Act, all rules of evidence are repealed, except those which the Act contains. But if this argument were well founded, the consequences would indeed be serious. The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of sections 115 to 117, however important those questions might be to the due administration of the law." I desire to point out that the principle of law which was laid down by Chief Justice Tindal to which I have referred is a matter of great importance.

It is not a matter of mere question of form whether the person who has been a tenant should be the plaintiff or the defendant, in a suit to establish the title of one or the other: it is a matter of substance, and in order to show that, one may take as an example a case, which is by no means unfrequent, where two parties are claiming title to certain land, and both parties have considerable difficulty in producing strict proof of their title to the land; in such a case as that, possession is of great importance, because the party who is in possession of the land has great advantage in such a suit; for, unless the party, who is out of possession, can satisfy the Court and discharge the burden which lies upon him to prove that he has got good title to the land, the person who is in possession, remains in possession of the land. Therefore, in my judgment it is a matter of great importance that the principle of law to which I have referred should be affirmed.

In the Court of first instance and also in the first Appellate Court another question was enquired into and a decision was arrived at upon it, namely, whether the plaintiff was in reality the owner of the land, or whether the defendant was in reality the owner of the land. In my judgment, that question was quite immaterial, as soon as it had been decided by the learned Judge that the defendant had been let into possession of the land under a tenancy granted by the plaintiff; this case must be decided as if that other question, which, in my opinion, was immaterial, had not been decided at all.

For these grounds I am of opinion that the appeal from the learned Judge's judgment ought to be allowed, and the result is that the plaintiff is entitled to the possession of the land, and she is also entitled to such damages as the Munsif awarded her (that I understand to be Rs. 5) for the defendant wrongfully retaining possession.

The plaintiff is entitled to her costs in all the Courts.

MOOKERJEE, J.—The facts material for the determination of the question of law raised before us are not in controversy. On the 14th January 1910, the plaintiff let out the land in suit to the defendant for a term of one year and placed him in possession. The tenancy expired on the 14th January 1911; but the defendant refused to deliver up possession to the plaintiff; the result was the institution of this suit for ejectment on the

UNIVERSITY OF CALCUTTA NOT TO BE REMOVED DEPARTMENT OF LAW

LP 1956

4th February 1911. The defendant resisted the claim on the allegation that the plaintiff had no exclusive title to the property on the date of the lease in his favour; that the plaintiff had inherited the property not from her mother, as she alleged, but from her husband who was the brother of the defendant; consequently, upon the death of her husband, the property would, under the Muhammadan Law, descend, not to her alone but to her along with the defendant and other possible heirs. The Court of first instance made a decree in favour of the plaintiff. Upon appeal, that decree was reversed. On appeal to this Court, the decree of the Court of Appeal below has been affirmed by Mr. Justice Mullick, who has overruled the contention of the plaintiff that the defendant was bound by the doctrine of estoppel and could not challenge the title of the plaintiff. Reliance was placed by the plaintiff on section 116 of the Indian Evidence Act which provides that "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property." To this, the defendant answered that as the tenancy here had terminated, the rule of estoppel was no longer applicable. This contention found favour with Mr. Justice Mullick and the result was that the suit was dismissed.

It has not been disputed before us that according to the law of England a person who has been let into possession as tenant by the plaintiff is estopped from denying his lessor's title without first surrendering possession. Reference may be made to *Doe d. Knight* v. *Smythe* (17) decided in 1815, where the tenant in possession paid rent to the lessor and then disclaimed. Bayley, J., observed that "the tenant should have given up the possession to Knight (the lessor), and then the defendant, if she has title, might have maintained her ejectment." Mr. Justice Dampier added: "It has been ruled often that neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last 70 years, and I remember was so laid down by Buller, J., upon the Western Circuit in *Doe* d. *Bristow* v. *Pegge* (18). This position of the law has been repeatedly re-affirmed. [*Alchorne* v. *Gomme* (19); *Doe* d. *Joseph Manton* v. *Austin* (16); *Tadman* v. *Henman* (20).] There is an instructive discussion on this subject in *Bayley* v. *Bradley* (21) to which reference may usefully be made. In the course of the argument in that case, Wilde, C. J., obsevered: "Does the lease operate as an estoppel except during the term?" Serjt Byles answered: "A tenant is at all times estopped from disputing the title of his landlord," and referred to a long line of cases, including *Doe* d. *Knight* v. *Smythe* (17). At a later stage of the argument, Mr. Justice Vaughan Williams repeated the question "whether the estoppel does not end with the term." Serjt Byles answered: "The estoppel is limited in point of extent; but there is no authority for saying that it is limited in point of time." Wilde, C. J., then intervened with the following observation: "In Co. Litt. 47 b., it is said, that, 'if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended; for, by the making of the lease, the estoppel doth grow, and, consequently, by the end of the lease the estoppel determines.' The only qualification I am aware of, that has been engrafted upon that rule, is, that, if the tenant came into possession under the lessor, he must restore the possession before he disputes the title." The position is different, as Erle, C. J., pointed out in *Accidental Death Insurance Co.* v. *Mackenzie* (22), when the tenant had possession before he took the lease.

Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions, then, are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises, and the

(17) (1815) 4 M. & S. 347; 16 R. R. 486; 105 E. R. 862.

(18) (1785) 1 T. R. 758*n*.; 4 Dougl. 309; 99 E. R. 1362.

(19) (1824) 2 Bing. 54; 9 Moore 130; 2 L. J. (o. s.). C. P. 118; 130 E. R. 225.

(20) (1893)2 Q. B. 168; 5 R. 479; 57 J. P. 664.

(21) (1848) 5 C B. 396; 16 L. J. C. P. 206; 136 E. R. 932; 75 R. R. 764

(22) (1861) 5 L. T. (N. s.) 20; 9 W. R. 783; 132 R. R. 964.

Department of Law Library
Acc. No. 7953
Date.....

estoppel prevails so long as such possession continues. That this was unquestionably the law in this country before the Indian Evidence Act was passed, is clear from a long line of decisions. The doctrine was expressly formulated in *Mohesh Chunder Biswas* v. *Gooroo persad Bose* (23) and *Vasudev Daji* v. *Babaj Ranu* (13) and was impliedly recognised in *Banee Madhub Ghose* v. *Thakoor Doss Mundul* (24); *Gouree Dass Byragee* v. *Jugurnath Roy Chowdhry* (25); *Messrs. Burn & Co.* v. *Rusho Moyee Dossee* (26); *Jainarayan Bose* v. *Kadambini Dasi* (27). We have further the weighty opinion of Sir Subramanya Ayyar, C. J., expressed in the case of *Muthunaiyan* v. *Sinna Samavaiyan* (11) that the law has not in this respect been altered by the Indian Evidence Act, and that now, as before, a tenant who had been let into possession was estopped from denying the landlord's title without first surrendering possession [see also *Trimbak Ramchandra Pandit* v. *Ghulam Zilani Waiker* (28)]. The respondent, however, has contended that this view is erroneous and that the law as embodied in section 116 of the Indian Evidence Act is an intentional departure from the English Law on the subject. In my opinion, there is no foundation for the contention that the Legislature, in 1872, intended to revive and introduce into this country the archaic rule prevalent in England in the days of Lord Coke. Section 116 does not, by its very terms, affect the present case. That section merely provides that, during the continuance of the tenancy, a tenant of an immoveable property or persons claiming through such tenant, cannot be permitted to deny that the landlord of such tenant, at the beginning of such tenancy, had title to the immoveable property. This does not imply that after the expiration of the tenancy the tenant is free to dispute the title of the landlord. There is no conceivable reason, why we should read into the section such an implication ; if the Legislature had intended to lay down the rule indicated by the respondent, the section might easily have been differently framed. Besides, as laid down in *Ganges Manufacturing Co.* v. *Sourujmull* (2) and *Rup Chand Ghose* v. *Sarbessur Chandra Chunder* (4), sections 115 and 116 of the Indian Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections. Reference was finally made to the decisions of *Ammu* v. *Ramakrishna Sastri* (14) and *Subbaraya* v. *Krishnappa* (15), which are clearly distinguishable, as they merely affirm the principle that a tenant is not estopped, either before or after the expiration of the term, from showing that the title of his lessor had determined. In the case before us, the defence is not that the title of the lessor had determined, but that the lessor had no title at the time the lease was granted. This defence was clearly not available to the defendant so long as he retained the possession which he had obtained by permission of the plaintiff.

I agree on these grounds that this appeal must be allowed and a decree made in the terms proposed by the Chief Justice.

Appeal allowed.

(23) (1863) Marsh. 377; 2 Hay. 473.
(24) (1866) B. L. R. Supp. Vol. 588; 6 W. R. Act X, 71.
(25) 7 W. R. 25.
(26) 14 W. R. 85.
(27) 7 B. L. R. 723 *Note.*
(28) 5 Ind. Cas. 965; 34 B. 329; 12 Bom. L. R. 208.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 160 OF 1915.

January 24, 1916.

Present:—Mr. Saunders, A. J. C.

NGA TIN GYI—APPLICANT

versus

NGA TWE AUNG, MINOR, BY HIS NEXT FRIEND MI LA MA—RESPONDENT.

Benami *transaction—Purchaser taking conveyance in name of another—Presumption—Burden of proof—Burma—Children, whether have vested interest during lifetime of either parent.*

When a person purchasing property takes the conveyance in the name of a relation, the presumption is that the purchase is *benami* and the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property. [p. 14, col 1.]

Naginbhai v. *Abdulla*, 6 B. 717, followed.

In Burma children have no vested interest in parental property during the lifetime of either parent, and the fact that a child can claim under certain circumstances does not prevent a surviving parent

from disposing of the whole of the property or give the child any interest until such claim is made. [p. 13, cols. 1 & 2.]

Ma Min Tha v. *Ma Naw*, U B. R. (1892-96) Vol. II, 581, followed.

Where, therefore, a house in occupation of the judgment-debtor being attached in execution of the decree, his minor son applied for removal of the attachment on the ground that the house belonged to him, and it appeared that the son lived only occasionally with his father in the house which was bought with the father's money and that the father raised money on it:

Held, that the purchase in the name of the son was a *benami* transaction entered into by the judgment-debtor with a view to committing a fraud upon his creditors and that, therefore, the attachment could not be removed. [p. 14, col. 2.]

Mr. *Dutt*, for the Applicant.

Mr. *Chatterjee*, for the Respondent.

JUDGMENT.—One Mg. Tin Gyi, having obtained a decree against Tet Pu, in execution of that decree attached a house in the occupation of Tet Pu. Thereupon Tet Pu's minor son Maung Twe Aung, by his next friend Ma Le Ma, applied for removal of the attachment on the ground that the house belonged to him. The District Court allowed the application and removed the attachment, and the decree-holder comes to this Court in revision.

The case for the minor was that the house in suit had been bought for him by his father by a registered deed of sale, which was put in evidence. For the decree-holder it was urged that the transaction was *benami* and fraudulent. The District Court found that the sale was not *benami*. *One* of the grounds for this finding appears to have been that the money with which the house was purchased was not all the father's but at any rate partly the son's. There is no explanation of this in the learned Judge's judgment. Apparently the minor's case was that the house was bought with the proceeds of jewels belonging to his mother who was dead, and it is urged by his learned Advocate that on the father's remarriage which had taken place before the house was purchased, the son had a share in the jewels which he could claim. But it was held in *Ma Min Tha* v. *Ma Naw* (1) that children have no vested interest in parental property during the lifetime of either parent and this view has been consistently followed by this Court. The fact that a child can claim under certain circumstances does not prevent a surviving parent from disposing of the whole of the property or give the child any interest until such claim is made.

The *second* reason given by the District Judge was that it was not the father who bought the house but an uncle. The Court might perhaps have made this point a little more clear, but it appears from the evidence that the house belonged to the uncle and if the uncle claims to have bought and sold his own house in the name of the minor, the transaction certainly appears to be open to suspicion, considering that the house was in the occupation of the judgment-debtor who subsequently mortgaged it to obtain a loan by depositing the title-deeds, including the deed of sale now relied upon. I fail to understand how the Court can have held that the purchaser was the uncle. The uncle said that the jewellery was put aside for the son and left with him and that he sold it and with the proceeds purchased the house, but he failed entirely to explain how the title-deed came into the possession of the judgment-debtor. The document itself upon examination appears to be rather a remarkable document. The child Mg. Twe Aung, on whose behalf the present claim is made, has been produced in Court and is a child of eight or ten years of age. He must have been a mere infant at the time when the document was executed, December 1912, and yet he is shown as having presented the document for registration and the endorsement to this effect purports to be signed by the person who so presented it. The child by name is Mg. Twe Aung, the purchaser's name in the document and the name of the person who presented the document for registration is Mg. Tun Aung. No attempt has been made to reconcile these discrepancies. The signature "Mg. Tun Aung" is obviously not that of a child. The case of *Meeyappa Chetty* v. *Maung Ba Bu* (2) was brought to the notice of the District Judge, and I am quite at a loss to understand how in view of that ruling he was able to come to the decision he did come to. It was there pointed out that as far back as 1854 it was decided by the Privy Council

(1) U. B. R. (1892-96) Vol. II, 581.

(2) 8 Ind. Cas. 450; 3 Bur. L. T. 62.

that the presumption made in English Law that when a person purchasing property takes the conveyance in the name of a relation the purchase is for the benefit and advancement of the relation does not apply in India, and that the presumption in India is that the purchase is *benami* and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property.

In Mayne's Hindu law and Usage, 6th Edition, page 571, the origin and objects of *benami* transactions are explained.

It is argued for the respondent that the rules which apply in the case of Indians do not apply to Burma and that the same presumptions cannot be made in Burma. But I cannot accept this argument. There can be no doubt that in matters of this kind, Burmese methods are Oriental and are much more akin to Indian than European or English methods. It was held in *Naginbhai* v. *Abdulla* (3) that when a purchase is made by a Hindu or Muhammadan in the name of his son, the presumption is in favour of its being a *benami* purchase; and it lies on the party in whose name it was purchased to prove that he is solely entitled to the legal and beneficial interest in the estate. When the rights of creditors are in issue in such a transaction, very strict proof of the nature of the transaction should be required from the objector to such rights, and the burden of proof lies with more than the ordinary weight on the person alleging that the purchase was intended for the benefit of the son.

Here we find the son living only occasionally with his father in occupation of the purchased property, the father raising money upon it and only when the creditor seeks to realise debts by attaching the house, the suggestion is made that the son is the real owner. The house was bought with the father's money. The document itself, which purports to be a conveyance to a minor, if not to a mere infant, makes no mention of the incapacity of the vendee and it purports to be signed by him though the signature is obviously not that of a child. It appears to me to be a clear case of a *benami* transaction entered into with a view to committing a fraud upon his creditors by the judgment-debtor in case at some future date he should wish to do so. Such a transaction cannot be sustained.

The order of the District Judge must be set aside and the attachment will be restored.

The respondent will pay the costs of this application—two gold *mohurs*.

Revision allowed.

(3) 6 B. 717.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1307 OF 1914.

January 29, 1916.

Present:— Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafiq.

KARAM ILAHI—DEFENDANT—APPELLANT

versus

SHARF-UD-DIN—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Gift by Muhammadan, deed of, proof of—Evidence Act (I of 1872), s. 68, applicability of.

The provisions of section 123 of the Transfer of Property Act are inapplicable to gifts made by Muhammadans and valid according to the Muhammadan Law. [p. 15, col. 1.]

Therefore, a deed of gift executed by a Muhammadan is admissible in evidence although not proved as required by section 68 of the Evidence Act. [p. 15, col. 1.]

Second appeal from a decree of the District Judge, Aligarh.

Messrs. *C. Dillon*, *Gokul Prasad* and *Iqbal Ahmad*, for the Appellant.

Mr. *Benoy Kumar Mukerji*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit brought by the plaintiff for a declaration that certain property was not liable to be sold under a decree. The plaintiff's case was that the property had already been transferred by gift. In support of this contention the plaintiff adduced in evidence a deed of gift. A witness was produced who is a marginal witness. On cross-examination, however, he admitted that when he signed

his name all the other parties had already signed. It is contended on behalf of the defendant-appellant that this deed cannot be said to be proved, having regard to the provisions of section 123 of Act IV of 1882. We may mention here that the point was not taken in either the first Court or in the lower Appellate Court. Section 123 of the Transfer of Property Act no doubt provides that a gift of immoveable property must be effected by a registered instrument signed by the donor and *attested* by at least two witnesses. Section 68 of the Evidence Act provides that where a document is required by law to be attested, one at least of the attesting witnesses must be called. The argument is that there was no proof that the deed was attested by two witnesses, and that the witness called by the plaintiff in the Court below cannot be regarded as an attesting witness at all inasmuch as he had not seen the donor sign. The respondent relies on the provisions of section 129 of the Transfer of Property Act, which is as follows:—"Nothing in this Chapter relates to gifts of immoveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law, or, save as provided by section 123, any rule of Hindu or Buddhist Law." It is admitted that a Muhammadan may make an oral gift provided that possession follows. It seems to us quite clear that the provisions of section 123 are inapplicable to gifts made by Muhammadans and valid according to their law. It is quite clear that the Legislature had in its mind the provisions of section 123 when enacting section 129. Section 123 is specifically referred to in section 129. The deed of gift is admissible to prove that a gift was made. This is the only point which could be or was argued in the present appeal. The appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 881 OF 1914.

April 25, 1916.

Present:—Mr. Justice Mullick.

SUNDAR LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UPENDRA NATH SEAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 102, 115, O. XLIII, r. 1, O. XLVII, r. 7—Review—Order granting review 'for sufficient ground'—Appeal—Revision—Power of single Judge of Patna High Court.

Under Order XLIII, rule 1, clause (*w*), Civil Procedure Code, an appeal lies against an order granting a review even where the original judgment is not appealable, but that is subject to the provisions of Order XLVII, rule 7. No appeal lies, therefore, against an order granting a review merely 'for sufficient ground.' [p. 15, col. 2.]

It is doubtful whether a Judge of the Patna High Court sitting singly can entertain an application in revision under section 115 of the Civil Procedure Code when he is not empowered by the Chief Justice to act as such. [p. 16, col. 1.]

Mr. *Atul Krishana Ray*, for the Appellants.

Messrs. *Susil M. Mullick* and *Rishindra Nath Sarkar*, for the Respondent.

JUDGMENT.—It is clear that there is no second appeal in this case. The decree relates to a sum of Rs. 114-8-9 due on account of house rent, which is a matter cognizable entirely by a Court of Small Causes.

Therefore under section 102, Civil procedure Code, there can be no second appeal against that decree.

Then it is said that although there may be no second appeal against the decree, an appeal from order lies against the order of the 1st of February 1914, by which the learned Judicial Commissioner reviewed the decree as passed by him on the 14th of November 1913.

Under Order XLIII, rule 1, clause (*w*), an appeal does lie against the order of granting a review, but that is subject to the provisions of Order XLVII, rule 7.

In the present case the order granting the review was not for any of the reasons enumerated in Order XLVII, rule 7, against which objection can be taken. An order granting a review merely for sufficient ground does not appear to be appealable. Therefore this appeal as an appeal against order must also fail.

GURAPPA SHIVGENAPPA *v.* TAYAWA SHIDAPPA.

Finally I am asked to treat the memorandum of appeal as an application for revision under section 115, Civil Procedure Code.

I see no reason for entertaining the revision even if I were disposed to do so and had jurisdiction to exercise my powers under section 115; but sitting singly and not being empowered by the Chief Justice to take applications for revision under section 115, I very much doubt whether I have the power to interfere in revision in this matter. Even if I had the power I would not exercise it in this case.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 31 OF 1915.
March 6, 1916.
Present:—Mr. Justice Batchelor and Mr. Justice Shah.
GURAPPA SHIVGENAPPA PUTTI — APPELLANT
versus
TAYAWA SHIDAPPA—RESPONDENT.

Guardians and Wards Act (*VIII of* 1890), *s.* 7—*Scope of proceedings under the Act—Welfare of minor—Elaborate enquiries as to nature of property forbidden*—Res judicata.

Proceedings under section 7 of the Guardians and Wards Act are summary and the order made by Court should be based on considerations of the minor's welfare. Elaborate enquiries as to the nature of the property left by the deceased are outside the scope of the Act and any decision that the Court may arrive at will not operate as *res judicata*. For the purposes of the Act, it is enough that the application is made on the footing and with the claim that the minor is separately entitled to separate property. The order appointing a guardian should be made on that footing, leaving it to him to institute suits on behalf of the minor for the recovery of the property which he claims. [p. 16, col. 2; p. 17, col. 1.]

First appeal from the decision of the Assistant Judge, Belgaum, in Miscellaneous Application No. 7 of 1914.

Mr. *Jayakar* (with him Mr. *Nilkant Atamaram*), for the Appellant.

Mr. *Coyaji* (with him Mr. *A. G. Desai*), for the Respondent.

JUDGMENT.

BATCHELOR, J.—This is an appeal from a judgment of the learned Assistant Judge of Belgaum pronounced in an application made under section 7 of the Guardians and Wards Act. The application was by the present appellant, who is the father of the minor concerned, a young widow named Savitribai, aged about 16 or 17. The application was that the appellant should be appointed guardian of her person and property.

The petition was made on the footing that certain property left on the death of the widow's husband's father, named Shidappa, was Shidappa's separate property. The opponents contended, on the other hand, that this property was joint property between Shidappa and his brother. The question, therefore, was raised in the lower Court whether the property was in fact the separate property of Shidappa or was joint family property, and the learned Judge below embarked upon a long and laborious enquiry upon this question. In the end he came to the conclusion adverse to the petitioner, holding that the property was joint. Consequently he refused to appoint the petitioner guardian of the property.

In appealing against this decision Counsel for the petitioner seeks to show that on the evidence the true conclusion should be that the property was separately owned by Shidappa. It appears to me, however, that there is an initial difficulty in the appellant's way, and that is that in my opinion elaborate enquiries of this nature are not contemplated to be made under section 7 of the Guardians and Wards Act. That section, in my judgment, contemplates only a summary enquiry followed by an order made for the welfare of the minor. Another reason for holding that such an enquiry as this is outside the scope of the Guardians and Wards Act is that, despite the elaborateness of the enquiry made, it is admitted that the Court's decision, whatever it might be, would not operate as *res judicata*, so that the difficult questions agitated in such an enquiry as this would still have to be agitated again in a civil suit in order that finality of decision could be attained.

Mr. Jayakar for the appellant has called our attention to the Full Bench decision in *Virupakshappa* v. *Nilgangava* (1). But that case is not, I apprehend, of authority upon our present facts. For the facts upon which that case was decided were that the minor in question was admittedly a member of a joint Hindu family governed by the Mitakshara Law, and, therefore, admittedly possessed of no separate property. Here it is otherwise. For the petitioner claims that the minor is not a member of a joint Hindu family and is entitled in her own right to the separate property owned exclusively by Shidappa. It is true that this position is contested on behalf of the opponents. But the question between them must, I think, be decided by a civil suit and ought not to be determined in summary proceedings under the Guardians and Wards Act. For the purposes of that Act it is, I think, enough that the petition is made on the footing and with the claim that the minor is separately entitled to separate property. Upon that footing, I think, we ought to appoint the petitioner the guardian of the property of the minor. It will then be for him on behalf of the infant to institute suits for the recovery of the property which he claims.

I would, therefore, reverse the finding and the order of the learned Assistant Judge and appoint the petitioner the guardian of the minor's property, without expressing any opinion as to whether the petitioner is right in claiming that the property belonged to Shidappa separately, or the opponents are right in maintaining the contrary.

We have not overlooked that passage in the petition where the petitioner expresses his willingness that the Nazir may be appointed guardian of the property. But on the whole it appears to us more satisfactory that the petitioner himself should be appointed in that capacity.

No costs here or in the Court below.

SHAH, J.—I am of the same opinion.

Order reversed.

(1) 19 B. 309.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 475 OF 1915.

June 5, 1916.

Present:—Mr. Justice Teunon and Mr. Justice Sheepshanks.

CHINTAMONI PATNI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TARAK CHANDRA GOSWAMI, MINOR, REPRESENTED BY HIS GUARDIAN *ad litem* MOTHER NAGENDRA BALA DEBI—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42 proviso—Declaratory suit, maintainability of, when properties are in possession of Receiver—Receiver's possession.

As the result of a certain proceeding under Act XIX of 1841 between the plaintiff and the defendant upon the death of a Hindu widow, some of the properties left by her, which were at first taken possession of by the plaintiff, were placed in the hands of a Receiver appointed by the Court and the others were either retained or disposed of by the plaintiff. The plaintiff then brought a suit under section 42 of the Specific Relief Act for declaration of his title to those properties as an heir to the widow:

Held, that the suit could not be thrown out on the ground that in the absence of a prayer for possession it was not maintainable by reason of the proviso to section 42 of the Specific Relief Act, as the Receiver's possession was to be considered to be the plaintiff's possession, if the plaintiff succeeded in establishing his title. [p. 18, col. 1.]

Vedanayaga Mudaliar v. *Vedammal*, 27 M. 591; *Aisa Siddika* v. *Bidhu Sekhar Banerjee*, 18 Ind. Cas. 633; 17 C. L. J. 30, relied upon.

Appeal against the decree of the District Judge, Hooghly, dated the 18th December 1914, affirming that of the Subordinate Judge, 3rd Court at Hooghly, dated the 10th June 1913.

FACTS of the case appear from the judgment.

Babu *Bipin Behari Ghose* (with him Babu *Narendra Nath Chaudhry*), for the Appellants.—The Courts below were wrong in throwing out the suit on the ground that it was barred by the proviso to section 42, Specific Relief Act. They ought to have been satisfied beyond all reasonable doubt that the plaintiffs ought to have sought further relief and yet claimed nothing beyond a declaration of title.

In the present case, if the title of the plaintiffs be declared, they would be considered to be in possession of the property in dispute as the possession of the Receiver is that of the Court on behalf of the rightful owner.

Refers to *Aisa Siddika* v. *Bidhu Sekhar Banerjee* (1).

Babu *Sib Chundra Palit*, for the Respondent.—The possession of the Receiver might be possession of the defendant too, if the defendant be the rightful owner: hence the suit comes within the mischief of the proviso of section 42, Specific Relief Act.

JUDGMENT.—In this case it appears that a certain Hindu widow died sometime about the year 1910, leaving certain ornaments and also a considerable sum in cash. Upon her death there followed certain proceeding under Act XIX of 1841 between the present plaintiffs-appellants, who are stated to be the sons of the widow's husband's brother, and the defendant-respondent, who is stated to be a descendant of her spiritual guide. In these proceedings the District Judge made over the properties to the present plaintiffs. The defendant thereupon made an application to this Court and that application resulted in the setting aside of the proceedings taken under Act XIX of 1841, in a direction that the parties should establish their title in the Civil Court and in the following order: "The Court will, no doubt, take the steps necessary for the protection of the property pending the disposal of the suit." The ornaments were thereupon returned by the plaintiff and are now in the hands of the Receiver appointed by the Court. The cash is either in the plaintiff's possession or has been spent, as he says, by him. He has now brought a suit under section 42 of the Specific Relief Act praying for a declaration of his title to the ornaments and the cash. Both the Courts below have thrown out that suit, on the ground that in the absence of a prayer for possession the suit is not maintainable by reason of the proviso to section 42 of the Specific Relief Act. We are of opinion that in taking this course the Courts below fell into error. The cash is clearly in the possession of the plaintiff or for the purposes of this suit is to be regarded as in his possession and the ornaments are in the possession of an officer of the Court, and should the plaintiffs succeed in establishing their title that possession may be considered to be the plaintiffs' possession. In any case it is clear that a declaration would be sufficient to give the plaintiffs all the relief that would be necessary for them in this matter. In support of the view we take we may refer to the cases of *Vedanayaga Mudaliar* v. *Vedammal* (2) and *Aisa Siddika* v. *Bidhu Sekhar Banerjee* (1). We, therefore, set aside the decrees of the Courts below and remit the case to be re-admitted in the Court of first instance and heard and determined on the merits. The costs in all Courts will abide the result.

Appeal allowed; *Case remanded.*

(1) 13 Ind. Cas. 633; 17 C. L. J. 30.

(2) 27 M. 591.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1933 OF 1914.

April 18, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

KOTAMREDDI SEETAMMA—DEFENDANT—APPELLANT

versus

VANNELAKANTI KRISHNASWAMY ROW AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 58, scope of—Transfer of Property Act (IV of 1882), s. 49—Admissions in pleadings of execution or contents of documents inadmissible or invalid—Denial of liability on technical grounds—Decree, award of, on such admissions—Contract preceded by negotiations reduced to writing—Unregistered document, admissibility of, to prove prior oral contract.

The Courts should not act on admissions made by parties in their pleadings, when the documents whose execution or contents are thus admitted are not receivable in evidence or are incapable by law of creating rights and liabilities and when the admissions are accompanied by denial of liability on the ground of such defect. [p. 22, cols. 1 & 2.]

Per *Sadasiva Aiyar*, *J.*—If the legislative provision declaring such a document to be inadmissible in evidence or ineffectual for certain purposes (or both) is based on reasons of public policy, a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in favour of either party. [p. 20, col. 2.]

The Courts are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. While section 58 of the Evidence Act can be invoked where documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws, it

cannot be invoked to overrule the provisions of non-revenue enactments. Provisions relating to compulsory registration of documents or to the legal impotence of certain unregistered or unattested documents to create title or to convey property must be deemed to have been enacted on high grounds of public policy and Courts should not be astute in creating loopholes for evading the plain intentions of the Legislature. [p. 21, cols. 1 & 2; p. 22, col. 1.]

Maung Kan v. *Maung Myat Thaing*, 11 Ind. Cas. 850, 4 Bur. L. T. 182, dissented from.

Subrahmania Aiyar v. *Savitri Ammal*, 3 Ind. Cas. 321; 19 M. L. J. 228, 4 M. L. T. 354, distinguished.

Muttukaruppa Kaundan v. *Rama Pillai*, 3 M. H. C. R. 158; *Chedambaram Chetty* v. *Karunalaya-valangapuly Taver*, 3 M. H. C. R. 342; *Syud Reza Ali* v. *Bhikun Khan*, 7 W. R. 334; *Rahimtolla* v. *Murray*, 11 Ind. Cas. 810; 4 Bur. L. T. 171 and *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*, 5 B. 143, examined and considered.

When the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter-proposals, and so on, are reduced finally to the form of a document signed by one or both of the parties, the strong presumption is, not that there are two independent contracts (the first an oral contract and the second the written contract), but that the written contract is the only final contract between the parties. [p. 19, col. 2.]

It is an arguable point, when a contract was completed before the creation of evidence of it in writing was thought desirable, whether that contract of prior date may not be proved as an independent contract creating rights and liabilities, though the writing of later date is legally inadmissible in evidence or incapable of creating any rights or liabilities, and whether such writing cannot be used as evidence of the prior contract, though not as itself creating rights. [p. 19, col. 2; p. 20, col. 1.]

Ridgway v. *Wharton*, (1857) 6 H. L. C. 238 at p. 264; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804, 10 E. R. 1287; 29 L. T. (O. S.) 390; 108 R. R. 88; *Burjorji Cursetji Panthaki* v. *Muncherji Kunverji*, 5 B. 143; *Rajah of Venkatagiri* v. *Naryaana Reddi*, 17 M. 476; 4 M. L. J. 198; *Naravanan Chetty* v. *Muthiah Servai*, 8 Ind. Cas. 520; 35 M. 63; 21 M. L. J. 44; 9 M. L. T. 142 and *Morgan* v. *Fernandez*, 33 Ind. Cas. 439; 30 M. L. J. 519; 3 L. W. 370; (1916) 1 M. W. N. 373; 19 M. L. T. 377, referred to

Appeal against the decree of the District Court of Nellore, in Appeal Suit No. 169 of 1913, preferred against that of the Court of the District Munsif, Kavali, in Original Suit No. 791 of 1911.

Mr. *S. Varadachariar*, for the Appellant.

Mr. *T. V. Venkatarama Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant, the plaintiffs having obtained a decree in the lower Courts for the specific performance of an alleged contract made by the defendant in favour of the plaintiffs to grant a lease of the plaint lands for a term of 12 years.

I do not think that the plaint relies upon any oral agreement to give a lease of the plaint lands, independent of the "letter" (agreeing to give such a lease) which was executed by the defendant. The written statement, while admitting the genuineness of the letter, expressly states that the letter is legally ineffective for want of registration.

Ordinarily, when the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter-proposals, and so on, are reduced finally to the form of a document signed by one or both of the parties, the strong presumption is, not that there are two independent contracts (the *first*, an oral contract and the *second*, the written contract), but that the written contract is the only final contract between the parties [*Ridgway* v. *Wharton* (1)]. As West, J., puts it [*Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2)], "When the parties have agreed to commit their oral agreement to writing, a presumption was raised by the Roman Law and is raised by the Prussian Codes and other modern laws, that the right or obligation is dependent on an execution of the instrument; there is a presumption, which reason at once recognizes of the merely tentative character of an oral declaration, meant to be superseded by a written one." When a contract is once reduced to writing, no other evidence can be given of its terms (section 91 of the Evidence Act).

There may be rare cases in which the contract was completed sometime before the creation of evidence of it in writing was thought desirable by the parties, and it is an arguable point whether that contract of the prior date may not be proved as an independent contract creating rights and liabilities, though the writing of the later date is legally inadmissible in evidence or incapable of creating any rights or liabilities and whether such writing cannot be used

(1) (1857) 6 H. L. C. 238 at p. 264; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 10 E. R. 1287; 29 L. T. (O. S.) 390; 108 R. R. 88.

(2) 5 B. 143.

as evidence of the prior contract, though not as itself creating rights.

In *Rajah of Venkatagiri* v. *Narayana Reddi* (3) a contract to lease was completed on 24th October 1889, the defendant having finally agreed on that date to execute a lease of the plaint lands to the plaintiff. (It appears from the report that a written *darkhast* application and an order on that application had completed the contract on 24th October 1889.) The plaintiff executed a *kabuliat* to the defendant on 30th November 1889, that is, more than a month after the completion of the contract. The question was whether the *kabuliat* of 30th November executed by the plaintiff can be admitted in evidence of the prior agreement of 24th October 1889. It was held, that it was so admissible. All the other observations in the judgments of the Full Bench in that case tending to lay down wider propositions of law than the narrow one above mentioned have been explained away in the Full Bench decision in *Narayanan Chetty* v. *Muthiah Servai* (4) and by my learned brother Napier, J. (Mr. Justice Ayling concurring), in the very recent case in *Morgan* v. *Fernandez* (5). But in this case, as I understand the pleadings, no prior independent oral agreement is set up in the plaint or is admitted in the written statement.

As regards admissions in pleadings, if the plaint relies on a document and mentions its contents, but does not disclose that through want of proper stamp, through non-registration, through non-compliance with a statutory provision relating to attestation or through other similar defects the writing is inadmissible in evidence and if the defendant does not set up in his defence that the document is so inadmissible and, on the other hand, admits the contents and the validity of the document, the Court might possibly act upon the defendant's admission in the plaintiff's favour notwithstanding that during the course of the trial, the Court finds that the document is inadmissible in evidence, through the existence of such defect or defects. Even in such a case, if the legislative provision declaring such a document to be inadmissible in evidence or ineffectual for certain purposes (or both) was based on reasons of public policy, I think that a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in the plaintiff's favour. The very eminent Judge (West, J.), whom I have already quoted, says in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2): "If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed."

Mr. T. V. Venkatarama Aiyar quoted some English decisions, the decisions in *Muttukaruppa Kaundan* v. *Rama Pillai* (6), *Chedambaram Chetty* v. *Karunalyavalangapuly Taver* (7), *Subramaniah Aiyar* v. *Savitri Ammal* (8), *Syud Reza Ali* v. *Bhikun Khan* (9), some decisions from the Bombay Unreported Printed Judgments, a few other Indian cases and two Burma cases, *Maung Kan* v. *Maung Myat Thaing* (10) and *Rahimtolla* v. *Murray* (11), in support of his contention that the Court should act on an admission made in the pleadings notwithstanding the inadmissibility in evidence of the document whose contents are admitted in the pleadings. He went further and contended that, if the document is, through certain defects (such as absence of due registration or attestation), declared by the Legislature to be incapable of affecting the property dealt with therein, the Court should treat the rights to property as affected on the admission of the documents in the pleadings, just as if no such defects existed in the document which rendered it ineffectual. In some of the cases quoted, it was held that by the admission of the contents of a document in the plead-

(3) 17 M. 456; 4 M. L. J. 198.
(4) 8 Ind. Cas. 520; 35 M. 63; 21 M. L. J. 44; 9 M. L. T. 142.
(5) 33 Ind. Cas. 439; 3 L. W. 370; (1916) 1 M. W. N. 373; 19 M. L. T. 377; 30 M. L. J. 519.
(6) 3 M. H. C. R. 158.
(7) 3 M. H. C. R. 342.
(8) 3 Ind. Cas. 321; 19 M. L. J. 228; 4 M. L. T. 354.
(9) 7 W. R. 334.
(10) 11 Ind. Cas. 850; 4 Bur. L. T. 182.
(11) 11 Ind. Cas. 810; 4 Bur. L. T. 171.

ings of one of the parties to a suit, the opposite party was exonerated from producing and proving the document relied on by him and hence, even though the document was inadmissible in evidence, legal 'rights' in favour of the latter could be established and awarded on the contents of the document as admitted and that the Court need not go into a question of admissibility which was not raised in issue, though during the trial facts may have been brought out which show the document to be legally inadmissible in evidence. As regards the English cases, I am not prepared to introduce into our Courts all the artificial technicalities as to the legal results of particular modes of advancing pleas on both sides which have been elaborated in English decisions, especially where learned judges wished to get over the provisions of Statutes (like the Statute of Frauds) which they did not like. "Such Rules", (established by English cases) "are to be applied with discretion in this country where a strict system of pleading is not followed." When documents are made merely inadmissible in evidence by statutory law for the non-payment of proper stamp duty thereon, it may be a question whether public policy requires the admission in pleadings of their contents to be rejected by the Courts, especially as the Stamp Act itself enacts that when a document is once admitted in evidence, though not properly stamped, the admission cannot be called in question afterwards in the suit (see last paragraph of section 35) and that Criminal Courts might ignore the Stamp Act [section 33, clause 2 (*a*)]. Most unstamped and insufficiently stamped documents could also be made admissible in evidence on the payment of the proper duty and a penalty. The Courts, again, are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. But where a document is not merely made inadmissible in evidence [wholly or for certain purposes as in the Registration Act, section 49, clause (*c*)], but the Legislature further enacts that a document not registered shall not affect any immoveable property comprised therein, or that a transaction of a particular nature in respect of immoveable property (generally or of a particular description) can be legally effected only by a document complying with prescribed conditions as to attestation, registration, etc., (sections 54, 59, 107, etc., of the Transfer of Property Act), such provisions must be deemed to have been enacted on high grounds of public policy and Courts should not, in my opinion, be astute in creating loopholes for evading the plain intentions of the Legislature. I do not think it would serve any useful purpose to deal in detail with all the decisions quoted by Mr. Venkatarama Aiyar. Most of them could be distinguished on the ground that they make use of admissions in pleadings to get rid of only the disability relating to inadmissibility in evidence imposed by stamp laws. A few others could be distinguished on the ground that the defendant, without referring to the inadmissible and ineffectual document, admitted the plaintiff's right to be given a decree for a portion of the reliefs claimed by him and the Court was entitled to give such a decree if there was nothing to show that the admission was based on the defendant's acceptance of the validity of the document condemned by the Legislature. [See *Subrahmania Aiyar* v. *Savitri Ammal* (8).] As regards, however, the remaining few cases which could not be so distinguished [for instance, the Burma case reported as *Maung Kan* v. *Maung Myat Thaing* (10) decided by a single learned Judge who absolutely ignores the public policy underlying section 59 of the Transfer of Property Act], I need only say that I respectfully dissent from that decision. Mr. Venkataramier went so far as to argue that even if the defendant expressly raised in his written statement the plea of the legal ineffectuality and inadmissibility of a document relied on by the plaintiff and even if he denied in his written statement that the plaintiff was entitled to any relief whatever, the Court could give to the plaintiff the relief which he could be legally entitled to if the document was legally effectual and admissible in evidence, provided the defendant was honest (or foolish) enough to admit the genuineness of the defective document referred to in the plaint. I emphatically dissent from that proposition of law. While

section 58 of the Evidence Act can be invoked where the documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws, it cannot, in my opinion, be invoked to overrule the provisions of non-revenue enactments, nor can it be used to bind a party who has made an admission of the genuineness of a document when such admission is accompanied by the legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration or attestation, etc. Some of the decisions which rely on section 58 of the Evidence Act have, in my opinion, ignored the proviso to section 58, which is as follows:—"Provided that the Court may, in its discretion, *require the facts admitted to be proved otherwise than by such admission.*" I believe that by the proviso, it was intended that Courts should, in their discretion, ignore such admissions, not only when they are made collusively or fraudulently, but also when they are accompanied by pleas of legal inadmissibility in evidence of the admitted facts (such as the genuineness of a document and the nature of its contents) or the legal ineffectuality of the transaction sought to be effected by the admitted document or where if the Court acted on the admitted facts, it would be defeating the policy and provisions of enactments based on public policy.

In the present case, the defendant, while admitting the writing of the "letter" relied on by the plaintiff, clearly raised the plea (see paragraph 4 of his written statement) that it was invalid for want of registration and he further denied that the plaintiff was entitled to any of the reliefs claimed in the plaint (paragraph 5 of the written statement).

Mr. Venkataramier argued that Exhibit A was only a proposal to give a lease and did not itself constitute the agreement to give a lease. Having considered the pleadings and perused Exhibit A, I have no doubt that Exhibit A was delivered by the defendant to the plaintiffs on the mutual understanding that it was to be the writing which embodied the agreement then concluded between the parties. I am also not prepared to act upon Mr. Venkataramier's suggestion that the soundness of the decision in *Narayanan Chetty* v. *Muthiah Servai* (4) should be referred for consideration to another Full Bench.

In the result, I would set aside the decision of the lower Court and dismiss the plaintiffs' suit. The parties will, under the circumstances, bear their respective costs in the lower Courts. The plaintiffs must pay the appellants' costs in this suit.

PHILLIPS, J.—I need add but little and I concur in the order proposed. The several cases cited in which a decree was given in accordance with the terms of a document inadmissible in evidence, can mostly be explained by the fact that there was an admission of liability in the pleadings and a decree could be given without reference to the document, which could not be admitted in evidence. To this extent, I am prepared to accept those authorities but when, as in this case, no liability is admitted, and the defendant merely admits execution and pleads that the document is invalid for want of registration, it would be impossible to frame a decree without reference to the document, but the document cannot be referred to, because it is inadmissible in evidence, and consequently no decree could be framed. The further argument that there was a separate and prior oral agreement is untenable in view of the language of the plaint, in which no separate oral agreement is set out. Nor can Exhibit A be treated as a mere proposal, for there is no evidence that there was any subsequent acceptance and consequently there would be no cause of action. I accordingly think that plaintiffs' suit should be dismissed and agree in the order as to costs.

Appeal allowed; Suit dismissed.

V.R.P.

NARAIN DAS *v.* DHANIA.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1359 OF 1914.

December 23, 1915.

Present:—Justice Sir P. C. Banerjee, KT., and Mr. Justice Walsh.

NARAIN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat DHANIA—DEFENDANT—RESPONDENT.

Minor—Contract—Sale in favour of minor through guardian—Suit for possession, maintainability of—Non-payment of consideration, effect of—Specific performance, suit for—Transfer of Property Act (IV of 1882), ss. 54, 55.

A minor can acquire and hold property, inasmuch as there is nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immoveable property, and is also entitled to maintain a suit for possession of the property purchased, on the ground that he has acquired a title to it by virtue of the sale-deed. Such a suit by a minor is not a suit for the specific performance of a contract as no question of mutuality arises. [p. 24, col. 2; p. 25, cols. 1 & 2.]

Non-payment of consideration for a sale does not prevent the transfer of ownership to the buyer and does not entitle the seller to retain and withhold possession, although on equitable principles the Court will not make a decree for possession in favour of the purchaser without attaching to it a condition directing payment of the purchase-money. [p. 24, col. 2.]

No contractual obligations are undertaken by a minor in a case in which a contract is entered into with his father and guardian. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor. [p. 25, col. 2.]

Second appeal from a decree of the District Judge, Agra, dated the 1st August 1914.

Mr. *Damodar Das*, for the Appellant.

Munshi *Kanhaya Lal*, for the Respondents.

JUDGMENT.

BANERJI, J.—This appeal arises in a suit brought by Suraj Bhan, a minor, through his guardian and next friend for possession of a house. It is stated in the plaint that *Musammat* Radha was the owner of the house and jointly with the defendant and *Musammat* Jeoni, now deceased, sold it to the plaintiff "through his father and guardian Narain Das" under a sale-deed dated the 1st of April 1912; that out of the amount of consideration for the sale they received Rs. 51 as earnest money; that they refused to have the sale-deed registered but the plaintiff got it compulsorily registered; that *Musammat* Radha and Jeoni are dead and the defendant is in possession of the house; that the plaintiff repeatedly asked the defendant to receive the balance of consideration money, but that the latter refused to take it and has withheld possession. It is further alleged in the plaint that the plaintiff is ready and willing to pay the balance of consideration and it is prayed that it be caused to be paid to the defendant.

The defendant, in her written statement, denied the execution of the sale-deed and pleaded that even if it was executed by *Musammats* Radha and Jeoni she was not bound by it, that it was invalid and that no relief could be granted to the plaintiff on the basis of it.

The Courts below have not tried the case on the merits. They have treated the suit as one for specific performance of a contract and have held that a minor, being incapable of entering into a contract, could not purchase property and that the plaintiff is, therefore, not entitled to maintain the suit. On this preliminary ground they dismissed the suit. The learned District Judge relies on the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1). In the argument before us the case of *Mohori Bibee* v. *Dharmodas Ghose* (2), also decided by their Lordships, has been referred to on behalf of the respondent. In our judgment neither of these rulings has any bearing on the present case. In the case last mentioned the suit was brought against a minor to enforce a contract entered into by him. It was held that such a contract was void and could not be enforced. The former was a suit on behalf of a minor for specific performance of a contract to sell. It was held that such a contract could not be specifically performed. The suit before us is not a suit to enforce a contract against a minor and it is not a suit for specific performance of a contract. The Court below is, in our opinion, wrong in holding that this is a suit for specific performance. The suit is not based on a contract but is founded on the title acquired by the plaintiff under the sale-deed executed in his favour. The sale is referred to as

(1) 13 Ind. Cas. 331 (P. C.); 9 A. L. J. 33; 39 C. 232; 16 C. W. N. 74; 21 M. L. J 1156; 11 M. L. T. 8; (1912) M. W. N. 22; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 I. A. 1.

(2) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.).

evidence of his title. Where a contract has been made for sale of immoveable property and that contract has not been completed by the execution of a sale-deed, no title in the property is vested in the purchaser until the execution of the sale-deed. This is provided in section 54 of the Transfer of Property Act, in the following terms :— "A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property." In the case of a transaction which has not advanced beyond the stage of a contract to sell, the remedy is a suit for specific performance of the contract. Where, however, a sale-deed has been executed and, in the case of tangible immoveable property of the value of one hundred rupees and upwards, registered, the title to the property vests in, and the ownership of it passes to, the purchaser. And as held in *Shib Lal* v. *Bhagwan Das* (3) and *Baijnath Singh* v. *Paltu* (4), this will be so even if the purchase-money has not been paid. In such a case the remedy is not a suit for specific performance but one for possession on the strength of the ownership acquired by virtue of the sale-deed. The present suit is a suit of this last description. and not one for specific performance. A sale has been defined in section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised and part paid and part promised." Prepayment of price is not a condition precedent to the transfer of ownership and a transaction is nonetheless a sale if the price has not been paid in whole or in part. By section 55, sub-section (1) (*f*), of the same Act it is provided that a seller is bound, on being so required, to give the buyer possession of the property sold. If the whole of the purchase-money has not been paid the seller is entitled, under sub-section (3) of the same section, to withhold documents of title. He is also entitled under sub-section (4), clause (*b*), to a charge for unpaid purchase-money "upon the property in the hands of the buyer." This last clause assumes that the ownership of the property has passed to the buyer. It was held by the Madras High Court in *Velayutha Chetty* v. *Govindasawmi Naiken* (5) that the "lien of the unpaid vendor of land under section 55 of the Transfer of Property Act is non-possessory. He has only a right to retain the title-deeds and to a charge for the unpaid purchase-money, but he cannot retain possession of the property sold against the vendee." As pointed out by the learned Judges, this view is also in consonance with the English Law on the subject. (See Fisher on Mortgages, 6th Edition, section 505.) It is thus clear that non-payment of consideration does not prevent the transfer of ownership to the buyer and does not entitle the seller to retain and withhold possession. No doubt, on equitable principles, the Court will not make a decree for possession in favour of the purchaser without attaching to it a condition directing payment of the purchase-money. This was done in the two cases decided by this Court to which we have referred above. But non-payment of the purchase-money is, as shown above, immaterial, so far as the question of the vesting of title is concerned. In the present case it was alleged on behalf of the plaintiff that he was always ready and willing to pay the balance of purchase-money but that the defendant had refused to take it. It cannot, therefore, be said that non-payment of the purchase-money vitiates the title acquired under the sale-deed.

The *next* question to be considered is whether the fact of the minority of the plaintiff affects his right to maintain this suit. The Transfer of Property Act does not declare a minor to be incompetent to purchase property, and we have not been referred to any other statutory enactment which disqualifies him from doing so. On the contrary there is a mass of authority in favour of the view that a minor can acquire and hold property. The purchase of property by a minor through his guardian is very common in this country. It was held by this Court in *Ulfat Rai* v. *Gouri Shanker* (6) that there is "nothing in the Transfer of Property Act which

(3) 11 A. 244; A. W. N. (1889) 96.
(4) 30 A. 125; 5 A. L. J. 96; A. W. N. (1908) 38.
(5) 30 M. 521; 17 M. L. J. 450; 3 M. L. T. 10.
(6) 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670.

makes a minor incapable of being the transferee of immoveable property." The same view was held by the learned Chief Justice and Rafique, J., in the recent case of *Munni Koer* v. *Madan Gopal* (7). The Calcutta High Court in *Bahal-ud-din* v. *Rafaqat Husain* (8) and the Judicial Commissioner of Oudh in *Raghunath Bakhsh* v. *Muhammad Bakhsh* (9) expressed the same opinion. The only decision to the contrary is that of the Madras High Court in *Navakoti Narayana Chetty* v. *Loyalinga Chetty* (10). With great respect we are unable to agree with the learned Judges who decided that case. It is to be observed that the view taken in this case was not adopted by that Court in the later case of *Muniya Konan* v. *Perumal Konan* (11). In *Mohori Bibee* v. *Dharmodas Ghose* (2) and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) their Lordships of the Privy Council did not decide that a minor could not purchase property and we do not understand the effect of those rulings to be to declare him disqualified.

It was strenuously argued on behalf of the respondent that although the fact of the purchaser in this case being a minor might not have precluded him from maintaining the suit, the circumstance that a great part of the consideration remained unpaid made a difference, that the seller was entitled to retain possession is enforcement of her lien for unpaid purchase money and that she could not sue the plaintiff for the balance of the purchase-money, the contract by him to pay it being void by reason of his minority. As we have already pointed out, non-payment of consideration does not prevent a purchaser from acquiring title under his purchase and it is immaterial whether he is a minor or of full age. We have also shown above that the seller's lien for unpaid purchase-money does not entitle him to retain possession of the property sold. We have also pointed out that under the rulings of this Court the decree for possession in a case like this must be subject to the condition that the balance of the purchase-money should be paid by the plaintiff.

There would, therefore, be no occasion for the defendant to sue for the purchase-money. Furthermore, the plaintiff's case is that he offered the purchase-money and has always been and still is ready to pay it. If, therefore, he was competent to purchase, the fact of non-payment of the purchase-money, under the circumstances alleged, cannot in law or equity deprive him of the right he has acquired in the property. Moreover, the allegation in the plaint is that the purchase was made through the father and guardian of the plaintiff and in the receipt for earnest money granted by the vendors, which has been produced by the plaintiff, it is stated that the purchase was made by Narain Das (the plaintiff's father and guardian) and that he would pay the balance of price. If this document is genuine, the purchase was made by the plaintiff's father for him and he would be liable for the purchase-money. No question of non-payment of such money, therefore, arises. In *Muniya Konan* v. *Perumal Konan* (11) two learned Judges of the Madras High Court observed that "it cannot be denied that a person may purchase property and hold it as trustee for a minor. There is no reason why he should not create a trust by purchasing it in the name of the minor. No contractual obligations are undertaken by the minor in such a case. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor." These remarks are applicable to the circumstances of this case. It cannot be said that the vendor would be in a worse position than the vendee and would be without remedy for the realization of the purchase-money.

For the reasons stated above we hold that the present suit is not one for the specific performance of a contract and no question of mutuality arises; that a minor is competent to purchase property; and that if the sale-deed relied upon by the plaintiff is genuine, he has by virtue of it acquired a title to the property sold and is entitled to maintain the suit.

Another ground on which the lower Appellate Court has decided against the plaintiff is that he has no cause of action against the defendant. This ground is wholly untenable,

(7) 31 Ind. Cas. 792; 13 A. L. J. 1084; 38 A. 62.
(8) 18 Ind. Cas. 451.
(9) 30 Ind. Cas. 200; 18 O. C. 115; 2 O. L. J. 200.
(10) 4 Ind. Cas. 383; 33 M. 312; 19 M. L. J. 752 7 M. L. T. 233.
(11) 18 Ind. Cas. 963; 24 M. L. J. 352; 13 M. L. T. 311.

It is alleged in the 4th paragraph of the plaint that the defendant is in possession of the house claimed and this paragraph is admitted by the defendant in her written statement. There is, therefore, a clear cause of action against the defendant.

We, therefore, allow the appeal, set aside the decree of the Courts below and remand the case to the Court of first instance for trial on the merits. Costs here and hitherto will be costs in the cause.

WALSH, J.—I agree with the judgment that has been delivered by my brother Mr. Justice Banerji. Throughout the argument in Court it seemed to me that the contention on behalf of the respondent was right. It was not until my attention was drawn to section 55 of the Transfer of Property Act that I could see an answer to what I regarded as the unassailable position taken up by the respondent and affirmed by the judgment in the Court below. But looking at section 55 and particularly sub-section 3 and sub-section 4 (*b*), it is quite clear that provision is there made for a non-possessory lien in favour of the vendor; that is to say, by one part of the section, where there has been a failure to pay the whole of the purchase-money, he is apparently entitled to withhold the documents of title, and further where the title to the property has passed to the buyer, he has a charge upon the property for the unpaid purchase-money in the hands of the buyer. That is inconsistent with his withholding possession. Apart from that section it seemed to me, in the particular circumstances of this transaction, that the vendor was in rightful possession, and the vendor being in rightful possession, the purchaser could not obtain possession. Having regard to section 55 I am now satisfied that that view is fallacious and some trouble might have been saved if attention had been drawn to the section during the argument. It is another illustration of the importance of paying attention to the language of the Code. So long as you keep to the Code, you may make a false stay but you are not likely to take the wrong road. The result, in this particular case and in all such cases, is obviously to inflict what might be described as injustice upon the vendor, because it is clear that a minor under such circumstances as these would have, and the minor in this particular case had, twelve years within which to exercise his option as to whether he would take possession or not, and during that time the vendor, who would be unable to sue for the purchase-money, would remain in possession of another person's property with certain obligations resting upon him, uncertain as to whether the transaction would ever be completed or not. There are possibly two answers to that. It may be said that a purchaser from a minor must take his chance inasmuch as the law has set its face against minors entering into any obligations at all. *Secondly*, it may be presumed to be a somewhat rare occurrence that for a period of no less than two years there should be a purchaser who did not want the property and a vendor who did not want his money. There is probably something behind this case which further investigation will elucidate, and under the circumstances I am not sorry that the result of our decision is that the case goes down to the Court of first instance for evidence to be taken on the merits and for the true facts to be investigated. I agree in the order passed.

Appeal allowed; Cause remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 304 OF 1913.

May 13, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Roe.

BISESWAR GANGOOLY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHAGABATI CHARAN BANERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Co-owner's possession, when adverse—Ouster.

Where after the dispossession of the owners of a land by an adverse claimant some of them come into possession under a lease granted by the adverse possessor, their possession must be referred to the title which they acquired under the lease and not to their title as co-owners of the property and consequently, it will be considered adverse to the other co-owners, so as to extinguish the title of the latter under the Limitation law.

Appeal against the judgment and decree of the Subordinate Judge, Faridpore, dated the 22nd August 1913, affirming those of the Munsif, Madaripur, dated 24th June 1912.

Babu *Brojendranath Chatterjee*, for the Appellants

Babu *Ashitaranjan Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for declaration of title to land and for recovery of joint possession thereof along with the defendants. The land in dispute is included in an estate owned jointly by the plaintiffs and the defendants. Both the plaintiffs and the defendants were dispossessed by the proprietor of a neighbouring estate, who took possession of the land on the assertion that it formed part of his estate. Subsequently, the defendants took a lease of this land from the adverse possessor. The plaintiffs assert that as the defendants are their co-sharers, their possession cannot be treated as adverse to them. The Courts below have concurrently overruled this contention, which appears to us to be wholly unfounded.

Reliance has been placed by the plaintiffs on the decision of the Judicial Committee in the case of *Corea* v. *Appuhamy* (1), where Lord Macnaghten stated, with regard to the possession of a co-owner, that his possession is in law the possession of his co-owner, and it is not possible for him to put an end to that possession by any secret intention in his mind; nothing short of ouster or something equivalent to ouster can bring about that result. That doctrine has no application to the circumstances of the present case. Here the possession of the plaintiffs was not terminated by the defendants. The possession of both of them was terminated by a hostile claimant. The defendants subsequently came into possession under a lease granted by the claimant. Their possession must be referred to the title which they acquired under the lease, and not to their title as co-owners of the property held by them and the plaintiffs jointly. No doubt, as observed by Wood, V. C., in *Thomas* v. *Thomas* (2), possession is never considered adverse, if it can be referred to a lawful title. Here, however, the possession of the defendants is referable only to their title as lessees under a person who claims to hold adversely both to the plaintiffs and the defendants. We must, consequently, hold, on the principles explained in *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (3), that there was an ouster of the plaintiffs by the defendants, and as that ouster has continued for more than 12 years, the title of the plaintiffs has been extinguished.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(2) (1855) 2 K. & J. 79; 110 R. R. 107; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701.

(3) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 131 OF 1915.

January 3, 1916.

Present:—Mr. Justice Tudball and Mr. Justice Walsh.

GULZARI LAL—PLAINTIFF—APPELLANT

versus

LATIF HUSAIN—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss 182, 193—Appeal, second, to District Judge—Remand, order of—Appeal to High Court, maintainability of.

No appeal lies to the High Court from the order of remand passed by a District Judge in a second appeal to him under section 180 (2) of the Agra Tenancy Act. [p. 28, col. 1.]

First appeal from an order of the Additional Judge Farrukhabad, dated the 21st of April 1915.

Dr. *Surendra Nath Sen*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.

TUDBALL, J.—This is an appeal from an order of remand passed by a District Judge in a simple suit for rent. A preliminary objection is taken that no appeal lies to this Court. The suit was instituted in the Court of an Assistant Collector of the second class and was decreed. An appeal was preferred in the Court of the Collector of the District which upheld the decree. A second appeal was preferred to the District Judge under the provisions of section 180, clause (2). The learned District Judge has remanded the case through the Court of the first appeal to the Court of first instance for decision, in view of certain remarks made by the District Judge in his judgment. Act II of 1901, section 175, clearly lays down that no appeal shall lie from any decree or order passed by any Court under this Act

except as hereinafter provided. Appeals from District Judge's decisions are governed by section 182, which allows only second appeals to this Court from a decree in appeal of a District Judge in accordance with the provisions of Chapter XLII of the Code of Civil Procedure (Act XIV of 1882). In view of the above section and of the provisions of section 193, clause (*a*), it is quite clear that no appeal lies to this Court from the order of remand passed by the Court below. The preliminary objection must, therefore, prevail and the appeal is rejected with costs.

Appeal rejected.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 47 OF 1915.

May 25, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

REAJUDDIN BEPARI—PLAINTIFF—APPELLANT

versus

CHAND BAKSHA HAJI—DEFENDANT No. 1—RESPONDENT.

Landlord and tenant—Adverse possession—Acquisition of title by tenant.

A person who enters into possession of a land in the capacity of an under-*raiyat* cannot acquire any title by adverse possession against his lessor, unless he first goes out of occupation or unless he distinctly asserts such a title to the lessor's knowledge and gives him notice of such assertion. [p. 29, cols. 1 & 2.]

Failure to pay rent by a lessee to the lessor does not alone operate to create in favour of the lessee a title by adverse possession. [p. 29, col. 2.]

Doe d. *Joseph Manton* v. *Austin*, (1832) 9 Bing. 41; 2 M. & Scott. 107; 1 L. J. C. P. 152; 131 E. R. 529 and *Madan Mohan Gossain* v. *Kumar Rameswar Malia*, 7 C. L. J. 615, referred to.

Appeal under the Letters Patent against the decree of Mr. Justice Walmsley, dated the 11th March 1915, in Appeal from Appellate Decree No. 4168 of 1913.

FACTS of the case appear from the judgment.

Babu *Jotendra Mohan Ghosh*, for the Appellant.—This appeal arises out of a suit for *khas* possession on declaration of plaintiff's *raiyati* right in respect of three plots of land. The present appeal concerns itself with plot No. 3 of the plaint. My right and possession with regard to others have been declared. The Courts below as well as Mr. Justice Walmsley have held that my interest has been barred by adverse possession on the part of the contesting defendant No. 1. My submission would be that at least I was entitled in the suit to a declaration of my *raiyati* right over plot No. 3. The finding of the Munsif is that defendant No. 1 is a purchaser of the under-*raiyati* interest and as I have not recognised him and received rent from him for 12 years, my claim as regards this plot is barred. The lower Appellate Court affirms this finding. Here the defendant alleges to have held the *raiyati* interest in adverse possession in his defence. But there is no finding in the judgment of the lower Appellate Court to the effect that defendant No. 1 was holding adversely as a *raiyat*. He was holding as an under-*raiyat* and though he did not pay rent, mere non-payment of rent could not put an end to the status of landlord and tenant between himself and myself.

The lower Appellate Court should have, before deciding my right as barred, held that defendant, though he came into possession as an under-*raiyat*, subsequently asserted a *raiyati* title adversely to me and to my knowledge more than 12 years before suit.

The cases reported as *Madan Mohan Gossain* v. *Kumar Rameswar Malia* (1); *Rameshar Koer* v. *Gobardhan Lal* (2); *Ram Pershad Koeri* v. *Jaiwahir Roy* (3); *Moti Lal Roy* v. *Kalu Mandar* (4) and *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry* (5) support my contention.

Babu *Sailendra Nath Roy Chowdhary* for *B. Satish Chandra Ghose*, for the Respondent.—Defendant No. 1 claimed to hold as a *raiyat*. He did so without payment of rent for more than 12 years. Plaintiff would not recognise him. He sued him as a trespasser. The defendant has proved possession for over 12 years. Hence he has got the interest of a *raiyat* by an adverse possession against the plaintiff.

(1) 7 C. L. J. 615.
(2) 7 C. L. J. 202.
(3) 7 C. L. J. 72; 12 C. W. N. 899.
(4) 19 Ind. Cas. 853; 19 C. L. J. 321 at p. 323.
(5) 31 C. 397.

REAJUDIN BEPARI *v.* CHAND BAKSHA HAJI.

[MOOKERJEE, J.—Can you, coming in as a tenant, assert that you claimed adversely to the landlord subsequently? You have failed to show at what point of time you first changed your character as tenant. You cannot take recourse to an invalid deed which describes the under-*raiyat* as *raiyat*, and coming in through that assert that you have *raiyati* interest by adverse possession].

JUDGMENT.

SANDERSON, C. J.—In this case I think the appeal should be allowed.

It appears that the plaintiff purchased the *raiyati* interest in the land from Bakshi Prodhania and Falu Sikdar. The under-*raiyat* interest became vested by a series of transactions in a man called Abdul Ali, and through Abdul Ali the under-*raiyati* interest became vested in defendant No. 1 in respect of plot No. 3, which is the only plot regarding which this appeal is made.

Now apparently Abdul Ali purported to sell the *raiyati* interest, but it has been found by the Court below as a fact, which we must accept, that he had only the under-*raiyati* interest at the time of the sale. Therefore, as between him and the defendant No. 1, he was able to pass nothing more than the under-*raiyati* interest. The defendant No. 1 went into possession in the year 1893 in consequence of this purchase from Abdul Ali. Therefore, it must be taken for the purpose of this appeal that he entered upon the land in the capacity of an under-*raiyat*. The suit has been dismissed in respect of this plot, on the ground that the defendant No. 1 has thus been in possession of this plot from 1893 down to the institution of the suit, that is, more than twelve years. In my judgment in the circumstances of this case that is not a good ground for the dismissal of the suit.

This matter may be looked at perhaps from two points of view. If it is looked at from the point of view of the English Law, the defendant No. 1 being the under-*raiyat* of the plaintiff who had the *raiyati* interest, the defendant No. 1 could not dispute his landlord's title without first going out of occupation. We had occasion the other day to deal with this matter and I referred to the case of *Doe* d. *Joseph Manton* v. *Austin* (6) where Chief Justice Tindal said: "A tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title let him go out of possession." Looked at from this point of view of the English law if the defendant, the under-*raiyat*, wished to dispute the title of the *raiyat*, the plaintiff, he ought to have gone out of possession, and thereby made it clear that he intended to dispute the *raiyat's* title.

On the other hand, it may be looked at from another point of view, namely, that laid down by Mr. Justice Brett in the case of *Madan Mohan Gossain* v. *Kumar Rameswar Malia* (1). The head-note correctly, I think, represents the passage in the judgment to which I desire to refer and is as follows: "Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title." If we look at this matter from that point of view, there is no evidence whatever that the defendant, either when he went into possession of plot No 3 or after he went into possession of that plot, at any time asserted title so that it came to the landlord's knowledge that he, the defendant, was occupying the land not as under-*raiyat* having obtained the interest of Abdul Ali, but as owner asserting his title adversely to the plaintiff in this case. Whether we look at it from the point of view of the English Law or whether we look at it from the point of view of the law laid down in the case in this Court, to which I have referred, there is nothing to show that the occupancy of the defendant had ceased as that of a tenant and became that of an adverse possessor. Perhaps, it is only right to mention that failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession. It is true that no rent has been paid by the defendant to the plaintiff, but from the point of view of the law laid down in the above-mentioned case it will not operate as a defence for defendant No. 1.

(6) (1832) 9 Bing. 41; 2 M. & Scott. 107; 1 L. J. C. P. 152; 131 E. R. 529.

For these reasons I think that the learned Judge was wrong in dismissing the suit of the plaintiff as regards plot No. 3 altogether. In my judgment, the plaintiff is entitled to a declaration that his position is that of a *raiyat* and the position of the defendant No. 1 is that of an under-*raiyat* under him and that the plaintiff is entitled to rent on account of plot No. 3 from defendant No. 1.

The plaintiff is not entitled in this suit to a decree for possession, because he has not taken the steps which are necessary for him to take as *raiyat* to eject the under-*raiyat*.

For these reasons I think the decree of the first Appellate Court should be set aside and a decree made in favour of the plaintiff in the terms I have indicated.

The plaintiff will have the costs of this appeal and the appeal before Mr. Justice Walmsley, but each party will bear their own costs in the two lower Courts.

Of course this judgment is as regards plot No 3 only and we do not interfere with any of the decrees as regards the other plots

MOOKERJEE, J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

APPEALS FROM LOWER BURMA CHIEF COURT.

May 15, 1916.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

MAHOMED ISMAIL ARIFF AND OTHERS—APPELLANTS

versus

Hajee AHMED MOOLLA DAWOOD AND ANOTHER—RESPONDENTS.

Muhammadan Law—Trusts, public—Wakf—*Mosque—Scheme, settlement of, for management—Trustees, appointment of—Power of Court—Founder's intentions, enforcement of—Civil Procedure Code* (*Act XIV of* 1882), *s.* 539.

The Mussulman Law, like the English Law, draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the *Kazi*, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the *Kazi's* discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution. [p. 34, col. 1.]

In giving effect to the provisions of section 539 of the Code of Civil Procedure, 1882, and in appointing new trustees and settling a scheme for a public trust, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future. [p. 34, col. 2.]

The Board deprecated the giving of the power of appointing or electing trustees of a mosque in the hands of an indeterminate and necessarily fluctuating body of people, whether they called themselves *panchayet* or *jamaet*, and directed that the appointment of future trustees should be entrusted to a committee of worshippers, the composition of which was to be in the discretion of the Court, with due regard to local needs and conditions. [p. 35, cols. 1 & 2.]

Consolidated appeals from a judgment and decree of the Chief Court, Lower Burma, dated May 29th, 1912, reported as 18 Ind. Cas 105, reversing those of the same Court in its original civil jurisdiction, dated April 25th, 1910.

FACTS of the case are sufficiently set forth in their Lordships' judgment and in 18 Ind. Cas. 105.

Sir *Robert Finlay*, *K. C.* (with him Messrs. *A. P. Page* and Dr. *A. Majid*), for the Appellants.—In 850 the conquest of Burma took place. The mosque built in 1854 was burnt down in 1857. There was the conveyance of a plot of land in 1860. Hashim went away to Mecca in 1862 and the same year the grant of lands was made by the Government for the mosque In 1872 the plots were bought by the Randherias and a deed of *wakf* executed. Subscriptions were raised for building a Juma Mosque. All the things were done solely by the Randherias. The management had always remained in the hands of the same people, although the mosque was open to all Muslims for the purposes of prayer. The history of the mosque clearly shows that the intention of the founder was

that the management was to be in the hands of the Randherias alone. The Muhammadan Law laid down that the wishes of the founder could not be interfered with and that there was no difference between a public and private *wakf* in that respect.

Reference was made to *Shah Gulam Rahumtulla Sahib* v. *Mahommed Akbar Sahib* (1), *Advocate-General* v. *Fatima Sultani Begam* (2); Fatawa Alamgiri (Egyptian Edition), Vol. II, p. 407; Moheet-ul-Sarkhasi; Fatawa Kazi Khan; Zakhira.

Mr. *Dunne* (with him Mr. *Coltman*), for the Respondents.—The appellants had asked the Board to deal with the case in a manner never dealt with in the lower Courts. The respondents relied upon grants by the Government and the Court will have to see whether the story of succession was true.

[MR. AMEER ALI.—Other mosques were founded by others and so is this mosque.]

[LORD HALDANE.—If a chapel is established for all Baptists and the management vested in one section, the claim of other sections could not be sustained.]

[SIR JOHN EDGE.—If I were to profess the Sunni religion I can go there.]

[MR. AMEER ALI.—You have a right to come in if worship is conducted differently.]

The case was tried on the question of title of Randherias, but the question now raised was never raised in the pleadings. As a rule no such question of succession which would confine it to Randherias could be sustained by the Court. Hashim never laid down the rule of succession nor was it settled by custom. The mosque was held in trust for the Sunni Muslims generally and not for Randherias only. *Prima facie* the congregation must have a voice in the management.

[LORD HALDANE.—The intention of the founder will be determined by the circumstances.]

The Randherias could not have any right.

[SIR LAWRENCEE JANKINS.—In view of (1) custom and (2) deed of 1872, how could you upset it?]

[SIR JOHN EDGE.—They are trustees for all Muslims as they have to keep the mosque open.]

It was always called Juma Musjid and the main body of worshippers were non-Randherias.

(1) 8 M H. C. R. 63 at p. 67.
(2) 9 B. H. C. R. 19.

[MR AMEER ALI.—The *Kazi* would be entitled to appoint trustees and, therefore, a body may be appointed.]

[SIR JOHN EDGE.—The Randheria *Punchayet* may be appointed to deal with the matter.]

[LORD HALDANE.—The management would be vested in the Randherias possibly in the *punchayet* in trust for all, with a right to them to act if breach of trust occurred.]

Mr. *Page*, in reply.

JUDGMENT.

MR. AMEER ALI.—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque situated in the city of Rangoon. The plaintiffs in the action are five Mahommedan worshippers at the mosque, who trace their origin to a place called Randher, said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahommedans without restriction as to place of origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahommedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati Mosque. The Randherias, though trying to differentiate them-

selves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahommedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassin Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahommedan religion."

These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Mehtar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahommedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ibrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust-deed bears date the 16th March 1872 and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the *Sunni Jamaet Musjid* is erected or is in the course of being built, together with the godowns attached thereto, are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain exclusively in the hands of the Randheria *Jamaet* (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust-deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria *Punchayet* was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the

Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burma. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants Nos. 12 and 13, representing the general body of Sunni worshippers, and defendants Nos. 8 to 11 claiming to represent the Surati community, and Nos. 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any, is to be framed, should be framed on that basis.

The defendants Nos. 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahommedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, *viz.*:—

1. The effect of the trust-deed of 1872, and

2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust-deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned Trial Judge states their contentions in the following terms:—"It is urged that the original mosque was created by a Randheria; that the grant was revoked and the lands sold outright to Randherias; that they thus became the creators of the trust and were at liberty to make any lawful condition they pleased as to the management of the trust."

And his decision is expressed in these words:—"The position in 1871, then, was that the five vendees became the absolute and untrammelled owners of these two plots and could do with them as they pleased.....They became the owners of the mosque, shops, and lands, and created a trust of them. It was undoubtedly open to them to manage the trust themselves or to lay down the manner in which it was to be managed, and this they did in Exhibit C."

He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahommedan religion." they thought that "all Sunni Mahommedans were entitled to a voice and control of the Juma Musjid of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their

behalf. It has further been contended that under the Muhammadan Law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman Law, like the English Law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the *Kazi*, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect, so far as possible, to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the *Kazi's* discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman Law. And the authorities lay down that, "were the *wakif* (the founder) to make a condition that the King or *Kazi* should not interfere in the management of the *wakf*, still the *Kazi* will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust-deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahommedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under section 539 of the Code, which vests a very wide discretion in the Court. It declares (omitting the parts not material to this case) that—

"Whenever the direction of the Court is deemed necessary for the administration of any express or constructive trust created for public, charitable, or religious purposes, the Advocate-General, acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court, or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

"(*a*) appointing new trustees under the trust:

"(*e*) settling a scheme for its management;

"or granting such further or other relief as the nature of the case may require."

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow-

townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them; and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman Law vests in the *Kazi*, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael* v. *Abdool Carrim Peermamode* (3), which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *punchayet* or *jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers, the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

Orders discharged; Case remitted.

Solicitors for the Appellants: Messrs. *Bramall* and *White*.

Solicitors for the Respondents: Messrs. *Arnold and Son*.

(3) 1 Ind. Cas. 314; 35 I. A. 151; 13 C. W. N. 26 (P. C.); 4 M. L T. Special page 25.

JATINDRA NATH ROY *v.* SABIDANNESSA KHATUN.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 59 OF 1914.

May 31, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MR. JATINDRA NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SABIDANNESSA KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-owners, rights of—Joint property—Right to joint possession—Co-owner asserting exclusive right under adverse claimant, effect of, on rights of other sharers—Ouster, what constitutes.

A co-owner of an estate is entitled to a decree for joint possession of a parcel of the joint property, against his co-sharer who is in possession thereof by asserting an exclusive right under a title derived from an adverse claimant. [p. 38, col. 1; p. 39, col. 2.]

Per *Mookerjee, J.—Prima facie* co-owners are entitled to hold joint possession of joint property. Consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established, so as to justify exclusive occupation of the joint property by one of the co-owners [p. 39, col. 1.]

A co-sharer who has been ousted from joint property by another co-sharer is entitled to recover joint possession. [p. 39, col. 2.]

To constitute ouster, a physical eviction is not essential, if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other co-owners, there is an ouster in law: [p. 39, col. 2.]

Watson and Company v. *Ram Chund Dutt*, 18 C. 10; 17 I. A. 110; *Lachmeswar Singh* v. *Manowar Hossein* 19 C. 253; 19 I. A. 48; *Mohesh Narain* v. *Nawbut Pathak*, 1 C. L. J. 437; 32 C. 837, distinguished.

Lokenath Singh v. *Dhwakeshwar Prosad Narayan Singh*, 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51; *Biseswar Gangooly* v. *Bhagabati Charan Banerjee* 35 Ind. Cas. 26; 24 C. L. J. 38, referred to.

Appeal against the decree of Mr. Justice Mullick, dated the 19th May 1914, in Appeal from Appellate Decree No. 1468 of 1908.

FACTS of the case appear clearly from the judgment.

Babu *Surendra ChandraSen*, for the Appellants.—A co-sharer has the right to get joint possession with other co-sharers of any part of the joint property, if the other co-sharers are in possession so as to oust the former.

Mr. Justice Mullick is wrong in relying upon the two Privy Council cases of *Watson and Company* v. *Ram Chund Dutt* (1) and *Lachmeswar Singh* v. *Manowar Hossein* (2), as being authorities to the contrary. In those cases, there was no ouster and hence they are distinguishable.

Refers to *Mohesh Narain* v. *Nawbut Pathak* (3), *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (4).

Dr. *Dwarka Nath Mitter* for Babu *Provash Chandra Mitter*, for the Respondents.—Although in the written statement it was pleaded that the property in dispute is not any part of the joint property it has been now found that that defence is incorrect and the rights of the parties ought now be governed by the law that applies to co-sharers. Their pleading exclusive ownership does not amount to ouster. [See *Lachmeswar Singh* v. *Manowar Hossein* (2).]

At any rate, the case should be remanded so that the issue between the parties as to whether the possession was the possession of a co-sharer or amounted to ouster may now be tried on evidence.

JUDGMENT.

SANDERSON, C. J.—In this case in my judgment this appeal should be allowed.

The action was brought by the plaintiffs claiming a declaration of their title to 5/6th share in a certain property and also claiming that on the declaration of that title the plaintiffs should be admitted to joint possession with their co-sharers, and they also claimed mesne profits.

In the first Court the suit was dismissed altogether. In the second Court the plaintiffs obtained a decree for a declaration of their title and for joint possession with their co-sharers who are defendants Nos. 18 and 19. Defendants Nos. 18 and 19 appealed.

Mr. Justice Mullick upheld the decree so far as it concerned the title, but held that the plaintiffs were not entitled to joint possession with their co-sharers. The issues in the case were:—

"*First*:—Is the suit barred by limitation?

Second:—Is the suit bad for defect of parties?

(1) 18 C. 10; 17 I. A. 110 (P. C.).

(2) 19 C. 253; 19 I. A. 48 (P. C.).

(3) 1 C. L. J. 437; 32 C. 837.

(4) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.

Third:—Is the suit bad for misjoinder of parties and causes of action?

Fourth:—Does the land in suit appertain to *Mauza* Mukshadpur and *Zemindary* No. 5557?

Fifth:—What relief, if any, are the plaintiffs entitled to?

Sixth:—Have the plaintiffs their alleged right to the lands in suit?

In the Court of first instance, one of the material points in dispute between the parties was as to whether the land in dispute belonged to *Zemindari* No. 5557 or to Estate No. 2540, the defendants alleging that they admitted that the plaintiffs were entitled to 5/6th share in *Zemindary* No. 5557, and that they, the defendants, were entitled to 1/6th share in that *zemindary*. But they also alleged that the land in question did not belong to No. 5557 at all but belonged to No. 2540. Their case was that the owner of Estate No. 2540 granted to these defendants Nos. 18 and 19 a lease by reason of which they settled the land with the tenants in the year 1896, so that the defendants were alleging that the plaintiffs had no interest whatsoever in the land in question but that, on the contrary, the land belonged to the owner of Estate No. 2540 and that they were tenants of the land.

The questions stated by the learned Judge of the first Court of Appeal were in substance the same as what they were in the first Court but they were stated rather differently. The first issue was whether the plaintiffs' claim wes barred by limitation. The second was whether the disputed land was within the plaintiffs' *zemindary* in *Mauza* Mukshadpur and whether the defendants had the alleged right. That right is one which I have just now referred to, namely, the right of lessees under the owner of No. 2540. The third issue was whether the plaintiffs were entitled to get *khas* possession and *wasilat*.

Now the learned Judge of the first Appellate Court held that the land in question was part of Estate No. 5557 as the plaintiffs alleged, and thereby decided that point against the defendants. He also held that the case was not barred by limitation.

Then, when the case came to the High Court, the defendants Nos. 18 and 19 shifted their ground. They realized that they must now approach the case from the point of view that the land in question was part of No. 5557, although all along they, the defendants, had asserted that it belonged to No. 2540 and they urged that inasmuch as they, the defendants Nos. 18 and 19, were co-sharers with the plaintiffs in that Estate No. 5557, and they had been in occupation thereof, they could not be deprived of possession, placing reliance upon the cases which have been referred to in the course of Mr. Justice Mullick's judgment. The first of these cases was *Watson and Company* v. *Ram Chund Dutt* (1), the second was *Lachmeswar Singh* v. *Manowar Hossein* (2) and the third was *Mohesh Narain* v. *Nawbut Pathak* (3), in which Mr. Justice Harington and my learned brother Mr. Justice Mookerjee gave the decision. In my judgment, none of those cases covers this case. The defendants Nos. 18 and 19 asserted all along that their right to the land in question depended upon the title of a third person, namely, the owner of Estate No. 2540, and that they were in possession of the land under that person. They disputed the plaintiffs' allegation that this land was part of the *zemindary* of which the plaintiffs and the defendants were co-sharers, and consequently this case does not come within the decision of *Watson & Co.'s* case (1), which is the basis of all these cases, for this reason. In that case the land was held by the persons in common, one of whom was in actual occupation of part, cultivating it as if it had been his separate property. The other co-sharer attempted to enter on the land. The co-sharer in occupation resisted and it was held that as the resistance was made for the object of protecting himself in the profitable use of the land in good husbandry and not in denial of the other's title, such resistance was no ground for proceedings on the part of the other to obtain a decree for joint possession. In this case, defendants Nos. 18 and 19, although as a matter of fact it turns out now that they were co-sharers of the land in question, had in fact all along been setting up the interest of a third party, and were denying the title of the plaintiffs. For this reason I think that this case in no way comes within the decision in *Watson & Co.'s* case (1). The passage in the subsequent case [*Lach-*

meswar Singh v. *Manowar Hossein* (2)] which was read at my request by Dr. Dwarka Nath Mitter, shows that that decision was based upon the reason that although the co-sharer had set up the ferry and at one time had disputed the right of his co-sharers to have anything whatever to do with it, it was held that, although he had taken up that position, he did not interfere with the plaintiffs', the co-sharers' possession of the river and he, in fact, did not exclude any co-sharers. In the present case the defendants did exclude the co-sharers. Through their tenants they occupied the land not as co-sharers, but, as already pointed out, setting up the title of a third party and denying the plaintiffs' title and by so doing they excluded the co-sharers, the plaintiffs. For these reasons the cases to which I have referred do not cover this case. The learned Judge, I think with great respect to him, was misled when he thought, there was any similarity between the facts of this case and those of the above-mentioned cases.

With regard to the last point which was urged by Dr. Dwarka Nath Mitter, namely, that this case should be remitted to the Court of first instance, in order that an issue should be tried between the plaintiffs and the defendants treating them both as co-sharers, and in order that the defendants might be allowed to set up the defence that they had been in occupation as co-sharers and were cultivating the land as co-sharers with the consent of the plaintiffs, although personally I am always most anxious that the real issues between the parties should be investigated, especially if that can be done by making proper provision as regards costs, I do not think that this is a case in which we should do that. It has been pointed out by my learned brother Mr. Justice Mookerjee that this litigation has been going on for the last ten years and it was not until the last moment, when the case came before Mr. Justice Mullick in the High Court, that this point apparently was ever thought of. Besides it was quite inconsistent with the case set up in the Courts below. I do not think we should be doing justice to the plaintiffs in this case if we were to accede to this argument of the learned Vakil.

For these reasons I think this appeal should be allowed, the judgment of Mr. Justice Mullick set aside and that of the first Appellate Court restored. The plaintiffs are entitled to their costs of this appeal and the appeal before Mr. Justice Mullick.

MOOKERJEE, J.—I agree that the judgment of Mr. Justice Mullick cannot be supported.

The plaintiffs instituted this suit on the 23rd February 1906 for recovery of possession of a parcel of land upon declaration of title. Their case, shortly stated, was that the disputed land was comprised in Estate No. 5557 on the revenue rolls of the Collector of Faridpur; that they, along with the eighteenth and nineteenth defendants, were proprietors of that estate in the proportion of five to one; and that on the 18th February 1897 their co-sharers and the other defendants had unlawfully taken exclusive possession of the land. They prayed accordingly for recovery of joint possession on declaration of the aforesaid title to a 5/6th share of the land in suit. The defence in substance was that the disputed land was not comprised in Estate No. 5557; that it did not constitute the joint property of the plaintiffs and their co-sharer defendants; that it was the property of two other defendants who were proprietors of another Estate No. 2540 on the revenue rolls of the Collector of Faridpur; and that the defendants were lawfully in possession as lessees under the proprietors of that estate. The defendants further pleaded that the suit was barred by limitation, inasmuch as neither the plaintiffs nor the defendants as their co-sharers had been in occupation of the land as included in Estate No. 5557 within 12 years antecedent to the institution of the suit. The Court of first instance found upon the questions of title and limitation against the plaintiffs and dismissed the suit. Upon appeal the Subordinate Judge came to the conclusions, first, that the land was included in Estate No. 5557 as alleged by the plaintiffs and not in Estate No. 2540 as asserted by the defendants, and secondly, that the plaintiffs had been in possession within 12 years of the institution of the suit. The Subordinate Judge accordingly made a decree in favour of the plaintiffs, which entitled them to recover possession to the extent of their 5/6th share

jointly with the co-sharer defendants. On appeal to this Court, the decree of the Subordinate Judge was assailed principally on two grounds, namely, first, that the decision was erroneous in respect of the question of title; and secondly, that even if the question of title was deemed concluded by the decision of the Subordinate Judge, the plaintiffs were not entitled to a decree for joint possession of the land. Mr. Justice Mullick has held that the plaintiffs are not entitled to joint possession, and he has placed reliance upon two decisions of the Judicial Committee, namely, *Watson and Company* v. *Ram Chund Dutt* (1) and *Lachmeswar Singh* v. *Manowar Hossein* (2).

This decision has now been assailed on behalf of the appellants upon two grounds, namely, *first*, that the defendants should not be allowed, at this stage of the case, to fall back upon their position as co-sharers and to defeat the claim for joint possession of the land on the ground that they were entitled as co-sharers to take exclusive possession of the disputed land, and *secondly*, that even if the defendants be permitted to rely upon their status as co-sharers, the decisions mentioned are of no assistance to them. In my opinion, these contentions are well founded. It is plain that the defendants, even in their appeal to this Court, sought to maintain the position that they had entered upon the land as lessees under the proprietors of the Estate No. 2540. It was not until after they had failed upon that point, that they turned round and relied upon their position as co-sharers of the plaintiffs in respect of Estate No. 5557.

Now, the rule laid down by the Judicial Committee in *Watson and Company* v. *Ram Chund Dutt* (1), which is a rule of justice, equity and good conscience, must be applied with reference to the circumstances of the individual case before the Court. *Prima facie*, co-owners are entitled to hold joint possession of joint property. Consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established, so as to justify exclusive occupation of the joint property by one of the co-owners. No foundation for such a case has been laid in the pleadings, in the issues or in the evidence. The Court cannot now, after the matter has been fought for over ten years upon entirely different lines, allow the defendants to make a new case wholly inconsistent with what they had made before, and to have a remand and retrial. Besides it is perfectly plain, upon the admitted facts of this case, that the defendants cannot possibly resist the claim for joint possession. The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession. [*Mohesh Narain* v. *Nawbut Pathak* (3); *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (4).] In the present case, there is no room for doubt that the plaintiffs were ousted by the defendants. No other effect can possibly be attributed to the acceptance by the contesting defendant of a lease of the disputed land from an adverse claimant and to their entry upon the land in assertion of the title so derived from the adverse claimant. [*Biseswar Gangooly* v. *Bhagabati Charan Banerjee* (5) decided by Mr. Justice Roe and myself on the 13th May 1915.] Reliance has been placed, however, upon a passage from the judgment of the Judicial Committee in *Lachmeswar Singh* v. *Manowar Hossein* (2), to show that the mere fact that a co-owner has set up an adverse title in himself does not disentitle him to the benefit of his position as a co-sharer. That case is clearly distinguishable on the ground that there the co-owner had not been excluded from the enjoyment of the joint property. In the case before us, on the other hand, the plaintiffs have been excluded from the enjoyment of the joint property by the defendants in assertion of a hostile title. To constitute ouster, a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-owners, there is an ouster in law. When a co-owner accepts, as here, a deed of the whole property from one who has no title, and claims and exercises the rights of sole ownership under a denial of any other person's right in the premises, he is obviously in adverse possession to the exclusion of his co-sharers. In these circumstances, the plaintiffs are clearly entitled to a decree for joint possession.

(5) 35 Ind. Cas. 26; 24 C. L. J. 38.

In my opinion, the judgment of Mr. Justice Mullick is erroneous and cannot be supported; his decree must accordingly be reversed and that of the Subordinate Judge restored with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1444 OF 1915.

June 19, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

AUT BEHARY GUI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMESWAR MITRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Injunction, perpetual—Easement—Right to water of tank declared by decree of Court—Threatened interference with right—Owner filling up tank—Specific Relief Act (I of 1877), s. 54.

Where the right to the use of water in a tank has been declared in favour of a person by a decree of Court, the Court will permanently restrain the owner from interfering with such right by filling up the tank on the ground that it was overgrown with weeds, especially when the party who has acquired the easement offers to clear the weeds. [p. 41, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 21st of April 1915, reversing that of the Munsif, 1st Court, Katwa, dated the 29th May 1914.

FACTS.—This appeal arose out of a suit for perpetual injunction restraining the defendants from interfering with the plaintiffs' right of easement, in respect of which the plaintiffs in a previous suit between the parties had got a declaration.

The Court of first instance decreed the suit but the Court of Appeal below reversed the decision of the Court of first instance and dismissed the suit, holding that the tank became a nuisance and, therefore, might be filled up.

Babu *Bepin Behari Ghosh II*, for the Appellants.—The decree in the previous suit clearly declared the right of the appellants to use the water of the tank: the filling up of the tank means the infringement of that right and should, therefore, be restrained by a perpetual injunction.

Babu *Panchanan Ghose* for Babu *Naresh Chandra Sinha*, for the Respondents.—The right of easement presupposes two tenements, the dominant and the servient; if the dominant tenement is destroyed the right of easement also goes. See section 45, Indian Easements Act. The declaration in the previous suit of the plaintiffs' right to take water can restrain the defendants from any interference with that right so long as the tank exists, but it cannot restrain the defendants from filling up the tank if that be necessary. The Court of Appeal below has found that the tank has become a nuisance, hence the Municipal Authorities could have ordered the defendants to fill up the tank.

JUDGMENT.—This is an appeal from the judgment of the learned Subordinate Judge of Burdwan, dated the 21st April 1915, reversing the decision of the Munsif of Katwa. The suit was brought by the plaintiffs to obtain a perpetual injunction restraining the defendants from filling up a certain tank in which the plaintiffs had an easement by virtue of a declaratory decree that was made in a former suit in their favour. The case apparently, therefore, was a very simple one because the evidence established without doubt that the defendants were doing and about to do acts which must necessarily interfere with the rights of the plaintiffs that were declared in their favour in the former suit. The case, however, which was made and commended itself to the learned Judge of the lower Appellate Court was that the tank had become a nuisanec to the defendants and that, therefore, the defendants were entitled to fill it up. The method in which the tank, according to the judgment of the learned Judge, became a nuisance to the defendants was that the tank was overgrown with weeds and was full of insects. As regards the second point I have grave doubt whether the learned Judge did, in fact, mean that the tank was full of insects, because in one place of his judgment he remarked that the ladies of the plaintiffs' household were using the water of the tank for washing clothes, utensils, etc., and that apparently the water was also used for drinking purposes, which I am astonished to

hear if the learned Judge could have meant to say that the water was full of insects. The view, of course, that the tank is full of weeds may be true, because if weeds once begin to grow in a tank it is liable to be overgrown with them. The plaintiffs, however, offered to bear the expenses of having the tank cleared of these weeds. So, therefore, the defendants had no substantial grievance with regard to that point. The insects apparently, according to the argument of the learned Vakil of the defendants who are the respondents before us, are not in the tank but only over the top of the tank, the water of which we are told is overgrown with weeds. We are not told what these insects are. They may be butterfly or mosquito or any other kind of insect. It is wholly a novel idea that because insects fly over the tank, the ladies of the plaintiffs' household cannot use the water of it which the Court in the former suit found that they had a right to. This Court in making the decision in the former suit expressed no opinion as to the defendants' right to fill up the tank. There can be no doubt that that was the the source both of the weeds and the insects and the origin of the present suit. The plaintiffs have a clear right in this case under the declaration made by the Court in the former suit and the right declared in that suit has been deliberately infringed by the defendants, and the Court ought in this case to award to the plaintiffs a perpetual injunction restraining the defendants from interfering with that right. The present appeal must, therefore, be allowed and the decree of the learned Judge of the Court of Appeal below must be set aside and that of the Court of first instance restored. The defendants must pay the costs of the plaintiffs in this Court as well as in the Court of Appeal below.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 35 OF 1916.

May 31, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

BHAWAN AND ANOTHER—DEFENDANTS APPELLANTS

versus

MADAN MOHAN LAL—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Remand—Determination of question of tenancy, failure of—Agra Tenancy Act (II of 1901), s. 202—*Res judicata*—Previous decision of revenue Court not given effect to—Fresh suit, maintainability of.*

Where in a suit the defendant meets the plaintiff's suit by a plea of the existence of a still subsisting tenancy, the position described by section 202 of the Agra Tenancy Act arises; and if the first Court overlooks this provision, the Appellate Court is justified in remanding the suit to the first Court to be proceeded with from the point at which that Court went wrong. [p. 42, cols. 1 & 2.]

Where the Revenue Court once determined that the relationship of landlord and tenant existed between the parties, that point is *res judicata* between the parties; but if it is set up that events have taken place since then which have put an end to the tenancy and the landlord has entered into possession of the land as trespasser, pure and simple, the question has to be determined by the proper procedure. [p. 42, col. 2.]

First appeal from an order of the Subordinate Judge, Shahjahanpur, dated the 23rd December 1915.

Mr. *Lakshmi Narain*, for the Appellant.

Messrs. *Gulzari Lal* and *Baleshwari Prasada*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants against an order of remand. The appellants were at one time in possession of a certain plot of land as tenants of one Din Dayal. Din Dayal took proceedings in the Revenue Court to eject them, on the ground that they were tenants-at-will. The Court of first instance, *i. e.*, the Court of the Assistant Collector, dismissed Din Dayal's suit for ejectment. It was decreed on appeal by the Commissioner, and again dismissed on second appeal by the Board of Revenue. In the meantime, however, the *zamindar* had taken out execution of the Commissioner's decree and had obtained formal possession. After the decision of the Board of Revenue in their favour, the tenants came to the Revenue Court and asked to be restored to possession. It was held that this application, having been made after the pres-

cribed period of limitation, was not maintainable and it was dismissed accordingly. The present plaintiff is the son of Din Dayal. He has brought this suit in the Civil Court, on the allegation that the practical effect of the proceedings in the Revenue Court, and more particularly of the failure of the tenants to obtain within the prescribed period of limitation the benefit of the Board of Revenue's decision in their favour, had been to extinguish the tenancy. He alleges that he was himself in actual possession of the land in suit, cultivating the same as his *khudkasht*, when the defendants reentered into forcible possession thereof. He seeks for their ejectment as trespassers. The defendants' reply was to the effect that their tenancy was still subsisting and had not been extinguished by any of the facts relied upon by the plaintiff. The learned Munsif framed a number of issues and came to a decision in favour of the defendants on the question of their being still in possession under a subsisting tenancy. He also found in favour of the plaintiff on a subsidiary question, as to the latter's being entitled to damages on account of forcible possession taken by the defendants. Both parties appealed against this decree. The lower Appellate Court has pointed out that the provisions of section 202 of the Agra Tenancy Act (Local Act II of 1901) had been overlooked by the Court of first instance. When the defendants met the plaintiff's suit by a plea of the existence of a still subsisting tenancy the position described by section 202 aforesaid arose, and the provisions of that section ought to have been complied with. In this view the learned Subordinate Judge has set aside the decree of the Court of first instance and has remanded the case to that Court, with directions to begin the trial all over again at the point where that Court went wrong, *i. e.*, the Court of first instance has been directed to pass an order in compliance with the provisions of section 202 of the Tenancy Act and to suspend all further proceedings until the legal consequences of that order have taken effect.

In appeal against this order of remand a formal objection is taken that the order in question is not one which should have been passed, but that the lower Appellate Court ought, in any view of the case, to have passed an order itself under the provisions of section 202 aforesaid. It appears that there are conflicting decisions of the Court on the point; but we are content to refer to the case of *Mare* v. *Gauri Sahai* (1) which commends itself to our minds. We think it obviously more convenient that the case should be sent back to the Court of first instance to be proceeded with by that Court from the point at which that Court had gone wrong. In the *second*, place the decision of the lower Appellate Court is assailed on the merits. We have been referred to the reported case of *Sarju Missir* v. *Bendesri Pershad* (2) It is contended that the question of the existence of a tenancy, and of the rights of the present appellants as occupancy tenants of the land in suit, have been determined once for all by the decision of the Board of Revenue, that this decision should have been accepted and that there was no room for any order under section 202 of the Tenancy Act. On the facts of the present case we do not think that the ruling above referred to is applicable. The decision of the Board of Revenue determines this point, *viz.*, that on the date on which the present plaintiff's father sought the ejectment of the defendants as tenants-at-will, the said defendants were in fact in possession of the land in suit as occupancy tenants. That point is *res judicata* between the parties, having been determined by the ultimate Court of competent jurisdiction. The plaintiff's case is that events have taken place since then which have put an end to the tenancy, and that the defendants have re-entered into possession of the land in suit as trespassers, pure and simple. It has to be determined, on the one hand, what is the legal effect of the failure of the defendants to obtain within the prescribed period of limitation the benefit of the Board of Revenue's decision in their favour; and, on the other hand, the provisions of section 13 of the Tenancy Act and their application to the facts of the present case require to be considered. These, however, are points reserved by the Legislature for the decision of Revenue Courts. The question must go to those

(1) A. W. N. (1905) 46.
(2) 20 Ind. Cas. 917; 11 A. L. J. 691.

Courts for determination, whether the events which have occurred since the original suit for ejectment was instituted have or have not extinguished the tenancy which the Board of Revenue found to exist. We are satisfied that the order of the lower Appellate Court was right and the direction given by it correct. We, therefore, dismiss this appeal. Under the circumstances we order that costs of this appeal be costs in the cause.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2962 OF 1913.

May 3, 1916.

Present:—Mr. Justice Atkinson.

Lala RAJA RAM LAL AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

HANUMAN UPADHYA AND ANOTHER—PLAINTIFFS, AND *Musammat* TETRA KOER AND ANOTHER—DEFENDANTS NOS. 9 AND 10—RESPONDENTS.

Mortgage—Sale of mortgaged property under Revenue Sale Act—Extinction of mortgage right—Personal covenant, right to sue on—Subsequent letting by purchaser to mortgagee, whether operates as graft on prior interest—Right to proceed against surplus proceeds—Transfer of Property Act (IV of 1882), s. 90—Mortgagors, several, joint liability of.

An usufructuary mortgage was executed in 1891 in favour of the plaintiff. The mortgaged property was sold under the provisions of the Revenue Sale Act on 25th August 1905. The purchaser got actual physical possession on the 22nd of March 1906, and on 16th July 1908 transferred it by way of gift to a third person. The donee in his turn, on the 16th of July 1908, let a portion of the mortgaged property to the plaintiff who was the mortgagee under the deed of 1891. On August 26th, 1911, the plaintiff brought a suit on the basis of his mortgage for a personal decree against the mortgagors:

Held, (1) that the suit was not barred by limitation, as the cause of action accrued to plaintiff on 22nd March 1906 when he was ousted from the property; [p. 44, col. 1.]

(2) that the mortgage security having been completely extinguished under the provisions of the Revenue Sale Act in 1905, the subsequent re-letting to the plaintiff had not the effect of operating as a graft upon the prior interest of the mortgagor; [p. 44, col. 2.]

Raja Krishendatt Ram v. *Raja Mumtaz Ali Khan*, 5 C. 198; 5 C.L.R. 213; 6 I. A. 145; *Gurbasappa Sangappa* v. *Rango Venkatesh*, 16 Ind. Cas. 348; 36 B. 539; 14 Bom. L. R. 563, distinguished.

(3) that the possession of the mortgagee by virtue of the property being let out to him was not *qua* mortgagee and consequently his suit for a decree for money against his mortgagor was not barred. [p. 44, col. 2.]

Section 90 of the Transfer of Property Act has no application, except in cases where the mortgage-deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognized that a mortgagee has the right to proceed concurrently with all the remedies he is entitled to, to enable him to realize his debt. He is perfectly entitled to sue on the personal covenant contained in a mortgage-deed. [p. 44, col. 2.]

Mortgagors are jointly and severally liable to the mortgagee, though, as amongst themselves they are entitled to contribution. [p. 45, col. 1.]

Babu *Rajendra Prasad* for Babu *Harihar Prasad Sinha*, for the Appellants.

Mr. *Susil Madhub Mullick*, for the Respondents.

JUDGMENT.—This is an action to recover Rs. 999 as and for principal and interest on foot of a mortgage-bond dated the 13th of July 1891. The bond was executed by the defendants Nos. 1 and 4 and father of defendants Nos. 5 to 8. The land comprised in the mortgage was 18 *bighas* situate in *Mauza* Kasurha. The mortgagee now seeks to recover on foot of the personal covenant in the mortgage-deed the amount of principal and interest due. The mortgaged property was partly sold at a revenue sale in March 1899 and again a part was sold in June 1899, and the purchaser of both these parts was subsequently sold out by the Revenue Authorities for arrears due, when the entire estate was re-sold on the 25th of August 1905 under the provisions of the Revenue Sale Act. The 3rd sale was the sale of the entire property and under the provisions of the Revenue Sale Act the land became discharged from all encumbrances.

The purchaser at the revenue 3rd sale was Harihar Prasad Singh. He purchased the property on the 28th of August 1905 and he got actual physical possession of the land on the 22nd of March 1906 and the land was sold by the Revenue Authorities to satisfy an arrear due on the 26th of June 1905.

The contention put forward by the appellant is that this action is time-barred inasmuch as, he alleges, the cause of action arose on the 7th of June 1905. In my

opinion the cause of action did not arise on the 7th of June 1905; that is a date only fixed for the purpose of title and does not at all affect the question of possession on which depends the applicability of the Statute of Limitation.

It is alternatively contended that if the cause of action did not arise on the 7th of June 1905, then it arose on the 25th of August 1905, the date of the 3rd sale, and the plaintiffs' right to bring this action on the foot of their mortgage-deed would begin to run from that date and if that be the date taken, then they are statute-barred because the plaint was insufficiently stamped on the date it was filed. The plaint was filed and registered on the 26th of August, and was not fully stamped under the provisions of the Court Fees Act and it is alleged that by reason of this fact the limitation of time within which this action should have been brought, *viz.*, 6 years, would have expired for the suit was not duly instituted. It is not necessary for me to go into the question arising out of the Court Fees Act and the insufficiency of the stamp, because I hold that the time on which the cause of action in this case began to run would be the 26th of March 1906 the date when the possession of the mortgagees was in fact determined by ouster. But if it became necessary to consider whether or not the plaint filed on the 26th of August 1911 was in time, I would be prepared to hold on the evidence adduced in this case that the plaint having been duly registered and filed even though insufficiently stamped on 26th of August 1911, that even then the suit was in time. That disposes of the main point in this case and as to that I am satisfied that this action is in time and the defence pleaded of the Statute of Limitation is not maintainable.

It is contended, furthermore, that the plaintiffs are barred by being in possession, or at least having got a re-letting of the land, from the auction-purchaser who purchased in August 1905 or from his donee, inasmuch as that re-letting was made to a person occupying the position of a mortgagee and was a graft upon the original interest of the mortgagors and that thus the mortgagee was in fact and law, and still is, in possession of the mortgaged property. In my opinion that argument both in law and fact utterly fails. The question is one of mixed law and fact and the facts are not such as would in this case enable one to apply the legal principle of graft. The entire estate had been sold under the Revenue Act, all rights of the mortgagee had been barred, the old title was completely extinguished and the auction-purchaser conveyed on the 16th July 1908 (two years later) the property which he purchased, to some person as a gift and that person on the 16th of July 1908 made a letting of $15\frac{1}{2}$ *bighas* of the lands originally mortgaged to the plaintiffs who had been mortgagees in respect of the 18 *bighas* of land, the subject-matter of the mortgage-deed of the 18th July 1891. In that view it is impossible to contend that that letting could operate as graft upon the prior interest of the mortgagors. The cases referred to as *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (1) and *Gurbasappa Sangappa* v. *Rango Venkatesh* (2) in my opinion do not apply. In order that the doctrine of graft could apply there must be some life in the old stock, that is, in the old interest. In this case there is no such life, the interest was dead and determined by the sale and by operation of law.

It is further argued that the plaintiffs must pursue the relief they seek against the purchase-money representing the land sold, *viz.*, Rs. 7,500, before they can proceed upon their personal covenant. Section 90 of the Transfer of Property Act is relied upon to support this contention. Section 90 has no application, except in cases where the mortgage-deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognized that a mortgagee has the right to proceed concurrently with all the remedies he is entitled to, to enable him to realize his mortgage-debt. He has elected to proceed in this case on the personal covenant contained in the mortgage-deed. In my opinion he is clearly entitled to do so. It is said that Rs. 7,500 out of the sale-proceeds of this land was

(1) 5 C. 198; 5 C. L. R. 213; 6 I. A. 145.
(2) 16 Ind. Cas. 348; 36 B. 539; 14 Bom. L. R. 563.

lying in the Collectorate and available to satisfy the mortgagee's debt. If this money was really available to the mortgagee as Mr. Mullick very properly points out, nobody but a fool would have resorted to the course adopted, *viz.*, taking the chance of realising his debt by suit on the personal covenant. But we know nothing about the history of the Rs. 7,500. There may have been prior mortgages affecting it. It may have been appropriated for purposes of which, we know nothing. But I can hardly conceive it possible that a man who was a creditor, would allow the chance of getting paid his money pass without making an effort to get paid his debt, if there was a fund available to his hand for the purpose.

Then it is further contended that the mortgagors are only liable jointly in respect of their shares, or as the learned Vakil for the appellant puts it, liable by way of joint contribution. That argument is equally fallacious. Mortgagors are jointly and severally liable. As between themselves, of course, there may be contribution as between themselves does not affect the rights of the mortgagee. But as a basis of contribution as between the mortgagors themselves there must be a payment by one in satisfaction of the entire debt; then as between the one who pays the debt and the other the right to contribution may arise. But the mortgagee is entitled to recover from both jointly and severally.

For these reasons I am clearly of opinion that the learned Subordinate Judge was right and properly dismissed this action with costs. I dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 120 AND 121 OF 1915.

July 30, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

YUSUF AKRAM—PLAINTIFF—PETITIONER

versus

ARFAN ALI KHAN—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17 (1), proviso, applicability of—Application for revival of suit dismissed for default.

A plaintiff who applies for revival of his suit, which has been dismissed for default by a Small Cause Court, has not to make the deposit or furnish the security as required by the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act, as his application is not for an order to set aside a decree passed *ex parte*. [p. 45, col 2.]

Jamina Bibi v. *Seri Chand Bhagat*, 2 C. W. N. 693, followed.

Civil Rules against the decision of the Munsif, Bhanga, dated the 14th November 1914.

Babu *Hem Chunder Mojumdar*, for the Petitioner.

JUDGMENT.

MOOKERJEE, J.—We are invited in this Rule to set aside an order of the Small Cause Court Judge dismissing an application for revival of a suit which had been dismissed for default. The Small Cause Court Judge held that the plaintiff had failed to deposit, as required by law, the amount of costs due from him to the defendant under the decree or to furnish security to the satisfaction of the Court. In our opinion, this view is clearly erroneous. The proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act lays down that an applicant for an order to set aside a decree passed *ex parte* shall make the requisite deposit or give security. But an applicant for an order to set aside an order of dismissal for default is plainly not an applicant for an order to set aside a decree passed *ex parte*. This view is in accord with the decision of this Court in the case of *Jamina Bibi* v. *Seri Chand Bhagat* (1). The matter has now been placed beyond controversy by clause (2) of section 2 of the Code of 1908, which lays down that an order of dismissal for default is not a decree.

(1) 2 C. W. N. 693.

The result is that this Rule is made absolute, the order of the Small Cause Court Judge set aside and the case returned to him in order that the application for revival of the suit may be heard on the merits. As the Rule is not opposed we make no order for costs.

This judgment will govern Rule No. 121 of 1915 in which a similar order will be drawn up.

Rules made absolute; Cases remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 88 OF 1915.

May 12, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

GANGA DAHAL RAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat GAURA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 10, 11—Pauper suit partly successful—Costs, defendant, if liable for whole—Court-fees—Equity.

In a case in which a pauper plaintiff partly succeeds and partly fails, the Court is presumably intended to deal with such a case by combining the provisions of rules 10 and 11 of Order XXXIII of the Civil Procedure Code, 1908, and apportion the costs according to success and failure. [p. 47, col. 2.]

In a pauper suit it is not equitable to permit a plaintiff to penalise the defendant by exaggerating his claim. [p. 48, col. 1.]

Semble.—The question of the discretion of a Court in dealing with a case in which a pauper plaintiff has partially succeeded and partially failed is one which deserves to be dealt with by a special rule. [p. 47, col. 2.]

First appeal from the decision of the Subordinate Judge, Basti, dated the 16th January 1915.

FACTS.—The plaintiff, alleging herself to be the widow of a member of a joint Hindu family of which the defendants were the survivors, brought a suit for maintenance in *forma pauperis*. She claimed maintenance as the rate of Rs. 40 per mensem and Rs. 300 on account of the value of certain ornaments which, she alleged, had been wrongfully taken possession of by the defendants. The defendants denied that she was the widow of the deceased member of their family and pleaded that the property in their possession was very small. The Court held that the plaintiff was the widow of one of the members of the joint Hindu family, that the claim as to the ornaments was not proved and that she was entitled to Rs. 5 per mensem as maintenance. The defendants, however, were ordered to pay the full amount of Court-fee, *viz.*, Rs. 264-8-0.

The defendants appealed to the High Court.

Dr. *Surendra Nath Sen* (with him Mr. *Lakshmi Narain*), for the Appellants.—The Court below was not justified in awarding full costs to the plaintiff. The order as to the payment of full Court-fees by the defendants is inequitable and illegal. The Court may have a discretion in this matter, but in the present case there was no justification for passing such an order. The defendants should not be punished if the plaintiff chooses to inflate her claim in order to harass the defendants.

Mr. *Jawahar Lal Nehru*, for the Respondent.—The defendants denied the plaintiff's right altogether to claim maintenance. They set up a false defence and the Court below was justified in ordering them to pay the Court-fees on the amount claimed. The provisions of the Code of Civil Procedure, Order XXXIII, rule 10, apply to the case. Rule 11 of Order XXXIII does not apply.

Dr. *Sen* was heard in reply.

JUDGMENT.—The plaintiff in the suit out of which this appeal arises was a Hindu widow seeking to enforce her right of maintenance against the surviving members of the joint family to which her late husband had belonged. She claimed maintenance at the rate of Rs. 40 per mensem, and she added a further claim in respect of gold ornaments valued at Rs. 300, said to be her property in the hands of the defendants. She was met by a denial of the relationship on which her claim was based. In the opinion of the learned Subordinate Judge she succeeded in proving that relationship. She failed to support her claim in respect of the gold ornaments by any reliable evidence, and with regard to the amount of the maintenance claimed by her the Court below held that her claim

was altogether excessive in view of the evidence as to the means possessed by the defendants. In the result the learned Subordinate Judge gave the plaintiff a decree for maintenance at the rate of Rs. 5 per mensem and dismissed the rest of her claim. The appeal before us is by the defendants.

The first two paragraphs of the memorandum of appeal challenge the findings of fact on which the decree in favour of the plaintiff is based. It has been frankly conceded before us in argument that, in view of the evidence led in the Court below and accepted as true by the learned Subordinate Judge, these pleas cannot be pressed. A third plea in the memorandum of appeal before us assails the order of the Court below on the question of costs and this deserves consideration. It is apparent from the facts already stated that, on a mere paper estimate of the value of the claim as brought and the amount of the claim decreed, the plaintiff has succeeded only to a comparatively small extent. Nevertheless she has succeeded in proving her case against the defendants on the principal issue of fact involved. The learned Subordinate Judge was, therefore, of opinion that this was a case in which costs could not be apportioned strictly in accordance with the result of the litigation. He has, however, carried this principle very far in favour of the plaintiff by laying the entire costs of the suit on the defendants. It is to be noticed further that this is not a case which merely raises the question of the discretion of a Court in the matter of apportionment of costs. The fact is that the plaintiff sued as a pauper under the provisions of Order XXXIII of the Code of Civil Procedure, and the costs of the Court-fee stamp which would have been payable on the plaint require to be apportioned under the provisions of rules 10 and 11 of the aforesaid Order. The learned Subordinate Judge has directed the defendants to bear the costs actually incurred by the plaintiff in the litigation, and he has added a direction, purporting to be made under Order XXXIII, rule 11, of the Code of Civil Procedure, to the effect that a sum of Rs. 264-8-0, being the amount of the Court-fee which would have been payable on the plaint, shall be realised by the Collector of the district from the defendants. It is this portion of the order which is principally challenged in the present appeal. Under rule 10 of Order XXXIII of the Code of Civil Procedure the Legislature deals with the case of a pauper plaintiff who succeeds in the suit and under rule 11 with the case of a pauper plaintiff who fails in the suit. There is no separate provision for a case like the present, in which a pauper plaintiff has partly succeeded and partly failed. Presumably the Court is intended to deal with such a case by combining the provisions of the two rules. In a case somewhat similar to the present case, *Chandrareka* v. *Secretary of State for India* (1), the learned Judges of the Madras High Court held under the analogous provisions of the former Civil Procedure Code (Act XIV of 1882) that it was illegal to lay upon the defendant in such a suit a larger proportion of the Court-fees leviable from the plaintiff than would have been payable by the said plaintiff if the claim had been limited originally to that portion which was successful On this principle the correct order in the present case would be that a sum of Rs. 45 on account of the Court-fee stamp will be realisable from the defendants in the manner directed by the Court below, and that the balance of Rs. 219 8-0 is recoverable from the plaintiff under the provisions of Order XXXfII, rule 10. The question of the discretion of the Court in dealing with a matter of this sort, *i. e.*, with a case in which a pauper plaintiff has partially succeeded and partially failed, is perhaps one which deserves to be dealt with by a special rule. But certainly, on the provisions of Order XXXIII, rules 10 and 11 of the Code of Civil Procedure as they stand, it is difficult to arrive at any conclusion other than that laid down by the Madras High Court, without some apparent straining of the language of the rules.

With regard to the equities of the case there is this much to be said: in an ordinary litigation the defendant has some protection against any extravagant exaggeration of his claim on the part of a plaintiff who knows that he has a good case for some relief, in the fact that the plaintiff is bound

(1) 14 M. 163.

to pay out of his own pocket in the first instance the whole of the Court-fee leviable on the plaint as drafted. It is otherwise in the case of a suit brought by a pauper plaintiff, and it would not be equitable to permit such a plaintiff to penalise the defendant by exaggerating his claim. The present case illustrates this principle to a certain extent, and it would be still more obvious if the plaintiff had claimed maintenance at the rate of say Rs. 400 instead of Rs. 40 per mensem. The injustice in such a case of laying the entire burden of the Court-fee on the defendant would be apparent. We think, therefore, that the proper way to deal with the present case is to follow the principle laid down by the Madras High Court in the case already quoted. We accordingly modify the order of the Court below on the question of Court-fees. We direct that a sum of Rs. 45 be recoverable from the defendants as directed by the Court below, and with regard to the balance of Rs. 219-8-0 we can only deal with the same in the manner laid down by Order XXXIII, rule 10, of the Code of Civil Procedure, that is to say, we must make a formal order that this sum is recoverable by the Government from the plaintiff and is the first charge on the subject-matter of the suit, that is to say, on the annuity which has been decreed in favour of the plaintiff. We must leave it to the proper authorities to consider whether the interests of Government require that it should stand on its extreme rights in a matter of this sort. After all no actual loss has been suffered by Government by reason of the plaintiff's overestimate of her claim, and it will, no doubt, receive due consideration in the proper quarter whether it is equitable to insist upon realising this sum out of the small pittance decreed in favour of the plaintiff.

We accordingly allow this appeal to the extent stated and otherwise dismiss it. We leave the parties to bear their own costs in this Court.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1765 OF 1913.

May 20, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

GOVINDA CHANDRA BASAK—DEFENDANT—APPELLANT

versus

HARIDAS BASAK—PLAINTIFF—RESPONDENT.

Partnership—One partner contributing more capital than his share, rights of—Interest.

As a general rule, interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the parties as shown by the partnership books or a trade custom to the contrary; but this general rule is subject to an important qualification, namely, that subject to any agreement between the partners, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. [p. 48, col. 2; p. 49, col. 1.]

Appeal against the decision of the District Judge, Dacca, dated the 18th March 1913, confirming that of the Subordinate Judge, Dacca, dated the 21st September 1912.

Babus *Jogesh Chandra Roy* and *Bepin Chandra Bose*, for the Appellant.

Babu *Probodh Chandra Roy*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendant in a suit for dissolution of partnership and adjustment of accounts. The plaintiff and the defendant were partners. Their original idea was that capital should be contributed equally by both of them; but in the events which have happened, the defendant, it is said, has contributed a much larger sum than the plaintiff has done. The defendant prays that in the settlement of accounts he may be allowed interest on the excess sum contributed by him towards the capital. The Courts below have disallowed this claim. In our opinion the view taken by the District Judge cannot be supported.

On behalf of the respondent, it has been urged that, as a general rule, interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the parties as shown by the partnership books, or a trade custom to the contrary. This may be accepted as a correct statement of the general rule, and is recognised in a long

line of authorities. [*Rishton* v. *Grissell* (1); *Hill* v. *King* (2); *Rhodes* v. *Rhodes* (3); *Stevens* v. *Cook* (4); *Cooke* v. *Benbow* (5); *Boddam* v. *Ryley* (6); *Pim* v. *Harris* (7).] But upon this rule, there has been engrafted an important qualification, namely, that an advance by a partner to the firm is treated, not as an increase of its capital, but rather as a loan on which interest should be paid; and that, subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. This principle is obviously consistent with the rules of justice, equity and good conscience which we are bound to administer. In *Millar* v. *Craig* (8) Lord Langdale, M. R., observed: "Can one believe that a party to whom the whole capital belonged renounced his advantage in that respect, and continuing to take an equally laborious part in the transaction of the business, should bring in his whole income, both partnership and private, and yet intend to reserve no advantage of that income upon the settlement of accounts between himself and co-partner? I must say, I have great difficulty in coming to such a conclusion as that." A similar view was expressed by Knight Bruce, L. J., in *Ex parte Chippendale* (9): "But there remains the question of interest. As to this I have doubted. Without, however, relying merely on Lord Hardwicke's authority, as, for instance, on *Omychund* v. *Barker* (10) and *Barwell* v. *Parker* (11), I think that mercantile usage and the general course of trade dealings do, where a partner in a trade has duly and properly avanced money of his own for the purposes of the partnership business, so as to become justly a creditor in account with the partnership for the amount, raise an implied contract for interest, so as to entitle the partner advancing to have his account with the firm credited with interest accordingly, although his partners may not have authorised, and may not have known of the transaction, at least in the absence of any express contract to the contrary." To the same effect are the observations of Turner, L. J., that the view can be defended on grounds of equity. In our opinion, it is fairly clear that in the present case the plaintiff-respondent who claims the benefit of the profits which have accrued from the sums advanced to the partnership business by the defendant, is bound in justice to make an allowance for interest on those sums to his partner.

The result is that this appeal is allowed in part and the preliminary decree made by the District Judge modified. We direct that on all sums advanced by the defendant towards the partnership concern in excess of his share of the capital, interest be allowed in his favour at the rate of six per. cent. per annum. Each party will pay his own costs throughout the litigation.

Appeal partly allowed.

(1) (1868) 5 Eq. 326.
(2) (1863) 3 De G. J. & Sm. 418; 9 Jur. (N. s.) 527; 8 L. T. 220; 1 N. R. 341; 32 L. J. Ch. 79; 46 E. R. 697; 142 R. R. 118.
(3) (1860) 6 Jur. (N. s.) 600; Johns. 653; 119 R. R. 1058.
(4) (1859) 5 Jur. (N. s.) 1415; 115 R. R. 1066.
(5) (1863) 3 De G. J. & Sm. 1; 6 N. R. 135; 46 E. R. 538; 142 R. R. 1.
(6) (1783) 1 Brown. C. C. 239; (1785) 2 Brown. C. C. 2; (1787) 4 Brown. P. C. 561; 28 E. R. 1104.
(7) (1876) Ir. R. 10 Eq. 442.
(8) (1843) 6 Beav. 433; 49 E. R. 893; 63 R. R. 134.
(9) (1853) 4 De G. M. & G. 19 at p. 36; 18 Jur. 710; 22 L. J. Ch. 926; 2 W. R. 547; 23 L. T. (o. s.) 200; 102 R. R. 7; 43 E. R. 415 at p. 421.
(10) (1744) 1 Atk. 21; 2 Eq. Ab. 397; Willes 538; 26 E. R. 15.
(11) (1751) 2 Ves. Sen. 364; 28 E. R. 233.

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL No. 116 OF 1913.
May 12, 1916.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.
GANGA NARAYAN DUTTA—PLAINTIFF—APPELLANT
versus
INDRA NARAYAN SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mortgage by widow and the then reversioner—Decree against executants, if binds estate—Sale in execution—Auction-purchasers, title of, if defeasible by actual reversioners after death of judgment-debtors—Fraud in securing decree, effect of.

A decree in a suit on a mortgage, executed by a Hindu widow and the then reversioner, made by a competent Court in their presence, binds the entire inheritance and as long as that decree stands and until it is set aside for good reason, the actual reversioner cannot get behind it and maintain a suit for recovery of possession of the mortgaged property from a third party auction-purchaser in execution of that decree. [p. 51, col. 1; p. 52, col. 1.]

Hari Kishen Bhagat v. *Kashi Parshad Singh*, 27 Ind.

Cas. 674; 42 C. 876; 42 I. A. 64; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*, 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 12 A. L. J. 711; 16 Bom. L. R. 425; (1914) M. W. N. 430; 19 C. L. J. 620; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533; *Debi Prosad Chowdhry* v. *Golap Bhagat*, 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499, referred to.

Per *Mookerjee, J.*—When a mortgagee from a Hindu widow seeks to obtain a decree which would bind not only merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit; and when so impleaded the reversioner may well be deemed a party in a representative capacity and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow. [p. 51, col. 2; p. 52, col. 1.]

Nugendrachunder Ghose v. *Sreemutty Kaminee Dossee*, 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92; *Brij Bhookun Lall Awustee* v. *Mohadeo Dobey*, 17 W. R. 422; *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry*, 23 W. R. 174; *Srinath Dass* v. *Hari Pada Mitter*, 3 C. W. N. 637; *Bhagirathi Dass* v. *Baleswar Bagarti*, 19 Ind. Cas. 686; 41 C. 69; 17 C. W. N. 877; 19 C. L. J. 155; *Rameswar Mandal* v. *Provabati Debi*, 25 Ind. Cas. 84; 20 C. L. J. 23 at p. 31; 19 C. W. N. 313; *Indar Kuar* v. *Lalta Prasad Singh*, 4 A. 532; A. W. N. (1882) 133; *Veerabadra Aiyar* v. *Marudaga Nachiar*, 8 Ind. Cas. 1072; 21 M. L. J. 320; 9 M. L. T. 235; (1910) M. W. N. 799; 34 M. 188; *Llyod* v. *Jhones*, (1803) 9 Ves. 37 at p. 57; 7 R. R. 147; 32 E. R. 514; *Venkatanarayana Pillay* v. *Subbammal*, 29 Ind. Cas. 298; 38 M. 406; 21 C. L. J. 515; 28 M. L. J. 535; 17 M. L. T. 435; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125, referred to.

The title of the purchaser in such a case can be defeated only after the decree, which is the root of that title, has been successfully impeached for fraud, collusion or other like reason. If this is established, the fact that the parties had gone through the form of a suit and a decree cannot prejudice the right of the actual reversioners. [p. 52, col. 1.]

Katama Natchier v. *Rajah of Shivagunga*, 9 M. I. A. 539 at p. 604; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843, referred to.

Letters Patent Appeal against the decree of Mr. Justice Roy, in Appeal from Appellate Decree No. 3452 of 1911.

FACTS of the case material to the report are as follows:—

The appeal arose out of a suit for recovery of possession of a certain landed property brought by the plaintiff, who was one of the reversioners of one Ram Sankar, against the defendants who were third party purchasers in execution of a decree on a mortgage executed by the widow, named Brahmomoyi, of the said Ram Sankar and by one Ram Gopal, who was the only actual reversioner at the time. The main ground for setting aside the sale was that the mortgage executed by the widow was without legal necessity. It also appears that in the suit brought by the mortgagee, the widow as well as the then reversioner Ram Gopal were made parties.

The Court of first instance decreed the suit, holding that legal necessity was not proved. The Court of Appeal below reversed the said decision. On the question of legal necessity, the District Judge held that a good case, partly at least, for legal necessity had been made out and the absence of any recital as to legal necessity in the mortgage-bond could be explained by the fact that as the only actual reversioner at the time joined in executing the bond, the precaution was not considered essential. The District Judge further held that as both the widow as well as the then reversioner were made parties in the mortgage suit, the entire estate and not merely the widow's estate passed by the execution sale.

On second appeal, Roy, J., upheld the decision of the Court of Appeal below. Hence this appeal.

Babu *Bepin Behary Ghose*, for the Appellant.—The Full Bench decision in *Debi Prosad Chowdhury* v. *Golap Bhagat* (1) has settled the law now. The reversioner Ram Gopal had no interest in the property at the time of the execution of the mortgage-bond. The fact of his joining in the execution of the bond only shows his consent. But consent of reversioners raises only a presumption of the existence of legal necessity which can, however, be rebutted. See also *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (2). The evidence on the record has sufficiently rebutted the presumption of legal necessity. The learned District Judge has also found that legal necessity for only a portion of the mortgage-debt has been proved.

Babu *Surendra Nath Ghosal*, for the Respondents, was not called upon.

JUDGMENT.

SANDERSON, C. J.—In this case I think, this appeal must be dismissed, inspite of

(1) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

(2) 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 12 A. L. J. 711; 16 Bom. L. R. 425; (1914) M. W. N. 430; 19 C. L. J. 620; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533.

the interesting argument which has been presented to us by the learned Vakil for the appellant, and the short ground is that there was a decree in the mortgage suit in which the defendants were not only the widow but also the then reversioner. The decree must, therefore, be taken to bind the whole estate. Under that decree a sale was held and a third party purchased the estate, and it seems to me that as long as that decree stands, and until that is set aside for good grounds, the present plaintiff cannot get behind it and maintain the present suit. For this reason I think that the appeal should be dismissed with costs.

MOOKERJEE, J.—I agree that this appeal must be dismissed.

The property in dispute belonged originally to one Ram Sankar Roy who died in 1887. He left a widow Brahmomoyi and a daughter's son Ram Gopal Sen. On the 13th May 1896, Brahmomoyi and Ram Gopal executed, in favour of one Anant Lal Das, a mortgage of the land in suit to secure a loan of Rs. 499. In 1902, the mortgagee sued the widow and her daughter's son to enforce the security and obtained the usual mortgage-decree. In execution of that decree, the property was sold by the Court on the 6th June 1905 and was purchased by the Shahas, now defendants-respondents. The grandson died in 1906, and the widow died on the 21st July 1909. The plaintiff is one of five persons who upon the death of the widow succeeded to the estate of Ram Sankar Roy as reversionary heirs in their character of his sister's sons. On the 20th September 1909 he instituted the present suit to recover the property from the purchasers, on the allegation that there was no legal necessity for the loan and that the mortgage and sale took place under circumstances which do not make those transactions binding upon him as one of the actual reversioners. The Court of first instance decreed the suit. Upon appeal that decree was reversed by the District Judge, and a second appeal to this Court was dismissed by Mr. Justice Roy.

On the present appeal preferred under clause 15 of the Letters Patent, it has been argued by the plaintiff that the case has not been examined in the Courts below from the proper point of view. There is some force in this contention and the reason is not far to seek. The case was heard by the District Judge, as also by Mr. Justice Roy, before the decisions of the Judicial Committee in *Hari Kishen Bhagat* v. *Kashi Parshad Singh* (3) and *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (2) and of the Full Bench in *Debi Prosad Choudhry* v. *Golap Bhagat* (1) as to the precise effect of an alienation by a Hindu widow with the concurrence of the then next reversioner. *Prima facie*, therefore, the appellant is entitled to claim a remand for re-consideration of the questions in controversy. But upon the admitted facts, I think, it is reasonably plain that the plaintiff cannot possibly succeed in this litigation and a remand would be of no avail to him.

The mortgage, as we have seen, was executed by the widow and the then next reversioner; the suit was instituted and the decree was obtained against them. Neither at the time of the execution of the mortgage nor at the date of the institution of the suit had the plaintiff any present interest in the property; he was then not even the immediate reversioner; he was only a reversioner in the second degree. He was not a party to the mortgage transaction, nor was he a necessary party to the mortgage suit. On the other hand, Ram Gopal Sen, the daughter's son of the original owner, and the then next reversioner, was joined as a party to the mortgage transaction and to the mortgage suit, with a view to bind the entire inheritance. We have, consequently, a decree made by a competent Court in the presence of the widow and the then next reversioner; the decree directed the sale of the entire inheritance; and at the sale, which was held by the Court, the respondents purchased the property. What then is the true position of the purchasers? In the *first* place, when a mortgagee from a Hindu widow seeks to obtain a decree which would bind not merely the qualified interest of the widow, but the entire inheritance itself, the then next rever-

(3) 27 Ind. Cas. 674; 42 C. 876; 42 I. A. 64; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511.

sioner is a proper party to the suit [*Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (4), *Brij Bhookun Lall Awustee* v. *Mohadeo Dobey* (5), *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (6), *Srinath Dass* v. *Hari Pada Mitter* (7), *Bhagirathi Dass* v. *Baleswar Bagarti* (8), *Rameswar Mandal* v. *Provabati Debi* (9), *Indra Kuar* v. *Lalta Prasad Singh* (10), *Veerabadra Aiyar* v. *Marudaga Nachiar* (11), *Lloyd* v. *Jhones* (12); Story on Equity Pleadings, Article 144; Daniell on Chancery Practice, Chapter III, section 3.] In the *second* place, a reversioner so impleaded may well be deemed a party in a representative capacity [*Vankatanarayana Pillay* v. *Subbammal* (13)] and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow (Jones on Mortgage, section 1439). The title of the purchasers in this case can consequently be defeated by the plaintiff, only after the decree, which is the root of that title, has been successfully impeached for fraud, collusion or other like reason. Assume, that the plaintiff might possibly have attacked the decree on the ground of fraud, for instance, on the allegation that at the time when the mortgage was executed there was really no legal necessity for the loan, and yet, the widow and the immediate reversioner colluded to raise the money and to charge the inheritance so as to enable the reversioner to embark upon a speculation for his personal benefit. If this were established, the fact that the parties had gone through the form of a suit and a decree could not justly be held to prejudice the right of the actual reversioner. [*Katama Natchier* v. *Rajah of Shivagunga* (14)]. No such case of fraud, however, has been charged, much less proved and the mortgage and the decree thereon still stand unassailed; clearly so long as the decree stands, the plaintiff cannot successfully impeach the title of the defendants. In this view, the suit fails and has been rightly dismissed; consequently, the present appeal must be dismissed with costs.

Appeal dismissed.

(4) 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92.

(5) 17 W. R. 422.

(6) 23 W. R. 174.

(7) 3 C. W. N. 637.

(8) 19 Ind. Cas. 686; 41 C. 69; 17 C. W. N. 877; 19 C. L. J. 155.

(9) 25 Ind. Cas. 84; 20 C. L. J. 23 at p. 31; 19 C. W. N. 313.

(10) 4 A. 532; A. W. N. (1882) 133.

(11) 8 Ind. Cas. 1072; 34 M. 188; 21 M. L. J. 320; 9 M. L. T. 235; (1910) M. W. N. 799.

(12) (1803) 9 Ves. 37 at p. 57; 7 R. R. 147; 32 E. R. 514.

(13) 29 Ind. Cas. 298; 38 M. 406; 21 C. L. J. 515; 28 M. L. J. 535; 17 M. L. T. 435; 17 Bom. L. R. 468 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125.

(14) 9 M. I. A. 539 at p. 604; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 147 OF 1915.

April 18 1916.

Present:—Mr. Justice Napier and Mr. Justice Srinivasa Aiyangar.

V. RANGASAMI NAIDU AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

SUNDARARAJULU NAIDU AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 3—RESPONDENTS.

Hindu Law—Partition—Presumption, rebuttable, of complete division—Separation of co-parcener, effect of—Status of non-separated members—Civil Procedure Code (Act V of 1908), O. I, r. 10 (2)—Joinder of defendant in course of trial—Evidence taken supra, *admissibility of, against defendant newly added—Evidence Act (I of 1872), s. 33.*

The separation of one member of a joint Hindu family does not, in law, amount necessarily to a separation of the remaining members. The non-separated members continue as before as members of a joint family, and no special agreement among them is necessary to revive that status. This is so even in cases where, for the determination and allotment of the share of the member who separates, it is necessary to ascertain and set out the shares of the remaining members. [p. 54, col. 2; p. 55, col. 2.]

When a partition has been proved, the presumption is that the partition was complete both as regards the property and the members composing it; but the presumption may be rebutted, without proof *aliunde*, by the terms of the partition-deed, or a decree for partition, and if there is no written evidence of the separation, by the nature and mode of the separation and circumstances attending it. [p. 55, col. 1.]

Balabux v. *Rukhmabai*, 30 C. 725 at pp. 734, 735; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130, explained.

Sudarsanam Maistri v. *Narasimhulu Maistri*, 25 M. 149 at p. 156; 11 M. L. J. 353; *Ram Pershad Singh* v. *Lakhpati Koer*, 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103; 30 I. A. 1; *Gadian Chettiar* v. *Gadian Chettiar*, 26 Ind. Cas. 43; 1 L. W. 799; *Balakrishna Mudaliar* v. *Raju Mudaliar*, 27 Ind. Cas. 786; (1915) M. W. N. 16; 16 M. L. T. 610; *Anandibai* v. *Hari Suba Pai*,

10 Ind. Cas. 911; 35 B. 293; 13 Bom. L. R. 287, referred to.

Under Hindu Law, a father has power to separate one or more of his sons from himself, in which case there is no presumption of division between the father and his other sons. [p. 55, col. 2.]

A Hindu father, having incurred considerable expense for the marriage of two of his sons for which he had to sell two out of his three houses, gave them some cash and jewels and separated them from the family. They thereafter lived separately while the father and his other son lived together in the remaining family house:

Held, (1) that the transaction was a relinquishment by the separated sons of their interest in the remaining family properties; [p. 55, col. 2.]

(2) that the interest of the father, after the separation, devolved on the non-separated son by survivorship and it was not liable to attachment and sale for a decree-debt against the separated sons. [p. 55, col. 2.]

Where a defendant, who was newly added during the course of a trial by direction of Court, did not object to evidence taken at a previous stage of the proceedings going on record or desire that it should be reheard, and it appeared that his interests had been fully represented by another defendant and he was fully cognizant of the steps taken by the former to prove their common case, and both of them jointly appealed against the judgment of the Trial Court and the objection as to the non-admissibility of the evidence against the new defendant was taken for the first time in second appeal:

Held, that the objection should be disallowed and that section 33 of the Evidence Act did not apply to the case. [p. 53, col. 2.]

Per *Napier, J.*—The judgment of the Privy Council in *Balabux* v. *Rukhmabai*, 30 C. 725 at pp. 734, 735; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 1 cannot be interpreted as laying down that, where there is a separation at the instance of one member of a joint family, an undivided status among the others can only exist by contract. [p. 55, col. 2.]

A definite declaration must be made by a father himself if he wishes to separate from his minor sons and it cannot be done by the mere separation by a son of full age. [p. 56, col. 1.]

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 106 of 1913, preferred against that of the Subordinate Judge, Nilgiris at Ootacamand, in Original Suit No. 97 of 1912.

Mr. *G. S. Ramachandra Aiyar*, for the Appellants.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.

SRINIVASA AIYANGAR, J.—This action was brought for a declaration that certain immoveable properties attached by the 1st defendant, in execution of a decree obtained against the second (a brother of the plaintiff), did not belong to him, but to the plaintiff. The plaintiff's case is, and that is found to be true by both the Courts below, that his two elder brothers, the 2nd and 3rd defendants in the action, were separated by his father Krishnaswami Naidu, that thereafter the plaintiff and his father continued to be members of a joint Hindu family, that one of the suit properties belonged to them as ancestral property and the other was acquired by them and became joint family property, and that neither of his two brothers had any interest in them. Originally the 1st defendant, the holder of the decree against the 2nd defendant, was alone made a party to the action. There was an appeal by him to the District Court, Coimbatore, and the then District Judge directed the brothers of the plaintiff to be made parties and remanded the suit to the 1st Court to take the evidence which may be let in by the brothers after they had been made parties. This was done and the appeal was finally decided against the 1st and 2nd defendants; the 3rd defendant, the other brother of the plaintiff, disclaimed all interest in these properties. The 1st and 2nd defendants have jointly appealed to this Court and their learned Pleader has raised two points in appeal.

First of all he contended that the evidence taken in the suit, before the 2nd defendant was made a party, should not have been used against him and relied on section 33 of the Evidence Act. I think that there is no merit in this contention. The 2nd defendant, after he was made a party, was served with summons, took time and filed a written statement which was the same as that of the 1st, took an adjournment for letting in his evidence and on the adjourned day put in his evidence. He did not require that the evidence previously taken should be re-heard nor did he desire a trial *de novo* of the suit as against him. When the appeal was heard in the District Court, he again took no objection to the evidence already taken in the case being considered, against him. It is clear that the 1st defendant represented his interest in the previous stages of the proceedings, and he was fully cognizant of the steps taken by him to prove their common case. In fact, he himself gave evidence at the previous trial, and the present appeal is a joint appeal by the 1st and 2nd defendants on the same grounds. In these circumstances, I think he is not now entitled to take that objection and section

33 of the Evidence Act has no application to this case.

The *other* point taken is that, there having been a separation of the 2nd and 3rd defendants, in law, there was a separation *in status* between the plaintiff and his father, and unless there was proof of a subsequent reunion, the plaintiff and his father must be deemed to have been holding the suit properties as tenants-in-common, in which case the father's share (now that he is dead) would devolve on his sons, including the 2nd and 3rd defendants, in equal shares. It is also stated that the appellants were in a position to prove that the plaintiff at the time of the separation of the brothers was a minor and was incapable, therefore, of entering into an agreement to remain united or to reunite after partition. I may observe at the outset that no such contention appears to have been raised in either of the lower Courts, and that the question for decision is really one of fact, whether or not the plaintiff and his father were members of a joint Hindu family, though in arriving at a conclusion all presumptions, whether of law or fact, may have to be taken into account. But as however we have heard the learned Pleader for the appellants at length, I think it right to examine the question raised by him.

Reliance was mainly placed on the observations of their Lordships of the Judicial Committee in the case of *Balabux* v. *Rukhmabai* (1), wherein it is said: "there is no presumption when one co-parcener separates from others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." These observations do not, I think, lend any support to the contention of the appellants. There can scarcely be any doubt that one member of a family may separate himself from the rest leaving the others to continue as before as members of the joint Hindu family: that this can be done even in cases where for the determination and allotment of the share of the member who separates, it is necessary to ascertain and set out the shares of the remaining members. It is not correct to say that either in the first or the second case the separation of one member is in law necessarily a separation of the remaining members and that the remaining members, if they desire to remain or become a joint Hindu family, can only do so by an agreement to reunite subject to the limitations of the Hindu Law regarding that status; for it will be observed that their Lordships contemplate a case where the remaining members agree to remain united, which would be impossible if in law there was a necessary division in status; when once there is a separation, the joint family would cease to exist, and an agreement to remain united could only be an agreement to reunite; the status of reunited members is not the same as that of members of a joint Hindu family.

It was at one time doubtful whether the *remaining* members of a family can continue to be a joint Hindu family when there has been a separation of one of the members. In *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2) Bashyam Aiyengar, J., said that "if one or more members become divided by partition, it is not equally clear that the status of the remaining members as an undivided family in its normal condition continues unaffected. By some of the Hindu lawyers a separation, such as to give one or more members their several shares, is regarded as necessarily involving a general partition. Those who have not separated, are, on this theory, looked on as reunited (West and Buhler 'Hindu Law,' 3rd Edition, page 685). So far as this Presidency is concerned, though there is no reported decision bearing directly on the point, the principle generally recognized and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family.

(1) 30 C. 725 at p. 736 (P. C.); 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I. A. 130.

(2) 25 M. 149 at p. 156; 11 M. L. J. 353.

And according to usage and custom the remaining members of an undivided family..... continue as undivided members in its normal state and not as members, who after partition have become reunited". But the decision in *Ram Pershad Singh* v. *Lakhpati Koer* (3) has now settled the law in the sense indicated by Bashyam Iyengar, J. No doubt when a partition has been proved, the presumption is that the partition was complete both as regards the property of the family and the members composing it; but this presumption may be rebutted without proof *aliunde* by the terms of the partition-deed, or decree for partition, and if there is no written evidence of the separation, by the nature and mode of the separation, and the circumstances attending it. In *Ram Pershad Singh* v. *Lakhpati Koer* (3) where there was a decree for partition Sir Andrew Scoble delivering the judgment of their Lordships observed as follows: "It was contended on behalf of the appellants in the present suit that, although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*; and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu Law, namely, the intention of the members of the family to become separate owners." The observations in *Balabux* v. *Rukhmabai* (1) do not in any way qualify the above statement; nor do the decisions of this Court in *Gadian Chettiar* v. *Gadian Chettiar* (4), *Balakrishna Mudaliar* v. *Raju Mudaliar* (5) and that of the Bombay High Court in *Anandibai* v. *Hari Suba Pai* (6) lay down anything to the contrary.

In this case there was no division of the family properties by shares. The evidence is (and that has been accepted by both the lower Courts) that the father incurred considerable expense for the marriage of the 2nd and 3rd defendants, and had to sell two of the three houses which the family owned to meet those expenses, that he gave some cash and jewels to them and separated them from the family; they thereafter lived separately, while the plaintiff and his father lived together in the remaining family house. The transaction was a relinquishment by defendants Nos. 2 and 3 of their interest in the remaining family properties on receipt of a certain sum of money and certain moveables. In such a case as that there is, I think, no basis for any presumption of a division between the plaintiff and his father. [See the observations of Bashyam Iyengar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2).] Moreover, the power of a father to separate one or more of his sons from himself is undoubted; and if, as in this case, the father separated his two elder sons, there is again no scope for any presumption of division as between the father and his other son. In many cases of division there may be minor members in the family whose interest it may be to remain undivided. If, as contended by the learned Pleader for the appellants, there can be no agreement by them or on their behalf to remain united and if in law there is necessarily a separation in status amongst all the members of the family by the separation of one, the consequences, so far as the minor members are concerned, may be disastrous. I disallow this contention also. In the result the second appeal must be dismissed with costs.

NAPIER, J.—I entirely agree. I cannot read the judgment of the Privy Council in *Balabux* v. *Rukhmabai* (1) as laying down that where there is a separation at the instance of one member of a joint family an undivided status among the others can only exist by contract. This, as pointed out by my learned brother, is entirely inconsistent with the language used by the Board in *Ram Pershad Singh* v. *Lakhpati Koer* (3) If the true test is, as laid down there, *the intention of the members of the family to become separate owners*, then it must be impossible for one member who desires to become a separate owner to compel the others, who do not so desire, to become separated from one another. It was fairly admitted in argument that the result of this contention would be serious for there are few Hindu joint families without minor sons. A minor cannot make a contract and their Lordships of the Privy

(3) 30 C. 231; 30 I A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103.
(4) 26 Ind. Cas. 43; 1 L. W. 799.
(5) 27 Ind. Cas. 736; (1915) M. W. N. 17; 16 M. L. T. 610.
(6) 10 Ind Cas. 911; 35 B. 203; 13 Bom. L. R. 237.

Council say expressly in *Balabux* v. *Rukhmabai* (1) speaking of reunion: "It is difficult...to see how an agreement for that purpose could have been made by or on behalf of the appellant during his minority." It would follow, therefore, that a son who has attained full age could by a mere unequivocal declaration separate not only himself, but his father from his own minor children irrevocably until the children one after the other attained the age when they could make a contract of reunion. Not only that, but the separated son could reunite with his father leaving the minor children separate. The right of an adult member to separate is not founded on any principle that requires such an injury to be inflicted on the minors, but on the principle that he is entitled to be put in a position in which he can enjoy to the full the results of his own industry and exertions. The normal status of a Hindu family is, however, joint and although a father can separate himself from his minor sons, it seems contrary to all principle that he should be compelled to do so against his will. Assuming that a presumption arises that the adult members desire all to become separate owners, in the words of *Ram Pershad Singh* v. *Lakhpati Koer* (3), I see no reason why such a presumption should be made as to a father and his minor sons. The minors obviously are incapable of expressing any such desire and there is no guardian of their property known to Hindu Law capable of making such a declaration for them. I am satisfied, therefore, that a definite declaration must be made by a father himself if he wishes to separate from his minor children and that it cannot be done by the mere separation by a son of full age. The appeal will be dismissed with costs.

Appeal dismissed.

V. R. P.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 10 OF 1914.

May 25, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

Shaikh EBADUT ALI—PLAINTIFF—APPELLANT

versus

MUHAMMAD FAREED AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Consideration, presumption as to—Burden of proof—Muhammadan Law—Alienation by mother as guardian of minor—Benefit of minor—Burden of proof—Alienation for paying off separate debt of minor's brother, validity of—Registration Act (XVI of 1908), s. 35 (3)—Registrar's power to register—Admission by executant of having signed on blank sheets, whether admission of execution.

Where it is pleaded that no consideration passed for a mortgage, the burden of proof is on the mortgagor to establish it. Where the mortgagor makes a statement of fact which renders it probable that he executed the document without consideration, the onus is shifted on to the other side. The initial presumption, however, where the document is in the hands of the mortgagee, is that consideration passed for it. [p. 57, col. 2.]

Where a Muhammadan mother, as *de facto* guardian of her minor son, undertakes to alienate or encumber his property, the burden of proof is on the alienee or mortgagee to prove that the transaction was for the benefit of the minor. The discharge of a debt of the minor's brother, who had no interest in the minor's properties, is not for the minor's benefit and an alienation effected for such a purpose is void as against the minor, unless accepted by him on his attaining majority. [p. 58, col. 2.]

Mafazzal Hosain v. *Basid Sheikh*, 34 C. 36; 4 C. L. J. 485; 11 C. W. N. 71; *Ram Charan Sanyal* v. *Anukul Chandra Acharjya*, 34 C. 65; 11 C. W. N. 160; 4 C. L. J. 578, followed.

A Registrar cannot register a document whose execution is not admitted by the alleged executant. [p. 59, col. 2.]

Execution of a document consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there cannot be execution. Where an executant clearly says that he signed on a blank paper and that the document which he had authorised is not the document which he contemplated, the statement is a denial, not an admission of execution. [p. 60, col. 1.]

David Yule v. *Ram Khelwan Sahai*, 6 C. W. N. 329, distinguished.

First appeal from a decision of the Subordinate Judge, Purnea, dated the 30th August 1913.

Mr. *Nuruddin Ahmad*, for the Appellant.

Mr. *Mustafa Khan*, for the Respondents.

EBADUT ALI *v.* MUHAMMAD FAREED.

JUDGMENT.—The plaintiff in this case was one Ebadut Ali. He appears to have been the agent of a family to whom had been given a '*putni*' grant of the property now in question. From time to time various members of this family took loans from Ebadut Ali, and on three occasions executed mortgages in his favour. The dates of these mortgages are, the 13th *Jet* 1306, for Rs. 2,500, by *Mussammat* Jharkhun and Muhammad Latif, corresponding in date to the 28th May 1899; the 17th May 1900 for Rs. 1,000 by Muhammad Latif alone, and the 15th October 1903 for Rs. 1,000 by *Musammat* Jharkhun and her six children, Muhammad Fareed, Muhammad Latif and four daughters. In this last mortgage there is a proviso, that the mortgagee shall pay to the *zemindar* to protect the property from sale the rent due to the *zemindar*, and shall add to the sum for which the property is held in lien all sums so paid to the *zemindar* with interest at two per cent. per mensem.

The property mortgaged came into possession of this family by a deed of gift, and on a previous litigation it has been found, that each member of this family holds a one-seventh share in the property. This finding has been accepted as defining correctly the rights of the mortgagors. Ebadut Ali has a brother Nijabut. He, from time to time, has purchased approximately a nine-annas share in this property from *Musammat* Jharkhun and members of her family; and one Shillingford is in possession of 7 annas, by virtue of purchases from other members of the family, and of a '*dur-patni*' of the interest of the eldest son Muhammad Latif. Ebadut Ali now sues to recover his mortgage-money, and after adding the interest due on the various mortgages, and the sums alleged to have been paid to the *zemindar* in payment of rent, and deducting therefrom nearly Rs. 7,000 paid as interest, the total amount of his dues is said to be Rs. 11,970. In the lower Court no member of the mortgagors' family contested the suit, nor did Nijabut enter into contest. The only contest was that put forward by Mr. Shillingford, and the grounds of that contest were: *firstly*, that the mortgages were void for want of consideration; *secondly*, that Nijabut was a '*benamidar*' for Ebadut in the purchases made from the mortgagors of the right of redemption; *thirdly* that the mortgages had been extinguished by the enjoyment by Ebadut of the property as agent of the mortgagors and that he had placed to his own credit, from the funds coming into his hands on behalf of the mortgagors, a sufficient sum to redeem the mortgages; and *lastly*, that Mr. Shillingford was not required to redeem the mortgages to save his *dur-patni* interest in the property. These points were found in favour of the plaintiff Ebadut Ali. The only point upon which Ebadut Ali feels a grievance under the decree is, that no decree has been made for the sale of the '*dur-patni*' to defray the mortgage-debt. Upon this ground he appealed and Shillingford filed a cross-appeal, taking for the most part the grounds urged in the lower Court. On the appeal coming on for hearing, Mr. Mustafa Khan for the appellant concedes that his appeal is without substance. The '*dur-patni*' certainly cannot be sold, though it may be voidable at the instance of the auction-purchaser if the mortgage-debt is not paid. The appeal is dismissed with costs.

Upon the cross-appeal we take in order the grounds urged in the lower Court. The *first* is, that no consideration passed under this mortgage. Where a document is in the hands of the mortgagee the presumption is that consideration passed. The first step in the throwing of the burden of proof upon the other side, is a statement of fact which might render it probable that the mortgagor would execute a mortgage without consideration. No such statement of fact has been put before us. There is nothing to suggest any temptation on the part of Muhammad Latif and the family of which he was the head to execute a document without consideration. We agree with the learned Subordinate Judge that there is nothing to suggest that no consideration passed, and that we must accept the statement set forth in the deeds themselves that consideration did pass.

The *second* point is, whether Nijabut is

the '*benámidar*' for Ebadut. Beyond the fact that he is his brother, there is nothing on the record to suggest a '*benami*' transaction. The evidence of possession by Ebadut in the nine annas purchased is given by witnesses entirely unreliable. There are only three of them, and two of them are the brother and a debtor of Shillingford's *patwari*. We agree with the conclusions arrived at by the lower Court, that there is nothing to show that Ebadut and Nijabut are the same person, or that Ebadut has any interest in the equity of redemption.

The *third* point for consideration is, whether in the appropriation to himself of the proceeds of this property Ebadut has recouped himself to the full of the mortgages on the property. Here again we find ourselves in great difficulty owing to the paucity of the evidence upon the record upon this issue. There is very little to show what is the actual value of the property. We know as a fact, that the family consisted of seven members, and they have apparently been living in some comfort since the date of the death of Goghan, by whom this deed of gift was made. It is obvious that large sums must have been paid to them from time to time by Ebadut. It is not suggested by themselves, that the whole of the amount due under the mortgages has been paid up, and though we can see that it is very difficult indeed for a third party to show substantially how much has gone into the hands of Ebadut in satisfaction of the mortgages, and how much into the hands of the mortgagors for their maintenance, the burden of proof is on the third party to show that Ebadut has, from time to time, taken from the estate sufficient to clear off the mortgages. We find as a fact that there has not been any payment beyond the payments admitted in the plaint.

The *next* point, which does not seem to have been argued in the lower Court but which is obvious on the face of it in this Court, is, that there is nothing on the record to show that Fareed derived any benefit in this mortgage. He was a minor at the time of the execution. The execution was made and admitted by his mother. The case-law on the subject has been fully expounded in *Mafazza Hosain* v. *Basid Sheikh* (1) and *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (2). It is settled that where a Muhammdan mother as *de facto* guardian undertakes to alienate or encumber her minor son's property, the burden of proof is on the alienee or mortgagee to prove that the transaction was for the benefit of the minor. In the document itself it is set forth that the money is being borrowed for the liquidation of a debt due by Muhammad Latif. Clearly the paying up of his brother's debt, though a fine act, was a quixotic act, not an act in itself for the benefit of the minor. Such a transaction could not be entered into by the mother, and is void against the minor unless accepted by him on his attaining his majority. There is no evidence on the record of his having accepted the liability incurred by his mother. We hold that the mortgage does not cover the right, title and interest of the minor Fareed. We hold that it does cover the interest of *Musammat* Jharkhun and Muhammad Latif. How far it covers the interest of the other four daughters will be considered in due course.

The *last* point taken by the learned Vakil for the appellant is, that the account taken by the lower Court is on the face of it wrong, that it is an exorbitant and monstrous account, and that in equity this Court should interfere and re-arrange that account. We are put to great difficulty in this matter owing to the supineness of the respondent in the lower Court. He does not seem to have troubled to appear before the lower Court's officers to contest the account that was to be made. The result was that the account was made by those officers on the representations of the plaintiff only. We are asked to remand the case upon this point and to direct that a commission be issued for the taking of an account, that the plaintiff be put to the proof of payments made to the *zemindar*, and to the proof also that these payments were made from his own pocket and not from the money which came into his hands from the profits of the estate, of which he was, on behalf of the mortgagors.

(1) 34 C. 36; 4 C. L. J. 485; 11 C. W. N. 71.
(2) 34 C. 65; 11 C. W. N. 160; 4 C. L. J. 578.

the agent-in-charge. There is at the outset an error in the account, inasmuch as for the second mortgage the interest is calculated $1\frac{1}{2}$ per cent per mensem instead of at $\frac{1}{2}$ per cent. per mensen as set forth in the deed itself. There is also another patent error in these accounts, and that is, that they have all been mixed together and a joint account taken upon the three mortgages. The dues on the three mortgages are totally dissimilar and must be calculated separately. The first mortgage was executed by Jharkhun and Muhammad Latif jointly, the second was executed by Latif, and the third by the whole family. And in addition to this, the sums payable to the *zemindar* are not to be added to the sums due on the 1st and 2nd mortgages, but only to the sum due on the 3rd mortgage. It is clear that there must be a re-making of the account. In the re-making of that account we give the respondent leave to enter an appearance before the lower Court, and make such representations with regard to the making of that account as he may be advised to make. The decree of this Court will be only for the taking of an account. It will be left to the lower Court to proceed with the suit from that point. After making the account in accordance with the final decision of this case, the Court of the Subordinate Judge will direct that three months from the date of the completion of the account, the mortgaged property will be put up to sale, if the full amount due shall not have been paid.

It is suggested by the learned Vakil for the appellant, that inasmuch as Nijabut is the brother of Ebadut, therefore, the provisions of the last clause of section 60 of the Transfer of Property Act do not apply, and that in equity an order be made that Shillingford be allowed to redeem his own share in the mortgaged property without redeeming the whole mortgage. In this contention there does not seem to us to be any substance whatsoever.

The *final* point to be considered is, what rights, titles and interests have been mortgaged by the deed of the 15th October 1903. It is admitted that the right, title and interest of Najibun, that is, a one-seventh share in the property, had been purchased by Shillingford on a date prior to the execution of the mortgage of 1903. Certainly the mortgagee has no lien on Shillingford's interest in that share. The interest of Fareed, as we have already stated, is exempt.

Lastly, we have to consider whether there is a lien on the interests of the three other sisters. On page 22 of the paper-book, we read an endorsement by the Officiating Sub-Registrar who registered this document: "The last four executants, namely the daughters of *Musammat* Jharkhun, begged it to be noted that the signatures and marks had been obtained on blank paper on the clear understanding that no mention should be made in the papers of any previous transaction made by their mother and brother with the claimants."

In our view this was not an admission of execution. There having been no admission of execution, the Registrar had no jurisdiction to register the document. The document is, therefore, to be regarded as unregistered. But in arriving at this conclusion, we are faced with the difficulty that in the case of *David Yule* v. *Ram Khelwan Sahai* (3), the Divisional Bench of the Calcutta High Court held that "the Sub-Registrar had jurisdiction to register the deed. There was no defect in his jurisdiction. When Baijnath Sahai admitted his signature to the deed, the Sub-Registrar was entitled to regard this as an admission of execution and accordingly rightly registered it. Further on the merits we do not believe that Baijnath was telling the truth when he said he merely signed his name on a blank sheet of paper. The plaintiffs have adduced abundant evidence to prove that the bond was written on the paper before Baijnath signed it." We should have felt obliged to refer this matter to a Full Bench if the judgment had ended with the words "when Baij Nath Sahai admitted his signature to deed, the Sub-Registrar was entitled to regard this as an admission of execution and accordingly rightly registered it." But the case was not decided solely upon that point; there was a definite finding of fact that Baijnath Sahai was not telling the truth when he said that he had signed his name on blank paper. In what terms he admitted his signature is not stated; from the judgment

(3) 6 C. W. N. 329.

and from the head-note it appears that in addition to the signature was an endorsement in the executant's own handwriting: "The mortgage-bond for Rs. 21,750 on account of *hundis* executed by me is correct." We have it in the case before us now from the Registrar's endorsement itself, that there was a direct denial of execution of the document as drawn up. In our view, execution consists in signing a document written out and read over and understood, and does not consist of merely signing a name upon a blank sheet of paper. To be executed a document must be in existence; where there is no document in existence there cannot be execution. But this in the present case is not the whole point. Where an executant clearly says that he signed on blank paper and that the document which he had authorized is not the document which he contemplated, the statement is a denial, not an admission, of execution. The facts of the case of *David Yule* v. *Ram Khelwan Sahai* (3) are clearly distinguishable from those of the present case. The Registrar was required by section 35, clause (3), to refuse to register the document as to the four ladies denying, and register it only as to the persons admitting execution. We must regard the document as registered only as regards *Musammat* Jharkhun and Muhammad Latif, and unregistered as to the other four ladies. It follows, therefore, that the interests which passed under the mortgage are the interests of Jharkhun and Latif only, that Shillingford as *dur-patnidar* has a right to redeem these interests, that if he fails to redeem those interests, the *dar-patni* which he has taken subsequent to the mortgage is voidable at the instance of the auction-purchaser.

We note before concluding this judgment that the Court-fee is Rs. 10. This fact was brought to our notice at the conclusion of the appeal; we should otherwise have refused to hear the learned Vakil for the respondents until the proper Court-fee had been paid. Inasmuch as the matter had been heard at some length before the fact was brought to our notice we allowed the hearing to continue, but we direct the Registrar to take measures to secure that no decree be drawn up in the respondent's favour upon his cross-appeal, until such Court-fees as he as taxing officer may assess have been paid by the respondent upon his cross-appeal. If these fees are not paid within 15 days of the date of his assessment the appeal will stand dismissed with costs. If the Court-fees are paid within time the cross-appeal will be decreed in part in accordance with this judgment, each side bearing his own costs.

Appeal dismissed; Cross-appeal partly decreed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 28 OF 1915.

May 19, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

HON'BLE MAHARAJA ADHIRAJ SIR BIJOY CHAND MOHATAB BAHADUR—DEFENDANT No. 1—APPELLANT

versus

ISWAR CHANDRA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Adverse possession of tank, essential elements of—Tenant's adverse possession against another tenant of same landlord, when affects landlord.

A *patnidar* can, by adverse possession, acquire title to a tank covered by the *patni* of another *patnidar* under the same *zemindar*, and such title is good and valid against the *zemindar* when he acquires the *patni* interest of the latter by a private conveyance. [p. 61, col. 2; p. 63, col. 2.]

Sonet Kooer v. *Himmut Bahadoor*, 1 C. 391; 25 W. R. 239 (P. C.); 3 I. A. 92; *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri*, 2 C. 460, referred to.

Per *Mookerjee, J.*—Though mere appropriation of fish from a tank may not necessarily constitute adverse possession of the tank, a very different interpretation must be placed upon acts of an obviously proprietary character, such as the sub-letting, mortgaging or re-excavation of the tank or the expenditure of large sums in clearing silt out of it. [p. 63, col. 1.]

Bhaskarappa v. *Collector of North Kanara*, 3 B. 452; *Venzatrama Aiyar* v. *Secretary of State for India*, 5 Ind. Cas. 118; 20 M. L. J. 74; 33 M. 362; 7 M. L. T. 139, referred to.

Letters Patent Appeal against the decree of Mr. Justice Sharfuddin, dated the 16th February 1915, in Appeal from Appellate Decree No. 3839 of 1912.

Babus *Basanta Kumar Bose* and *Bepin Behary Ghosh*, for the Appellant.

Babus *D. N. Chackravarty* and *Jogendra Kumar Dey* for Babu *Basanta Behari Mukerjee*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the appeal, in my judgment, must be dismissed for the following reasons: it is necessary to state the facts shortly:—The action was brought by the plaintiffs for the purpose of obtaining a declaration that they were entitled to the tank in question, and that a writ of possession should be granted to them. On the other hand, the defendant No. 1 set up three points: *First*, that the evidence adduced by the plaintiffs about the possession of the tank should not be believed; *secondly*, that, even if believed, the possession was not of such a character as to show that it was adverse to the defendant No. 1; and *thirdly*, that before the defendant No. 1 acquired the *patni* tenure of Lot Baisgram the possession of the plaintiffs and their lessors was not adverse to him as *Mauza* Kamalpur was held by *patnidars* under the Maharaja of Burdwan. It appears that there were two *patnidars*, whose *patnis* were adjoining, the Hazrahs on the one hand and Gisbourne & Co. on the other, both holding under the same Maharaja, the defendant No. 1. It has been found, and we cannot go behind that finding of fact, that the land in question was originally included in the Gisbourne & Co.'s *patni*, but that the Hazrahs had annexed the land upon which the tank was situated and they let it to the plaintiffs, and it has been found that the Hazrahs and their tenants, the plaintiffs, had been in adverse possession as against the *patnidars*, Gisbourne and Co., for the necessary number of years.

Now the first point which I intend to deal with is the last one which I have mentioned, namely, that before the defendant No. 1 acquired the *patni* tenure of Lot Baisgram the possession of the plaintiffs and their lessors was not adverse to him as *Mauza* Kamalpur was held by *patnidars* under the Maharaja of Burdwan. I do not think myself that there is anything in that point, for this reason: The adverse possession which is relied upon by the plaintiffs was not against the Maharaja at all, it was really against the *patnidars* Gisbourne & Co. They had allowed the plaintiffs' lessors to annex this land—I am assuming for the moment that the possession was sufficient and for the necessary number of years.

Now, if this had been a question as between the lessor and the lessee, and the *patnidars* had been in the position of an ordinary lessee in England, there might have been some difficulty, and the lessee might not have been able to create any interest in the land or allowed any interest to be created in the land leased to him, which could bind the lessor's free hold. That is, however, a different question from that now before us, because the *patnidars*, Gisbourne & Co., held a permanent and heritable tenure which they had power to alienate, and, therefore, if they had in fact alienated this tank to the plaintiffs' lessors, that would have been within their power. Instead of an alienation taking place, Gisbourne & Co., the *patnidars*, had allowed the plaintiffs or their lessors to take adverse possession, the effect of which has been to create an interest just the same as would be the case if it had been conveyed by the *patnidars*. Therefore, as between the two sets of *patnidars*, the plaintiffs or their lessors obtained a title to the tank in question as against the *patnidars* Gisbourne & Co. Then what happened is that Gisbourne & Co. sold their *patni* interest to defendant No. 1. Now what had they got to sell? They had their *patni*, less the tank the right to which they had lost by allowing the plaintiffs and their lessors to obtain a right by adverse possession: To put it quite shortly, they had not at that time any interest in the tank which they had the power to convey to defendant No. 1 and, therefore, defendant No. 1 obtained no title. It was urged yesterday by the learned Vakil that when they sold their *patni* interest they relinquished all their right. It was put by my learned brother what did they relinquish? and I put the question how could they relinquish a right which they had not got—how could they relinquish a title to the tank which they had not got? Therefore in my judgment defendant No. 1 obtained no title to the tank at all under that conveyance. The plaintiffs having obtained that title, they were entitled to the declaration which they asked for and also a decree for possession.

Then it is said that the possession which the plaintiffs had, was not of sufficient cha-

racter to substantiate such adverse possession as is necessary. Now I take what the learned Subordinate Judge said at page 18, "Considering the whole evidence, I am perfectly satisfied that the plaintiffs exercised acts of possession in the tank publicly and openly and continually since 1290, asserting that they held the tank under the Hazrahs," and that is a statement which is equivalent to an allegation that they had exercised this right of possession *nec vi*, *nec clam*, *nec precario*, asserting their right to the tank, asserting it openly and continuously and without interruption: and it appears that the acts upon which the learned Judge relied are such acts as these, fishing in the tank, letting out the fishing to other people, mortgaging the tank, which means mortgaging the soil on which the water rests. I must say I do not see how the learned Judge of the first Appellate Court could come to any other conclusion upon the facts than that to which he did. In my opinion, the acts of possession were of sufficient character to justify the decision.

For these reasons I think that this appeal should be dismissed with costs.

MOOKERJEE, J.—I agree that the decree made by the Courts below in favour of the plaintiffs must be affirmed.

The plaintiffs instituted this suit on the 15th December 1909 for declaration of their title to a tank, which had been attached under section 146 of the Criminal Procedure Code on the 8th January 1907. Their case was that they held the tank under a lease granted to them on the 24th September 1883 by the Hazrahs, who were in possession as *patnidars* of Dubrajpur, under the 1st defendant. They alleged that they were in peaceful occupation till 1906, when the officers of the 1st defendant forcibly caught fish from the tank and disturbed their possession. The 1st defendant stated that the tank was not included in the *patni* of Dubrajpur held by the Hazrahs under him but was comprised in a *patni* Baisgram held under him by Gisbourne & Co. He further alleged that he had on the 25th November 1899 purchased the *patni* right in Baisgram from Gisbourne & Co. and was consequently entitled to take possession of the tank.

The Courts concurrently found that the tank was included in the *patni* of Baisgram held by Gisbourne & Co. and not in the *patni* of Dubrajpur held by the Hazarhs. But they have also found that, from before 1883, the Hazrahs had taken possession of the tank as included in their *patni* of Dubrajpur and that from the 24th September 1883, the plaintiffs had been in occupation thereof as tenants under the Hazrahs on the basis of the lease previously mentioned. In this view the Courts below have held that the plaintiffs had acquired a good title to the tank in dispute by adverse possession, and that consequently they were entitled to a decree for declaration of title and recovery of possession as against the 1st defendant.

On the present appeal that decree has been assailed on two grounds: *first*, that the acts exercised by the plaintiffs in respect of the disputed tank did not constitute adverse possession and were not sufficient to extinguish the title either of Gisbourne & Co., or of the 1st defendant, and, *secondly*, that even if these acts constituted adverse possession, they were of no avail as against the 1st defendant, who, it has been argued, would not as proprietor be affected by adverse possession so long as the *patni* of Gisbourne & Co. was in full operation.

As regards the *first* point, the appellant has argued that the act of catching fish in a tank does not constitute adverse possession of the tank, though possibly the person who catches fish may acquire a prescriptive right to fish in the tank. It appears, however, that not only was fish caught from the tank by the plaintiffs but that the tank was actually sub-let, mortgaged and re-excavated by them. It cannot be disputed that these were acts of possession in assertion of ownership. As was laid down in the case of *Bhaskarappa* v. *Collector of North Kanara* (1), the essential elements of possession are a fixed, definable and exclusive occupation present to the perception of the parties. In the case before us, there can be no doubt that the plaintiffs claimed the land on which the tank stood as their leasehold interest under the *patni* of the Hazrahs, and, in assertion of such right, let it out to sub-tenants from time to time, mortgaged it and re-excavated it. It cannot

(1) 3 B. 452.

be seriously contended for a moment that these acts could be interpreted as assertions of a mere right of fishery. As observed in *Venkatrama Aiyar* v. *Secretary of State for India* (2), although the mere appropriation (of fish from a tank may not necessarily) constitute adverse possession, a very different interpretation must be placed upon acts of an obviously proprietary character such as the expenditure of large sums in clearing silt out of the tank. In my opinion, the Subordinate Judge properly held that the possession of the tank by the plaintiffs was adequate in continuity, in publicity and in extent to show that it was adverse to the owner. The *first* contention of the appellant consequently fails.

As regards the *second* point, it may be conceded that there are expressions in the judgment of the Subordinate Judge to which exception may be taken, for instance, the statement that the possession of the plaintiffs was adverse possession against the first defendant up to the year 1899. The title of the first defendant by purchase did not accrue till the 25th November 1899. Up to that date, the possession of the plaintiffs was unquestionably adverse to Gisbourne & Co., the *patnidars* of Baisgram but it could not be described as adverse possession against the 1st defendant. In fact, at that time, the plaintiffs professed to hold the tank as lessees under the Hazrahs who were *patnidars* of Dubrajpur under the 1st defendant himself. But although the view indicated by the Subordinate Judge in the passage mentioned may not be sound the question still arises, whether the 1st defendant has acquired by his purchase from Gisbourne & Co. a title which enables him to resist successfully the claim of the plaintiffs? Now, the facts already stated show that before the 25th November 1899, the plaintiffs had, by adverse possession against Gisbourne & Co., commencing from at least the 24th September 1883, acquired a good title as against them : in other words, the encroachment by the plaintiffs had accrued to the benefit of their landlord and had resulted in the annexation of the tank to the *patni* of Dubrajpur. The true position, then on the 25th November 1899, was that Gisbourne & Co. had lost title to the tank as *patnidars* and the Hazrahs had acquired an indefeasible title therein by the operation of section 28 of the Indian Limitation Act. Consequently, the conveyance by Gisbourne and Co. in favour of the 1st defendant, although intended to transfer their entire interest as *patnidars* of Baisgram, operated in law in respect of such lands only as still remained in their occupation. The 1st defendant, accordingly, did not acquire by his purchase any title to the tank in dispute. Consequently, he cannot successfully resist the claim of the plaintiffs, who are entitled to have a decree, as against him for declaration of title and recovery of possession. His position might have been very different if he had acquired the *patni*, which, be it observed, is a permanent interest [*Sonet Koer* v. *Himmut Bahadoor*(3)] not by private purchase from Gisbourne and Co. but at a sale under the Patni Regulation or in execution of a decree for arrears of rent. The view I take is supported by the decision in *Gobinda Nath Shaha Chowdhry* v. *Surja Kanta Lahiri* (4), but it is necessary to add that no question arises in this litigation as to the legal effect of the incorporation of this tank into the *patni* of Dubrajpur held by the Hazrahs and we do not decide what rights and remedies, if any, the 1st defendant may as superior proprieter have acquired as against the Hazrahs.

Appeal dismissed.

(3) 1 C. 391; 25 W. R. 239 (P. C.); 3 I. A. 92.
(4) 26 C. 460.

(2) 5 Ind. Cas. 118; 20 M. L. J. 74; 7 M. L. T. 139; 33 M. 362.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 21 OF 1915.

April 1, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

BENI PRASAD AND ANOTHER—DEFENDANTS —APPELLANTS

versus

LAJJA RAM—PLAINTIFF—RESPONDENT.

Fraud—Minor, suit to set aside decree again st—

BENI PRASAD *v.* LAJJA RAM.

Guardian, gross negligence of—Fraud and negligence, no proof of—Suit, maintainability of.

It is possible for a minor, where his guardian has conducted his case with gross negligence, to come to the Court and seek relief by way of review of judgment. [p. 64, col. 2.]

If it be sought to set aside a decree obtained against an infant properly made a party and properly represented in the case and if it be sought to do this by a separate suit, the plaintiff in such a suit can only succeed upon proof of fraud or collusion. [p. 64, col. 2.]

Second appeal from the decision of the District Judge, Agra, dated the 7th November 1914.

Mr. *L. M. Banerji*, for the Appellants.

Mr. *Narain Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff in effect sought to set aside a decree which had been obtained by Debi Prasad. Debi Prasad's suit was based on the following allegations. He said that Lajja Ram owed a debt to one Ram Singh, that a creditor of Ram Singh had attached this debt and sold it in execution of a decree obtained against Ram Singh and that he (Debi Prasad) was the auction-purchaser of the debt. At the time that Beni Prasad brought his suit Lajja Ram was "technically" a minor. His mother had been appointed his guardian under the Guardians and Wards Act. On this account the attainment of majority by Lajja Ram was postponed from the period of 18 years (according to Hindu Law) to the special period of 21 years prescribed by the Guardians and Wards Act. Beni Prasad accordingly sued Lajja Ram through his certificated guardian who, at the time of the institution of the suit, was the defendant No. 2, one Tikait Narain. The allegation in the plaint in the present suit is that Tikait Narain colluded with Beni Prasad and did not plead limitation, that if limitation had been pleaded it would have been found that the alleged debt due by Lajja Ram to Ram Singh would have been barred by limitation, that the result of not pleading limitation was that Beni Prasad got a decree. It is this decree which the plaintiff seeks to set aside, having now come of age.

The Court of first instance dismissed the plaintiff's suit. The lower Appellate Court remanded the case for a finding on certain issues. The *first* issue was whether the plea of limitation could have been raised. The *second* issue was whether there had been collusion between Beni Prasad and the minor's guardian. The Court found that the plea of limitation might have been raised but that there was no collusion or fraud. On the return of the findings the District Judge granted the plaintiff a decree. He does not in any way find fault with the facts found by the Subordinate Judge upon the issues remanded, but he was of opinion that where it was shown that the plea of limitation might have been raised, the mere fact that it was not raised entitled the plaintiff to have the decree set aside. No doubt it is possible for a minor, where his guardian has conducted his case with gross negligence, to come to the Court and seek relief by way of review of judgment. No doubt also a minor is entitled by a separate suit to set aside a decree that has been obtained against him by fraud. The present proceeding is a separate suit and we entirely agree with the remarks of Field, J., in the case of *Raghubar Dayal Sahu* v. *Bhikya Lal Misser* (1): At page 76 the learned Judge says: "If it be sought to set aside a decree obtained against an infant properly made a party, and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can only succeed upon proof of fraud or collusion." Let us consider for a moment the facts of the present case. Tikait Narain was the certificated guardian of the minor, that is to say, he was the guardian appointed by the District Judge previous to the institution of the suit and probably on the application of the minor's mother or the minor himself. Lajja Ram was a minor technically only. Had it not been for the fact that a guardian had been appointed by the Court, he would have reached his full age a considerable time before the institution of the suit. Lajja Ram had property and there was no reason why he himself should not have put forward, and instructed the Pleader to put forward, every plea and every circumstance which would have enabled him successfully to defend the suit brought by Beni Prasad. The allegation against the guardian is that he neglected to plead limitation. There is no evidence

(1) 12 C. 69.

of any kind to connect Beni Prasad with the omission of the guardian to plead limitation. Furthermore, the plea of limitation is one to which effect can be given even though not pleaded. The Court is bound to give effect to the provisions of the Limitation Act of its own motion. Therefore, notwithstanding the omission to plead limitation the facts and circumstances could have been given at the trial. In our opinion there was no evidence from which the Court could infer collusion on behalf of Beni Prasad. If the view taken by Field, J., in the case to which we have referred is correct, this in itself is sufficient ground for dismissing the plaintiff's suit. Even if we were to hold that a minor can avoid a decree by a separate suit solely on the ground of the gross negligence of his guardian, we do not think under the circumstances of this case any such negligence has been established, bearing in mind in particular the fact of the age of Lajja Ram who, the learned Subordinate Judge says, was a very intelligent young man.

We think the view taken by the Subordinate Judge was correct and that his decree should be restored. We accordingly allow the appeal, set aside the decree of the learned District Judge and restore the decree of the Court of first instance with costs, including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2379 OF 1914.

March 9, 1916.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

MUNISWAMI GOUDU—PLAINTIFF—APPELLANT

versus

JUNJADU *alias* MUNI ELLUGUDU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. IX, rr. 8, 9—'Admits the claim or part thereof,' meaning of—Trial of suit—Default of plaintiff—Remedy—Costs—Admission by defendant as to liability for part of amount sued—Decree of part and dismissal of rest of claim, whether amounts to decree—Appeal.

A decree for part of a claim, which alone was admitted by the defendant, and the dismissal of the rest on plaintiff's default of appearance under Order IX, rule 8, is a decree within the meaning of section 2 (2), Civil Procedure Code, and is appealable. [p. 66 col. 1; p. 67, col. 1.]

The 'claim or part thereof' which a defendant may admit under Order IX, rule 8, Civil Procedure Code, must be the claim as laid down in the plaint and for the amount stated therein and not simply of the cause of action. [p. 67, cols. 1 & 2.]

At the hearing of a suit on a bond for Rs. 90 plaintiff was absent. Defendant admitted execution, but pleaded that he extinguished the liability by work and labour done for plaintiff with the exception of Rs. 10. The Munsif gave a decree for Rs. 10 and dismissed the rest of the claim under Order IX, rule 8, Civil Procedure Code:

Held, (1) that the part dismissal of the claim was a 'decree' and was appealable; [p. 66, col. 1; p. 67, col. 1.]

(2) (*Seshagiri Aiyar, J., dubitante*)—that the plea of the defendant was a case, within the rule of Order IX, rule 8, Civil Procedure Code, of admitting a part of a claim and was neither a plea of set-off nor of a counter-claim. [p. 66, col. 2.]

Per *Coutts Trotter, J.*—Where a Court decrees the admitted part of a claim and dismisses the rest of it under Order IX, rule 8, Civil Procedure Code, the entire adjudication is a decree and must be so treated. The same adjudication, the same document, cannot be, as to part of it, a decree, and as to another part of it, something else. [p. 66, col. 1.]

The words 'admits the claim or part thereof' in the said rule apply to a case where, on examining the plaint and the defendant's admission in the written statement, it can be considered that he, there and then, agreed to pay the money or to submit to the relief claimed in the plaint. [p. 66, col. 2.]

Armour v. *Bate*, (1891) 2 Q. B. 233, 60 L. J. Q. B. 433; 65 L. T. 137; 39 W. R. 546, referred to.

As a rule, a plaintiff ought not to be shut out from the judgment seat where costs will afford a sufficient protection to the defendant as against the plaintiff who is guilty of some technical error or mistake. [p. 66, col 2.]

Per *Seshagiri Aiyar, J.*—Section 2, clause 2, Civil Procedure Code, applies only to total dismissals of suits for default and not to partial dismissals. [p. 67, col. 1.]

The word 'claim' in Order IX, rule 8, is not necessarily synonymous with the amount sued for. It may refer to the right litigated, irrespective of the arithmetical figure stated in the relief column. The fact that the burden of proof is on the defendant will not enable the plaintiff to get a decree in a case under Order IX, rule 8, Civil Procedure Code, if there was no admission of the right sued for. [p. 67, col. 1.]

Second appeal against the decree of the District Court, Salem, in Appeal Suit No. 123 of 1913, preferred against that of the District Munsif, Krishnagiri, in Original Suit No. 316 of 1913.

Mr. *B. Somayya*, for the Appellant.

Mr. *T. M. Krishnaswami Aiyar*, for the Respondent.

JUDGMENT.

COUTTS TROTTER, J.—In this case the plaintiff failed to appear in the District Munsif's Court on the day which had

been fixed for the hearing of the suit, but the District Munsif found that the defendant was there. The defendant had by his pleadings admitted the execution of the bond on which the suit was brought and had admitted receipt of the principal sum made payable under it, but pleaded that by an arrangement he was allowed to work for a long period of years without wages under the plaintiff and in that way he had extinguished the whole debt except Rs. 10. In those circumstances the District Munsif acted under Order IX, rule 8, of the Code of Civil Procedure. He gave a determination to the effect that the plaintiff should have a decree for Rs. 10 and that his suit as to the remainder should stand dismissed.

It is contended before us for the respondent that the latter part of the determination was not a decree, although the former portion of it admittedly was, but was an order and nothing more, and that accordingly rule 9 of Order IX had to be availed of, where a special procedure is enacted giving a special remedy of setting aside orders dismissing suits for default of the plaintiff's appearance. That looks plausible, because rule 9 says: "Where a suit is wholly or partly dismissed.....the plaintiff shall be precluded from bringing a fresh suit.....But he may apply for an order to set the dismissal aside", and so forth. That undoubtedly leads to the conclusion that the dismissal under Order IX, rule 8, is to be treated as a dismissal for default whether it be of the whole suit or part of it, and in neither case is it to be regarded as a decree. Reference is made to the definition in section 2 of a decree which expressly excludes any order dismissing a suit for default. As I say, that is a tempting view of the matter, but I cannot bring myself to think that the same adjudication, the same document, can be, as to a part, a decree and as to another part of it, something else. It appears to me that so soon as you have a decretal portion of a pronouncement of a Court of Justice, the whole of the pronouncement is a decree and must be so treated. I, therefore, treat it as a decree within the meaning of the Code. That being so, there is a right of appeal.

Another point that arose was this: It was argued that the earlier portion of the words in rule 8 "unless the defendant admits the claim, or part thereof," applied here and this was a case of admitting a claim, reserving a right which was either to be considered as a set-off or a counter-claim, and was not a case within the rule of admitting a part of a claim, because it was said the defendant admitted the whole claim subject to his right to recoup himself in some other form. I do not think that is correct. I think that the words "admits the claim or part thereof" apply to a case where, on examining the plaint and the defendant's admissions in the written statement, it can be considered that he, there and then, agreed to pay the money or to submit to the relief claimed in the plaint. I am confirmed in that opinion by the decision in *Armour* v. *Bate* (1), a determination by a very strong Court on Order XXXVI, rule 32, of the Rules of the Supreme Court which corresponds to the rule we are considering. However, whether that view is right or wrong does not matter, because in the special circumstances of this case I am not prepared to say that the plaintiff should not be allowed on the merits to come up on appeal here, because I see the suit proceeded with a rapidity which for this country must almost be regarded as dazzling. The plaint was filed on the 18th June, the hearing and the whole determination of the matter took place on the 30th, and I think it may very well be that the plaintiff and his legal advisers had no time to make themselves ready with their case. I always take the view, whenever I possibly can, that a plaintiff ought not to be shut out from the judgment seat where costs will afford a sufficient protection to the defendant as against the plaintiff who is guilty of some technical error or mistake. This is not a case of a plaintiff who allows litigation to drag on and constantly applies for adjournments, a thing with which we are so familiar. As I said, any remissness on the part of the plaintiff in this case may be taken to be amply cured by the payment of costs. We set aside

(1) (1891) 2 Q. B. 233; 60 L. J. Q. B. 433; 65 L. T. 137; 39 W. R. 546.

the judgments of both the Courts below and send back the case to the Court of first instance for being tried and disposed of according to law. The plaintiff will pay the whole of the costs incurred by the defendant up to date.

SESHAGIRI AIYAR, J.—I agree. I am unable to agree with the contention of Mr. Seshagiri Sastri that the decision of the Munsif is not covered by the definition of the term "decree." Undoubtedly there was a decree in favour of the plaintiff for Rs. 10; his claim to the extent of Rs. 80 was disallowed. As regards the disallowed portion I fail to see how that is not an adjudication denying the right of the plaintiff to recover that amount. I, therefore, think that the conclusion come to by the Munsif was a decree. Hence there is a right of appeal, unless there is a positive provision of law against giving that right. Section 2, clause (2), in my opinion, applies only to total dismissals for default and not to partial dismissals of this kind. I am strengthened in this view by the language employed by the Legislature in describing Order IX, rule 9. I, therefore, think that there is an appeal.

Upon the question whether the admission as to the liability to pay Rs. 10 comes under the expression "admits the claim or part thereof" in Order IX, rule 8, I have some doubts. The word "claim" is not necessarily synonymous with the amount sued for. It may refer to the right litigated, irrespective of the arithmetical figure stated in the relief column. As I read the written statement, I regard it as an admission of the right litigated under the mortgage coupled with a claim to a set-off as regards the sum of Rs. 80. In that view, I would have held that the whole amount was admitted, and that the burden of proving that there had been a discharge to the extent of Rs. 80 was upon the defendant. The decision in *Armour* v. *Bate* (1) quoted by Mr. Seshagiri Sastri has rendered it unnecessary to consider this question any further. Lord Esher in that case held that the fact that the burden of proof was on the defendant would not enable the plaintiff to get a decree if there was no admission of the right sued for. Impliedly this seems to amount to a pronouncement that the claim to be admitted must be the claim as laid down in the plaint and for the amount stated therein, and not simply of the cause of action. On the question as to whether the Appellate Court should not have given the plaintiff an opportunity of proving his case, it seems to me that there has been speedy justice with a vengeance in this case. Within thirteen days of the filing of the plaint, every stage in the suit had been rushed through; and we find that on the thirteenth day the plaintiff was not allowed an opportunity of proving his case and his claim was dismissed. In these circumstances I think this is a case in which an opportunity should be given to the plaintiff to prove his claim.

On the question of costs, I entirely agree with my learned brother. It was the failure of the plaintiff to have his Pleader ready to go on with the case at the hearing that led to the dismissal. I think that on the plaintiff paying the costs incurred up to date the suit should be restored to file. Three weeks' time from the date of the ascertainment of the costs payable or four weeks from now, whichever is longer, will be allowed to plaintiff for payment of the costs. The defendant may be allowed to pay the Court-fee on the set-off.

Appeal allowed; *Case sent back.*

V.R.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3438 OF 1915.

March 6, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

ASA RAM—PLAINTIFF—APPELLANT

versus

BUDHU MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Discretion, exercise of—Limitation Act (IX of 1908), s. 5—"Sufficient cause," whether question of fact—Acts regulating procedure, interpretation of—Punjab Courts Act (III of 1914), whether retrospective.

No second appeal lies as to the exercise of discretion by a lower Court under section 5 of the Limitation Act. [p. 69, col. 1.]

Tulsa Kunwar v. *Gajraj Singh*, 25 A. 71; A. W. N. (1902) 203; *Hamid Ali* v. *Gayadin*, 26 A. 327; A. W. N. (1904) 23, followed.

The Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of parties to suits. [p. 69, col. 1.]

A right of appeal which has accrued is such a vested right. [p. 69, col. 1.]

The tribunal competent to dispose of appeals, instituted before a new Act came into force but still

ASA RAM *v.* BUDHU MAL.

pending when it came into force, is the tribunal which would have been competent to dispose of them, if the appeals had been instituted after the said new Act came into force. [p. 69, cols. 1 & 2.]

Meugens v. *Sutlej Flour Mills, Ferozepur*, 27 Ind. Cas. 625; 42 P. L. R. 1915; 25 P. W. R. 1915; 30 P. R. 1915, followed.

Where the operation of an Act is postponed, that Act is restrospective, the public being warned by the postponement in good time of the change of the law. [p. 69, col. 2.]

The decree of the 1st Court was given in a case on the 8th June 1914 by a Munsif, and under the law then in force the plaintiff had sixty days within which to appeal to the Divisional Judge. The new Punjab Courts Act came into force on the 1st August 1914. On that date an appeal was filed in the Court of the District Judge, but was dismissed as time-barred as the new Act only allowed 30 days. The District Judge declined to allow any extension under section 5 of the Limitation Act holding that ignorance of law was not a sufficient cause. On second appeal:

Held, (1) that the question of "sufficient cause" was a question of fact and, therefore, the second appeal was not competent; [p. 69, col. 1.]

(2) that inasmuch as the Act had been passed in January, assented to by the Viceroy in April, and published in the *Gazette* in May, all before the decree appealed against had even been passed, the appellant must or should have known that the limitation had been cut down and ought to have filed his appeal within time. [p. 70, col. 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 28th August 1915, affirming that of the Munsif, 1st Class, Jagadhri, dated the 8th June 1914, dismissing the claim.

Mr. *Raghu Nath Rai*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The decree of the first Court in this case was given on the 8th June 1914 by the Munsif, 1st class, Ambala District. Under the law then in force the plaintiff, whose suit had been dismissed, had sixty days within which to appeal to the Divisional Judge, Ambala. On the 15th January 1914, the new Punjab Courts Act had received the assent of the Lieutenant-Governor and on the 27th April 1914, that of His Excellency the Viceroy and Governor-General; and the Governor-General's assent was published in the Punjab Government Gazette of the 22nd May 1914. This Act, by notification of the Punjab Government, was brought into force on the 1st August 1914. Had there been no legislation the plaintiff would have had till the 8th August 1914 to file his appeal in the Court of the Divisional Judge, but on 1st August 1914, that Court ceased to exist and *Meugens* v. *Sutlej Flour Mills, Ferozepur* (1) is authority for the proposition that the Court of the District Judge created by the Punjab Courts Act aforesaid is not the same tribunal as the old Divisional Court, but an entirely new tribunal. An appeal was filed in the Court of the District Judge, Ambala, on the 1st August 1914, and first an *ex parte* decree was passed, which was, however, set aside. The learned District Judge then considered the question of limitation. He held that, as under the new Courts Act, all appeals to the Court of the District Judge must be preferred within thirty days and as the new Act had come into force when this appeal was presented, the appeal was barred by limitation. The District Judge's view was that, if the new Act had been one that simply reduced the limitation for appeal to the Divisional Judge from sixty days to thirty days, then, perhaps, the appeal might be within time, but that the Court of the District Judge not being the successor of the old Divisional Court but a new Court altogether, therefore, there could be no question of sixty days' limitation. It was apparently argued before the District Judge further that the Legislature could not have intended to take people by surprise by curtailing the time allowed for appeal, and this argument the District Judge met by pointing out that the Punjab Government Notification aforesaid gave due warning to the public of the future coming into force of the Act. Lastly, the learned District Judge declined to allow any indulgence under the provisions of the Limitation Act, holding that mere ignorance of law was no sufficient reason for extending the time prescribed by law.

The plaintiff now comes up here with this second appeal, and Mr. Nand Lal on behalf of the opposite party raises two preliminary objections, the *first* of which is with reference to the error in the appeal-petition, whereby respondent No. 2 is put down as Raghnath Das, although Raghnath Das was already dead before the appeal was instituted. I have no hesitation in overruling this objection, because the representatives of Raghnath Das are already on the record. The error was simply a clerical

(1) 27 Ind. Cas. 625; 30 P. R. 1915; 25 P. W. R. 1915; 42 P. L. R. 1915.

one and has caused no prejudice to any body. The *second* objection raised is more important. It is argued that no second appeal lies as to the exercise of discretion by a lower Court under section 5 of the Limitation Act. There are two Allahabad rulings directly in point, *Tulsa Kunwar* v. *Gajraj Singh* (2) and *Hamid Ali* v. *Gayadin* (3). In my opinion this objection is sound, and, therefore, I cannot allow the appellant to argue that the lower Court wrongly exercised its discretion under section 5 aforesaid. Indeed if the matter be considered, authority is hardly required. When a Court has decided that a suit or appeal is, strictly speaking, barred by limitation, and the appellant proposes to show that he had "sufficient cause" for being late with his appeal, that "sufficient cause" must always be a question of fact; and of course no second appeal lies on a question of fact. As to this the learned Counsel for the appellant makes a last effort to show that a second appeal lies by urging that up to the date on which his client filed his appeal in the lower Appellate Court (1st August 1914) no new law existed as yet and, therefore, the District Judge was wrong in talking about "ignorance of law." This argument seems to me to be based on wrong premises: the law certainly *existed* before 1st August 1914, though it did not come into operation until that date.

I turn now to the question whether apart from section 5 of the Indian Limitation Act, the appeal to the District Judge was in time or not. The question is something like the one decided in *Meugens* v. *Sutlej Flour Mills, Ferozepur* (1) though in that case there was no question of limitation. From that ruling I take the three following *dicta* as helping in the present case: (1) that Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to suit; (2) that a right of appeal which has accrued is such a vested right; and (3) that the tribunal competent to dispose of appeals instituted before a new Act came into force but still pending when it came into force, is the tribunal which would have been competent to dispose of them, if the appeals had been instituted after the said new Act came into force. Now if the facts and dates given above are seen, I understand that, according to this ruling, though the Court of the District Judge is not a successor of the Divisional Court, yet the appeal would lie to the District Judge from the decision of the Munsif in the present case. If the present Punjab Courts Act had been in existence before the 8th June 1914, when the Munsif passed his decree, the appeal certainly would have lain to the District Judge. But it was not decided in *Meugens* v. *Sutlej Flour Mills, Ferozepore* (1) whether, while such appeals should be heard under the new Punjab Courts Act by (in a case like the present) the District Judge, the limitation for those appeals should not be that under the new law, *i. e.*, 30 days, but that under the old law *i.e.*, 60 days.

A number of cases have been quoted to me, *Hemandas Ramrakhiomal* v. *Chellaram* (4); *Arayil Kali Amma* v. *Pelappakkara Manakal Sankaram Nambudripad* (5) and so forth, to the effect that where the operation of an Act is postponed, that Act is retrospective, the public being warned by the postponement in good time of the change of the law. In the present case the doctrine laid down in those cases is very difficult either to apply or to reject, for, while no doubt the Act itself was passed by the Local Council in January 1914, and approved by His Excellency the Viceroy on the 27th April 1914, and was published in the Gazette on the 22nd May 1914, the Local Government under section 1 (3) of the Act did not notify until the 15th July 1914 that 1st August was to be the date on which the Act should come into force. The question is whether this 16 days' notice of the coming into force of an Act allows us to infer that the Act was to be retrospective. In my opinion, it does; if all the circumstances be taken into account, no one was really taken by

(2) 25 A. 71; A. W. N. (1902) 203.
(3) 26 A. 327; A. W. N. (1904) 23.

(4) 13 Ind. Cas. 264; 5 S. L. R. 184.
(5) 5 Ind. Cas. 420; 7 M. L. T. 115; 20 M. L. J. 347; (1910) M. W. N. 516; 34 M. 292.

surprise. The Act had been passed in January, assented to by the Viceroy and Governor-General in April, and published in the *Gazette* in May, all before the decree appealed against had even been passed and appellant must or should have known that the limitation had been cut down from 60 to 30 days by an enactment which might any day come into force. Even apart from the postponement from 15th July to 1st August, he should in common prudence have filed his appeal while it was still safe to do so; and when the Notification of 15th July gave him 16 days' grace, he should certainly have come forward by 31st July at latest.

The first and second grounds of appeal are a mere quibble, the Act had come into force when the appeal was filed. The first additional ground of appeal is unsound. Article 152 fully applies: the appeal is an appeal "under" the Civil Procedure Code. though the Courts Act is the Act which determines where the appeal shall go. The contention raised would make Article 152 a dead letter. The next ground is also unsound : Section 4, General Clauses Act (Punjab), does not imply that the length of time a party has to appeal in is a right saved, where there is reason to suppose, as here, that the new Act was meant to be retrospective.

For these reasons I must dismiss this appeal but in all the circumstances I think parties should bear their own costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 194 OF 1915.

March 21, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Shaik DAVUD ROWTHER AND OTHERS—DEFENDANTS NOS. 2, 11, 13, 14—PETITIONERS—APPELLANTS

versus

PARAMASWAMI PILLAI—ASSIGNEE DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, O. XXXII, r. 7—Decree, adjustment of, out of Court—Minor, party to adjustment—Sanction of Court—Enquiry into question of adjustment—Evidence—Adjustment not conferring title, whether reason for dismissal of petition summarily.

The provisions of Order XXXII, rule 7, Civil Procedure Code, apply to a compromise entered into even after a decree has been passed, and an adjustment of a decree to which a minor is a party requires the sanction of the Court. [p. 72, col. 1.]

Virupakshappa v. *Shidappa*, 26 B. 109; 3 Bom. L. R. 565 and *Arunachellam Chetty* v. *Ramanadhan Chetty*, 29 M. 309, relied on.

It is incumbent on a Court to which a petition is presented for recording an adjustment of a decree to hold an enquiry into the matter, take evidence and investigate and decide any questions of fact on which the parties may not be agreed. The Court cannot summarily reject the petition on the ground that a sale-deed executed by one party to the other was not registered and was, therefore, incapable of conveying title to the vendee. [p. 72, col. 1.]

The expression 'show cause' in paragraph 2 of Order XXI, rule 2, Civil Procedure Code, does not mean merely to allege cause nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. [p. 72, col. 1.]

Rung Lall v. *Hem Narayan Gir*, 11 C. 166, referred to.

Appeal against the order of the Court of the Subordinate Judge, Negapatam, in Execution Application No. 386 of 1915, in Original Suit No. 38 of 1903, on the file of the Court of the Subordinate Judge, Kumbakonam.

Messrs. *S. Subramania Aiyar* and *S. Ramachandra Aiyar*, for the Appellants.

Messrs. *C. S. Venkatachariar* and *C. S. Govindaraja Mudaliar*, for the Respondent.

JUDGMENT.—This is an appeal by defendants Nos. 2, 11, 13 and 14 in Original Suit No. 38 of 1903 in the Subordinate Judge's Court of Kumbakonam against an order rejecting an application to record satisfaction of the decree. The facts which have given rise to this appeal may be shortly stated. The decree was obtained by the South Indian Export Company against the members of a Muhammadan family and was transferred by the company (decree-holder) to the respondent. On 1st February 1915 the appellants applied to the Court under Order XXI, rule 83, Civil Procedure Code, for permission to sell the properties which had been attached by the respondent for the purpose of discharging the decree-debt and to execute a sale-deed. On the same date the Subordinate Judge passed the following order: "Permis-

sion granted." In his affidavit in support of his petition, the 2nd defendant stated that the respondent had attached the judgment-debtor's share in the family properties in Athur village, that the disputes between the respondent and the judgment-debtors had been amicably settled and it had been arranged that they (judgment-debtors) were to sell their share of the properties in Athur village to the respondent for Rs. 40,000 The next step taken by the appellants was to apply on 5th July 1915 under Order XXI, rule 2, Civil Procedure Code, to the Court to record satisfaction of the decree. The allegations in the petition were that the following arrangement had been come to, *viz.*, that the appellants were to sell their share in the properties in Athur belonging to them to the respondent for Rs. 40,000, that out of the amount the respondent was to pay the appellants' share under the hypothecation decree and to set off the balance towards the sum of Rs. 24,000 settled as due under the decrees in Original Suit No. 38 of 1903 and Original Suit No. 14 of 1904, and that the respondent was to convey to the appellants all the properties in the Akkarai Puthur village excepting their share in the *punja*. It is further stated that an agreement to the above effect has been executed on 26th January 1915, that in accordance with the agreement a sale-deed for Rs. 40,000 was executed by the appellants to the respondent on 1st February 1915 and that the sale-deed had been delivered to the respondent. Notice was issued to the respondent, who strenuously opposed the application to record satisfaction and put in a lengthy counter-petition in which he contended, *inter alia*, that the appellants were not entitled to 19/49 shares and that the 10th defendant in the suit, who is said to be the widow of the 1st defendant, was also entitled to a share. According to the respondent the arrangement which was come to, in the presence of the 3rd defendant (the brother of the 1st defendant), was that the appellants and the 10th defendant were to convey their share in the lands in Athur village to the respondent, that the 10th defendant and the appellants were to execute a sale-deed for Rs. 40,000 and get it registered and that a deed of release should be obtained from the 10th defendant relinquishing her rights to the properties comprised in the sale-deed. The respondent further alleged that the sale-deeds were not completed as the appellants had not obtained a registered deed of lease from the 10th defendant. The Subordinate Judge without recording any evidence rejected the application to record satisfaction, on the ground that the sale-deed not having been registered could not pass title to the vendee, and that until the sale-deed was registered the question whether satisfaction of the decree should be recorded could not be gone into. The learned Vakil for the appellants contends that, as there was a lawful agreement sanctioned by the Court for the sale of the lands, and as a duly executed sale-deed was delivered to the respondent who was alone responsible for the non-registration of the document, the Subordinate Judge ought to have held that this was a proper adjustment of the decree, and that the Subordinate Judge ought to have enquired into the case on the merits and was wrong in holding that the question of satisfaction could not be gone into until the sale-deed had been registered.

We think that the Subordinate Judge was wrong in summarily rejecting the petition without allowing the parties an opportunity of establishing their respective allegations. It is impossible to decide the question whether there has been an "adjustment" of the decree within the meaning of Order XXI, rule 2, Civil Procedure Code, as there has been no enquiry by the lower Court into the allegations in the petition and counter-petition. The appellants' case was that in pursuance of the agreement, they had duly executed and delivered a sale-deed for Rs. 40,000 to the respondent and had thus performed their part of the contract and that nothing remained to be done except to have the sale-deed registered. The parties are at variance as to what the details of the arrangement and agreement were. According to the respondent, it embraced other matters such as a division of the lands and it was an essential part of the agreement that a registered sale-deed should be taken from the 10th defendant in respect of her share in the properties. The appellants did not produce the agreement in support of their petition but stated they would cause it to be produced during the enquiry. The agreement will pro-

bably throw considerable light on the questions at issue between the parties. In *Rung Lall* v. *Hem Narain Gir* (1) it was held that the words "to show cause" in section 258 of Act XIV of 1882, which corresponds to Order XXI, rule 2, Civil Procedure Code, do not mean merely to allege causes nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court, and that it is incumbent upon the Court to investigate and decide any questions of fact on which the parties may not be agreed. We are of opinion that the Subordinate Judge was wrong in rejecting the petition without holding any enquiry. In paragraph 11 of the counter-petition the respondent took the objection that the permission of the Court not having been obtained to enter into the compromise on behalf of the minor 14th defendant, the compromise was invalid. The Subordinate Judge has not noticed this point. It has been held in *Virupakshappa* v. *Shidappa* (2) and *Arunachellam Chetty* v. *Ramanadhan Chetty* (3) that the provisions of Order XXXII, rule 7, Civil Procedure Code, apply to a compromise entered into even after a decree has been passed and that an adjustment of a decree to which the minor is a party requires the sanction of the Court. See also sub-rule 1 (*a*) of rule 7 of Order XXXII, Civil Procedure Code. This is a matter which the Subordinate Judge will consider in disposing of the petition. The respondent in the 16th paragraph of his counter-petition contended that the petitioners' application was barred by limitation. If the "adjustment" was only completed by the delivery of the sale-deed to the respondent on the 1st of February 1915 (and not by the mere agreement of January 1915), the application seems not to be barred. The question again whether the adjustment was intended to be complete only after the petitioners had the sale-deed attested by the writer's signature, has also not been gone into (see paragraphs 5 and 8 of the counter-petition). Lastly, assuming that the registration of the sale-deed was intended to complete the adjustment, the probabilities are that according to the agreement between the parties, the petitioners were under an obligation to afford all necessary facilities to the respondent for that purpose. The last day for presentation of the document for registration was 1st June 1915. The respondent says in paragraph 8 of his counter-petition that the petitioners failed to appear at the Registration Office and to give the respondent the necessary facilities for registration even "on the last day for registration" and even after repeated prior requests. If so, the adjustment was not completed through the petitioner's default and the application would be unsustainable. We accordingly allow the appeal and set aside the order of the Subordinate Judge. He is directed to restore the petition to file and dispose of it with reference to the above observations according to law after giving the parties an opportunity of adducing evidence. Costs to abide the result.

Appeal allowed ; *Case sent back.*

V.R.P.

(1) 11 C. 166
(2) 26 B. 109; 3 Bom. L. R. 565.
(3) 29 M. 309.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3546 OF 1911.

June 20, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

TOMEJUDDI—PLAINTIFF No. 1—APPELLANT

versus

MULAI CHOWKIDAR AND OTHERS—DEFENDANTS AND PLAINTIFF No. 2—RESPONDENTS.

Co-owner's possession, effect of—Abandonment by one co-owner and exclusive possession by another effect of.

One co-owner is entitled to treat the possession of another as his own, unless and until by open assertion and exercise of hostile title the latter acquires an indefeasible title. [p. 73, col. 2.]

But a co-sharer, who has abandoned the land, cannot say that his co-sharers, who have since the abandonment been in actual and exclusive possession, did all this on his behalf. [p. 74, col. 1.]

TOMEJUDDI *v.* MULAI CHOWKIDAR.

Appeal against the decree of the Subordinate Judge, Barisal, dated the 12th of September 1911, reversing that of the Munsif, Patnakhali, dated the 27th January 1911.

FACTS of the case appear from the judgment.

Babu *Abinash Chandra Guha*, for the Appellant.—There must be some unequivocal act of possession which must amount to ouster. Defendants must show adverse possession. There should be exclusive claim of ownership in denial of the right of the other party amounting to an ouster, *vide Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (1). In the absence of any finding to show some such act of open and unequivocal possession, there cannot be any adverse possession. They are co-sharers, so the appellant is entitled to say that the respondents' possession is his possession, until and unless they can show adverse possession.

[D. CHATTERJEE, J.—As soon as you set up dispossession, their adverse possession is proved.]

The appellant being a co-sharer of defendants, he can rely upon their possession so long as they cannot show actual ouster. There is no finding that the plaintiff was not in possession within 12 years prior to the suit. Merely because the defendant claimed possession and paid rent cannot divest the plaintiff of his ownership and vest it in the defendants. Title still persists in the plaintiff. There is no such act of adverse possession which would make time run against the plaintiff. Having regard to the fact that the parties are co-tenants, can the fact that the defendants reclaimed land amount to adverse possession? The Subordinate Judge does not find that the plaintiff was dispossessed. Precise date must be found to find that the plaintiff is time-barred.

Babu *Gunada Charan Sen*, for the Respondents.—There is abandonment by the plaintiff, so it is not now open to him to come back and claim benefit. Defendants' adverse title is founded upon plaintiff's abandonment, so defendants did not hold on behalf of the plaintiff as a co-tenant. Defendants' possession must amount to adverse possession even as against a co-tenant.

Babu *Abinash Chandra Guha* replied.

JUDGMENT.—This appeal arises out of a suit for recovery of possession on the allegation of dispossession within 12 years. The plaintiffs said that they were 6-annas owners of a *kursa* holding of which the defendants were the 10-annas owners, and that the defendants having gradually encroached on their share of land, ultimately dispossessed them of this land entirely in 1313.

The first Court decreed the suit of the plaintiff for joint possession. The Court of Appeal has dismissed it. In so dismissing it the learned Judge says that the plaintiff has failed to prove possession and dispossession as alleged by him. The dispossession as alleged, was within 12 years. In dealing with this matter, the learned Judge says that "they (the plaintiffs) either abandoned the land or were forcibly dispossessed of it, as stated by the plaintiffs' side, at some period of time within twelve years from the date of the institution of the suit" and then further on, he finds: "the plaintiffs' story of their dispossession by force by the defendants, therefore, appears, to my mind, to be wholly false." The dispossession within 12 years was found to be false. This would ordinarily be a complete finding for the purpose of throwing out the suit of the plaintiff.

It is contended, however, that there is a difference in this case because the defendants were the co-owners and that therefore the plaintiffs were entitled to treat the possession of the defendants as their own possession, unless and until the defendants prove that by open assertion and exercise of hostile title they have acquired an indefeasible title to the property. That also is a correct proposition of law and would have stood in favour of the appellant but for another finding of the learned Judge that, upon the evidence, the plaintiff must have abandoned the land for more than 12 years before suit.

If there was an abandonment, then the possession of the co-sharer cannot be treated as possession in respect of which the defendant can be taken by the plaintiff as a

(1) 27 Ind. Cas. 465; 20 C. W. N. 51 at p. 55; 21 C. L. J. 253.

co-tenant. The fact of the abandonment shows that they have no longer any intention to treat this land as in their possession. They cannot now say that their co-sharers, who have since the abandonment been in actual and exclusive possession of the property, did all this on their behalf.

In this view of the case, we think that the finding of the learned Judge that the plaintiffs have failed to prove possession and dispossession within 12 years is correct. This sufficiently disposes of the suit. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 336 OF 1914.

March 31, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

ALAGAPPA CHETTY—DEFENDANT No. 1—PETITIONER

versus

ANNAMALAI CHETTY AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 20 (b), 105, 115—Leave to sue, order refusing grant of—Reversal of order on appeal against order returning plaint—Appellate Court, jurisdiction of—Suit for accounts against partners individually—Leave to sue, grant of, when some of the partners resident outside jurisdiction of Court where suit instituted—Cause of action—Suit, institution of, in wrong Court—Jurisdiction—High Court—Revision.

The plaintiff sued in the District Munsif's Court of Paramakudi a firm consisting of three partners impeaching a settlement of account arrived at in Rangoon. One of the partners resided within the jurisdiction of the said Court, while the other two were residents of Rangoon. The plaintiff did not sue the partnership as a single defendant, but impleaded the defendants as separate individuals and separate parties. He applied for leave, under section 20 (*b*), for leave to file the suit against all the defendants in the Paramakudi Munsif's Court. The Munsif refused leave and this order was embodied in a separate order returning the plaint for presentation to the Court at Rangoon. On appeal against the latter order, the District Judge not only reversed it, but at the same time granted leave to the plaintiff under section 20 (*b*), Civil Procedure Code. The plaintiff moved the High Court in revision:

Held, (1) that the order of the District Judge was strictly within section 20 (*b*), Civil Procedure Code, as defendants were sued not as a firm but as separate parties; [p. 75, col. 1.]

(2) that, though the Munsif's order refusing leave to sue in Paramakudi was not appealable, it was competent to the District Judge to consider the order on the principle of section 105, Civil Procedure Code, preliminary to the reversal of the order of the Munsif returning the plaint for presentation to the proper Court; [p. 75, cols. 1 & 2.]

Jones v. *Gough*, (1865) 3 Moore P. C. (N. S.) 1 at p. 12; 11 Jur. (N. S.) 251; 12 L. T. 31; 13 W. R. 509; 16 E. R. 1; 146 R. R. 1; *Cameron* v. *Fraser*, (1842) 4 Moore P. C. 1; 13 E. R. 200, referred to.

(3) that, though under the peculiar circumstances of the case, the suit was only triable in the Court at Rangoon, the High Court would not interfere under section 115, Civil Procedure Code, as it could not be said that the District Judge had exceeded his jurisdiction in dealing with the case. [p. 76, col. 1.]

Obiter.—The principle of section 105, Civil Procedure Code, would apply not only to decrees and interlocutory orders, but also to orders and interlocutory orders which lead up to the final order. [p. 75, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, Ramnad, in Civil Miscellaneous Appeal No. 4 of 1913, preferred against that of the District Munsif, Paramakudi, in Original Suit No. 680 of 1912.

Mr. *C. V. Anantha Krishna Aiyar*, for the Petitioner.

Mr. *K. Rajah Iyer*, for the Respondents.

JUDGMENT.—Mr. Anantha Krishna Aiyar, the learned Vakil for the petitioner, has raised in this case some interesting questions of law, on which, though I do not agree with him, I am free to admit, there is a great deal to be said. The facts of the case are these. The plaintiff borrowed a large sum of money from a firm of Nattukottai Chetties in Rangoon and, as security for the loan, deposited with the firm the mortgage securities obtained by him from third parties. Some time after the loan, the plaintiff settled accounts with the firm and paid a certain sum of money in full discharge of the amount due and got the securities re-transferred to his name. The present suit is brought by the plaintiff in the Paramakudi District Munsif's Court impeaching the settlement of account at Rangoon and claiming a certain sum of money from the defendant firm. At the time of the suit, the 1st defendant was undoubtedly residing within the jurisdiction of the District Munsif of Paramakudi. It is equally clear that the other two partners of the firm have been residing in Rangoon all through. In these circumstances, an application was made by the plaintiff asking the

Court under section 20, clause (*b*), of the Code of Civil Procedure for leave to institute the suit against all the defendants in the Paramakudi Court. By a separate order, the District Munsif refused to grant leave, and on the same day passed an order returning the plaint to the plaintiff for presentation to the Court at Rangoon. This order returning the plaint embodies the separate order on the application for leave. Against this order returning the plaint, an appeal was preferred to the District Court. No appeal was preferred against the order refusing leave, and none could have been preferred as the Civil Procedure Code does not provide for such an appeal. In appeal, the District Judge reversed the order of the District Munsif, and at the same time granted leave, to the plaintiff under section 20 (*b*) of the Civil Procedure Code. Mr. Anantha Krishna Aiyar's objection to that order is that it is not competent for the District Judge to grant leave under section 20 (*b*), because the defendants, although three in number, constitute but one defendant and that section 20 (*b*) contemplates the grant of such leave only in cases where one of the defendants is within the jurisdiction of the Court in which the suit is sought to be instituted and the others are outside such jurisdiction. I am somewhat impressed by this argument because, although three persons are mentioned as defendants, still, on looking into the plaint, it strikes me that the real object of the suit is to obtain a decree against the firm of which the three defendants are the partners. Nonetheless, the order of the District Judge is strictly within section 20, clause (*b*). If plaintiff had sued the partnership as a single defendant, though it was composed of three partners, then the contention of Mr. Anantha Krishna Aiyar would be unanswerable. But the plaintiff by impleading the defendants as separate individuals and separate parties has avoided that difficulty. In these circumstances, I am unable to accede to the argument of Mr. Anantha Krishna Aiyar upon this point.

The further argument of the learned Vakil is that as no appeal lay against the order refusing to grant leave, it is not open to the District Judge, in reversing the order of the District Munsif returning the plaint for presentation to the proper Court, to grant leave under section 20 (*b*). Here again there is no authority one way or the other. I am inclined to think that the principle of section 105, Civil Procedure Code, would apply not only to decrees and interlocutory orders, but also to orders and interlocutory orders which lead up to the final order. The principles enunciated in *Jones* v. *Gough* (1) and *Cameron* v. *Fraser* (2) to which Mr. Rajah Aiyar on behalf of the respondent drew my attention, support this view. I am, therefore, of opinion that it was competent to the District Judge to consider the order refusing to grant leave preliminary to the reversal of the order of the District Munsif.

Mr. Anantha Krishna Aiyar drew my attention to another circumstance upon which I do not think he is as strong as on the other points. The District Judge, no doubt, makes the statement that the defendants who did not reside within the District Munsif's jurisdiction raised no objection to the institution of the suit in the Paramakudi Court. I think he is right in the statement he makes, because there is only one written statement filed by the 1st defendant and in that statement he says that the other defendants have not acquiesced in the institution of the suit. But that is not a statement made by the other defendants. Consequently, the District Judge is right in saying that the other defendants have not objected to the institution of the suit in the Court of the Paramakudi District Munsif. Although I have expressed my views fully on the questions of law raised in the case,

I entirely agree with Mr. Anantha Krishna Aiyar that this suit ought not to be allowed to be tried in the Madura District because the settlement was come to in Rangoon, the parties, namely two of the defendants and the plaintiff, and his witnesses are at Rangoon, the dealings were in Rangoon and the securities were all in Rangoon. In these circumstances, the proper Court in which the litigation should be carried on is the Rangoon Court and not the

(1) (1865) 3 Moore P. C. (N. S.) 1 at p. 12; 11 Jur. (N. S.) 251; 12 L. T. 31; 13 W. R. 509; 16 E. R. 1; 146 R. R. 1.

(2) (1842) 4 Moore P. C. 1; 13 E. R. 200.

Paramakudi Munsif's Court. There is, however, this circumstance against Mr. Anantha Krishna Aiyar, namely, this is not a case in which I can interfere under section 115 of the Civil Procedure Code, for I cannot say that the District Judge has exceeded his jurisdiction in dealing with this case.

I, therefore, dismiss the petition under the circumstances, but I make no order as to costs.

Petition dismissed.

V.R.P.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 777, 953, 1130 OF 1912.

June 6, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

IN No. 777 AND 1130

PRAN KRISHNA SAHA—PLAINTIFF—APPELLANT

IN No. 953

OFAT PRAMANIK—PLAINTIFF—APPELLANT

versus

IN No. 777

KRIPA NATH CHOWDHURY AND OTHERS—RESPONDENTS

IN No. 953

KHUDIRAM SAHA AND OTHERS—RESPONDENTS

IN No. 1130

MADAN BISWAS AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885, B. C.), ss. 111, 111B — Suit instituted within prohibited period, how to be dealt with—Dismissal of suit—Rejection or return of plaint—Civil Procedure Code (Act V of 1908), O. VII, rr. 10, 11.

A suit involving issues mentioned in clauses (*b*) and (*c*) of section 111B of the Bengal Tenancy Act instituted, in contravention of the provisions of that section, within the period of three months following the date of the certificate of final publication of a Record of Rights, ought not to be dismissed but may be treated, subject always to any question arising under section 109, as though the plaint had been received and the suit instituted on the day following the expiration of such period. [p. 79, col. 1; p. 81, cols. 1 & 2.]

Ram Narayan Singh v. *Krishna Chandra Ghose*, 17 Ind. Cas. 430; 17 C. L. J. 239; 17 C. W. N. 408, distinguished.

Rendall v. *Blair*, (1890) 45 Ch. D. 139; 59 L. J. Ch 641; 63 L. T. 265; 38 W. R. 689; *Mahammad Azmat Ali Khan* v. *Lalli Begum*, 8 C. 422; 9 I. A. 8; *Alimuddin Khan* v. *Hira Lall Sen*, 23 C. 87, *Jijaji Pratapji Raje* v. *Balkrishna Mahadeo*, 17 B. 169; *Bando Subrao Jamnis* v. *Jambu Tavnappa Adake*, 7 Ind. Cas. 986; 12 Bom. L. R. 801; *Jagat Tarini Dasi* v. *Naba Gopal Chaki*, 34 C. 305; 5 C. L. J. 270; *Sarat Chandra Banerjee* v. *Apurba Krishna Roy*, 11 Ind. Cas. 187; 14 C. L. J. 55; 15 C. W. N. 925; *Chandulal* v. *Avad*, 21 B. 351; *Hira Koer* v. *Lachuman Gope*, 21 Ind. Cas. 958; 19 C. W. N. 1141, referred to.

But the plaint in such a suit should be at once returned or rejected under Order VII, rule 10 or 11, Civil Procedure Code. [p. 80, col. 2; p. 79, col. 1.]

Per *N. R. Chatterjea, J.*—If a suit appears from the statements of the plaint to be barred by any law, the proper course is to reject the plaint under Order VII, rule 11, clause (*d*), and not to dismiss the suit entirely. [p. 79, col. 1.]

Per *Richardson, J.*—Sections 111 and 111B of the Bengal Tenancy Act prohibit for the periods therein stated the entertainment by, or the institution in, the Civil Courts of suits of certain classes. But the jurisdiction of the Civil Courts in regard to such suits is not necessarily taken away for good and all. The Civil Courts are finally deprived of jurisdiction only in the case of suits concerning matters which have come before a Revenue Officer for decision under sections 105 to 108. [p. 80, col. 2.]

The provisions of sections 111 and 111B have the effect that in respect of certain suits the Civil Courts are closed to the plaintiff for the period specified in the sections. But the filing of a plaint within a prohibited period shall not entail the dismissal of the suit. [p. 81, col. 1.]

Appeals against the decrees of the District Judge, Pabna and Bogra, dated the 8th January 1912, affirming those of the Munsif, 2nd Court at Pabna, dated the 25th July 1911.

FACTS of the case appear from the judgment.

Babu *Joges Chandra Roy* (with him Babu *UpendraLal Roy*), for the Appellants.—In a case under section 91, Chota Nagpur Tenancy Act (VI of 1908), where the circumstances were exactly similar to those of the present one, it was held that suits instituted within three months should not be dismissed but stayed. Section 91, Chota Nagpur Tenancy Act, corresponds to section 111B of the Bengal Tenancy Act.

The marginal note to section 111B of the Bengal Tenancy Act is, "Stay of suits in which certain issues arise."

In one of the cases, my dispossession was in 1308, *i. e.*, 1901, and I instituted the suit in 1910; had the plaint been returned then and there, I might have brought a suit

within time; instead of doing that, the Court framed issues, took evidence and then saying that the suit had been instituted within three months of the date of the certificate of the final publication of the Record of Rights, dismissed my suit. The procedure adopted has greatly prejudiced the plaintiff. The doors of the Court have been closed against the plaintiff for ever by the dismissal of the suit.

Dr. *Dwarkanath Mitter* (with him Babus *Brajalal Chakravarty*, *Birajmohan Majumdar* and *Purna Chandra Roy*), for the Respondents.—The plaintiff did not pray for a stay order in the Memorandum of Appeal and the point cannot be raised now.

The lower Court is quite right in its construction of section 111B of the Bengal Tenancy Act.

Marginal notes are no part of an Act and so cannot be referred to in interpreting a section.

[N. CHATTERJEA, J.—Section 111B says a suit shall not be instituted within three months; suppose the plaint is presented at the end of two months 29 days; suppose it is left in the file for a day. Is it not allowable for us to treat the plaint as having been presented on the day when the suit was first called on for hearing?]

The section (111B of the Bengal Tenancy Act) is imperative in its terms and a strict compliance with its terms is necessary, especially as it involves a question of public policy, namely, to prevent conflict of jurisdiction of Civil and Revenue Courts.

[N. CHATTERJEA, J.—We can sometimes treat an appeal as being presented in time though it is presented after the expiry of the time.]

That is so under a special statutory provision.

Section 111B of the Bengal Tenancy Act differs in its terms from section 91 of the Chota Nagpur Tenancy Act. Section 91 of the Chota Nagpur Tenancy Act is similar to section 11 of the Civil Procedure Code.

Section 111B says, "A suit, etc., *shall not be instituted.*"

Section 91, Chota Nagpur Tenancy Act, says, "A Court *shall not entertain* a suit, etc."

Section 91 is similar to section 11 of the Civil Procedure Code, which says that the Court shall not try certain suits.

[N. CHATTERJEA, J.—You mean to say that there are cases when parties are entitled to bring suits but Courts are not entitled to entertain them!]

In the present case, the plaintiff had no cause of action for instituting the suit.

[N. CHATTERJEA, J.—And the Court also had no right to entertain the suit. The plaint and other papers were waste paper only, The question is, whether we are entitled to treat the plaint as being presented when the suit was called on for hearing, *i. e.*, after three months from the certificate of final publication.]

As the cause of action did not arise within three months, the plaint could have been rejected as not showing a cause of action under Order VII, rule 11 (*a*), and rejection of a plaint is equivalent to a decree under section 2, Civil Procedure Code.

According to rules of interpretation, conditions precedent are imperative (Maxwell on Interpretation of Statutes, page 623). Non-compliance with them would be fatal.

Babu *Joges Chandra Roy*, in reply.—Justice requires that the order I have prayed for should be made.

[N. CHATTERJEA, J.—You can get back your plaint and may rely on section 14 of the Limitation Act.]

The actual hearing took place after three months and the present case is not distinguishable from the case of *Hira Koer* v. *Lachuman Gope* (1).

JUDGMENT.

N. CHATTERJEA, J.—These appeals arise out of suits for recovery of possession of the lands in dispute on declaration of the plaintiff's title thereto.

The lands were recorded in the Record of Rights in the first case as the *brohmotter* and *lakheraj* lands of the defendants No. 1 to 3 and in the second as the *jotes* of defendants Nos. 1 to 5. The plaintiff claimed the lands as part of his *patni* and *dar-patni taruf*, it being alleged that the lands were settled with other persons who were dispossessed by the defendants and that the former thereupon relinquished the lands in favour of the plaintiff.

It appears that the Record of Rights were finally published on the 30th January 1910

(1) 21 Ind. Cas. 958; 19 C. W. N. 1141.

and the 2nd February 1910 was the date of certificate of final publication. The Courts below have dismissed the suits on the ground that as they raise issues coming within clauses (*b*) and (*c*) of section 111B of the Bengal Tenancy Act, they are barred by the provisions of the section, having been instituted within three months of the date of the certificate of final publication of the Record of Rights. The plaintiff has appealed to this Court.

The date of certificate of final publication of the Record of Rights was the 2nd February 1910, and three months from that date expired on the 2nd May 1910. These suits were filed on the 27th April 1910, *i.e.*, six days before the expiry of the three months.

The plaints, however, were not rejected but were registered. The defendants in their written statements filed on the 22nd July 1910 pleaded that "without bringing a suit for amending the Record of Rights in respect of the disputed lands after its final publication by the Settlement Court, the plaintiff having brought this suit contrary to the provisions of law, this suit cannot proceed in this Court. The suit brought by the plaintiff in the manner and in the form is not triable by this Court."

No specific objection was taken that the suit was not maintainable on the ground that the suits were instituted before the expiry of the three months, nor was any application made to have the plaint rejected on that ground. The suits were heard by the Court of first instance on the 25th July 1911, when they were dismissed on the ground that they were not maintainable as being contrary to the provisions of section 111B of the Bengal Tenancy Act, and the lower Appellate Court affirmed that decision on the 8th of January 1912.

Section 111B of the Bengal Tenancy Act provides that a suit shall not be instituted in any Civil Court for the decision of any of the issues mentioned in the section within three months from the date of certificate of final publication of the Record of Rights. The suits involve issues mentioned in clause (*b*) and (*c*) of section 111B. The suits, therefore, could not be instituted before the expiry of three months from the date of the certificate.

It is contended, however, that the suits should not have been dismissed but should have been stayed until the expiry of the three months, and we have been referred to certain observations made with the case of *Ram Narayan Singh* v. *Krishna Chandra Ghose* (2) in connection with section 91 of the Chota Nagpur Tenancy Act, which lays down that no Civil Court shall within six months after the final publication of the Record of Rights entertain any suit or application in which certain issues specified therein arise. In that case the learned Judges observed: "We may finally observe that even if the view taken by the Subordinate Judge had been well founded he ought not to have dismissed the suit. Section 91, where it is applicable, merely provides that the Civil Court should not entertain a suit of a particular description. That does not mean that the suit, if instituted, shall be dismissed. The proper course to follow in such a contingency is to adjourn the trial of the suit till the final publication of the Record of Rights. The view we take is supported by the principle recognised in *Rendall* v. *Blair*(3); *Mahammad Azmat Ali Khan* v. *Lalli Begum* (4); *Alimuddin Khan* v. *Hira Lall Sen* (5); *Jijaji Pratapji Raje* v. *Balkrishna Mahadeo* (6); *Bando Subrao Jamnis* v. *Jambu Tavnappa Adake* (7); *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (8) and *Sarat Chandra Banerjee* v. *Apurba Krishna Roy* (9) and does not militate against the decision in *Chandulal* v. *Awad* (10)." The principle was followed in a later case, *Hira Koer* v. *Lachuman Gope* (1), in connection with section 111 of the Bengal Tenancy Act and it was held that the suit should not be dismissed as three months from the date of final publication had already expired.

(2) 17 Ind. Cas. 490; 17 C. L. J. 239; 17 C. W. N. 408.
(3) (1890) 45 Ch. D. 139; 59 L. J. Ch. 641; 63 L. T. 265; 38 W. R. 689.
(4) 8 C. 422; 9 I. A. 8.
(5) 23 C. 87.
(6) 17 B. 169.
(7) 7 Ind. Cas. 986; 12 Bom. L. R. 801.
(8) 34 C. 305; 5 C. L. J. 270.
(9) 11 Ind. Cas. 187; 14 C. L. J. 55; 15 C. W. N. 925.
(10) 21 B. 351.

It is to be observed that under section 91 of the Chota Nagpur Tenancy Act as well as under section 111 of the Bengal Tenancy Act, the Civil Courts cannot *entertain a suit* whereas section 111B lays down that *no suit shall be instituted.* But although a suit cannot be instituted within the period of three months, the jurisdiction of the Civil Court is not wholly taken away when no suit has been instituted in respect of the same matter in the Revenue Court. There is no question that in such a case the suit may be instituted in the Civil Court on the expiry of that period and there is no provision in the Act for the dismissal of a suit instituted within the said period. I am of opinion, therefore, that the principle recognised in the above cases may also be applied to cases coming under section 111B of the Act.

In any case I think the suit ought not to have been dismissed. If a suit appears from the statements of the plaint to be barred by any law, the proper course is to reject the plaint under Order VII, rule 11, clause (*d*), and not to dismiss the suit entirely. The Court in the present case did not reject the plaint but registered it and fifteen months after the suit was dismissed at the hearing on the ground that it was instituted contrary to the provisions of section 111B of the Act. In the case of *Padmanund Sing* v. *Anant Lal Misser* (11), where it was held that it is competent to the Court to reject a plaint under section 54 (of the old Code) after it has been admitted and registered, the plaint was filed with insufficient Court-fees. The Court directed the plaintiff to put in the deficit Court-fees within the time fixed by it which he failed to do but put in the Court-fees subsequently, and the plaint was admitted and duly registered. At the time of the hearing of the suit, on the objection of the defendant the plaint was rejected. It was held by the Full Bench that in the circumstances of the case, the plaint might well be regarded as presented and filed on the date it was registered, with all the consequences that would follow it in regard to limitation or otherwise from its being filed on that date.

(11) 34 C. 20; 4 C. L. J. 421; 11 C. W. N. 38; 1 M. L. T. 355.

Maclean, C. J., observed: "If the Court had rejected the plaint in the first instance on the ground that the deficit Court-fee was tendered too late, the plaintiff could then have brought a fresh action, whilst, very possibly, by the objection being taken at so late a stage, such new suit would be barred by limitation."

In the Full Bench case something had to be done, *viz.*, the payment of the deficit Court-fee. In the present nothing further was to be done and there can be no question that the plaint if filed six days later would have been a quite valid one. A fresh suit now would be long out of time. Under the circumstances, I think the principle of the Full Bench decision may be followed and the suit treated as having been instituted on the 3rd May 1910.

We set aside the decrees of the Courts below and send back the case to the Court of first instance to be tried on the merits, costs to abide the result.

RICHARDSON, J.—The Courts below have concurred in dismissing these suits, on the ground that they were instituted in contravention of section 111B of the Bengal Tenancy Act within the period of three months following the date of the certificate of final publication of a Record of Rights covering the lands to which the suits respectively relate.

The Record of Rights was published on the 30th January 1910. The certificate of final publication is dated the 2nd February 1910 and the suits were instituted on the 27th April 1910 within the three months mentioned in the section. The question is whether the Courts below were right in dismissing the suits.

When a Record of Rights has been prepared and published for any local area, estate or tenure, and no settlement of land revenue is in question, section 105 of the Bengal Tenancy Act gives the Revenue Officer power, on application by landlord or tenant, to settle a fair and equitable rent for the land held by the tenant. The application must be made within two months of the date of the certificate of final publication. Section 106 further empowers the Revenue Officer to hear and decide disputes regarding entries in, or omissions from, the Record of Rights. For the purpose of obtaining his decision on such a dispute, a suit has to be

instituted before him within three months from the date of the certificate of final publication.

Then inasmuch as the jurisdiction so conferred on the Revenue Officer might bring him into conflict with the Civil Courts, provisions have been introduced with the object of preventing such a conflict.

The first of these provisions in logical order will be found in section 111, which in cases like the present covers the whole period from the issue of an order under section 101 directing the preparation of a Record of Rights until three months after its final publication. Symmetry would apparently demand that the three months should be calculated from the date of the certificate of final publication. But, however that may be, during the period specified no Civil Court is to "entertain.....any suit or application for the alteration of the rent or the determination of the status of any tenant in the area to which the Record of Rights applies."

Then comes section 111B, which comprises four sub-sections. Sub-section (1) relates to the three months from the date of the certificate of final publication during that period:

"No application or suit affecting such land or any tenant thereof shall...be made or instituted in any Civil Court for the decision of any of the following issues." Four issues are stated which need not be set out.

Sub-section (2) relates to the period before "the final publication of the Record of Rights", during which the jurisdiction of the Civil Court is not ousted, except to the extent provided by section 111. The clause says that if during the period:—

"A suit involving the decision of any of the issues mentioned in sub-section (1) has been instituted in a Civil Court, the Revenue Officer shall not entertain any suit under section 106 involving the decision of the same issue."

Sub-section (3) contains a somewhat similar provision in regard to the settlement of fair rents under section 105 and need not be further referred to.

Sub-section (4) provides for cases in which "the making of an application or institution of a suit has been delayed owing to the operation of sub-section (1)." In such cases the period of three months is to be excluded in computing the period of limitation prescribed for such suit or application. The division of jurisdiction between the Revenue Officer and the Civil Court is completed by section 109, which says that "subject to the provisions of section 109A (regarding appeals from the decisions of Revenue Officers) a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suits instituted or proceedings taken under sections 105 to 108 (both inclusive)."

This section indicates the object which the Legislature has in view and the mode in which it was sought to be attained. Omitting applications for the sake of brevity, sections 111 and 111B prohibit for the periods therein stated the entertainment by, or the institution in, the Civil Courts of suits of certain classes. But the jurisdiction of the Civil Courts in regard to such suits is not necessarily taken away for good and all. The Civil Courts are finally deprived of jurisdiction only in the case of suits concerning matters which have come before the Revenue Officer for decision under sections 105 to 108.

In regard to suits of the latter kind there is no difficulty, if such a suit has been entertained or instituted in contravention of section 111 or section 111B and if in the course of the proceedings it appears that if the suit had been instituted after the period specified in those sections, it would still have been open to objection under section 109, then it is clear that the Civil Court has no jurisdiction and the plaint must be rejected or the suit or so much of it as is open to such objection must be dismissed.

The difficulty arises when the suit is not open to objection under section 109, that is to say, when the suit would have been a perfectly good suit if it had been instituted after the period specified in section 111 or section 111B.

The Legislature, no dobut, intended or contemplated that a plaint presented during a prohibited period should be at once returned or rejected under the provisions of Order VII, rule 10 or rule 11 of the Civil Procedure Code. This, no doubt, is the proper

course when an untimely presentation is apparent on the face of the plaint and is then and there brought to the notice of the Court. But the breach of section 111 or section 111B may be overlooked or may not be apparent on the face of the plaint. The defect may not come to light till long afterwards when the suit is under trial. In such a case the Civil Court would have complete jurisdiction except for the fact that plaint was presented some few days before it ought to have been presented. Must the suit then be dismissed merely on that ground? Much expense may have been incurred. All the evidence necessary for the disposal of the suit on the merits may have been recorded. If the plaint is then returned or rejected only for the purpose of being re-filed, the plaintiff may be met by a plea of limitation which such a saving clause as that in sub-section (4) of section 111B might be insufficient to meet.

The prohibitions in the sections under considerations are generally addressed to the Court, which is directed not to "entertain" certain suits. In sub-section (1) of section 111 the prohibition is addressed to the intending plaintiff who is not to "institute" the suit. The practical effect in either case appears to be the same for the present purpose, at any rate it appears to be immaterial which form of prohibition is employed. A prohibition addressed to the Court, indirectly it may be but nonetheless patently, affects the party and *vice versa*.

In effect the Civil Courts are in respect of certain suits closed to a plaintiff for the periods specified in sections 111 and 111B. But there is no direction in either section that the filing of a plaint within a prohibited period shall entail the dismissal of the suit. The *ratio decidendi* in the cases of *Ram Narayan Singh* v. *Krishna Chandra Ghose* (2) and *Hira Koar* v. *Lachuman Gope* (1) would seem to be that the absence of such a direction justifies the Court in refusing to dismiss a suit merely on the ground of an infringement of section 111 or section 111B. Upon that footing if the plaint is not returned or rejected before the expiration of such period and remains on the file of the Court the suit may be treated subject always to any question arising under section 109 as though the plaint had been received and the suit instituted on the day following the expiration of such period.

If it be said that the result is to give a different interpretation to the same words in section 111 and section 109, the answer may be made that the deprivation of jurisdiction in section 109 is clearly intended to be permanent while in section 111 as in section 111B, the deprivation is clearly temporary or provisional. After the expiry of the periods specified in the two later sections the Civil Court so far as these sections are concerned is at liberty to receive any plaint. At that stage the jurisdiction to entertain a particular suit depends not on those sections but on section 109.

In view of the two cases cited I agree to the course which my learned brother proposes to take in the present cases.

Appeal allowed; *Case remanded.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1310 OF 1915.

June 15, 1916.

Present:—Mr. Justice Kingsford.

MOTIHARI, CONCERN LTD.,—PLAINTIFF—APPELLANT

versus

LACHMI PROSAD SAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Agency—Recognition of tenant's status by landlord's agent—Deposit of rent in Court—Withdrawal by agent, effect of—Scope of authority—Burden of proof—Liability of tenant.

When a question arises as to the authority of an agent to bind the landlord, it must be decided on the particular facts as in every other case regarding the scope of the authority of an agent to bind his principal. [p. 82, col. 2.]

The defendants who were transferees of a non-transferable holding deposited certain rents which were withdrawn by the landlord plaintiff's agent who was authorized to withdraw money deposited by tenants and was regularly in the habit of withdrawing money from the Civil Court on behalf of the plaintiff:

Held, that under the circumstances it was for the plaintiff to show that the withdrawal was outside the scope of the agent's authority. [p. 82, col. 2.]

Held, also, that the acceptance of rent by the agent from the defendants amounted to a recognition by plaintiff of the tenancy set up by the defendants inasmuch as the plaintiff was bound by the agent's withdrawal as he failed to show that in withdrawing the deposit the agent acted beyond the scope of his authority. [p. 83, cols. 1 & 2.]

Sudaman Jamadar v. *Behari Mahton*, 10 Ind. Cas. 456; 15 C. W. N. 953, referred to.

MOTIHARI CONCERN LTD. *v.* LACHMI PROSAD SAH.

Appeal from a decision of the District Judge, Muzaffarpur, dated the 6th March 1916.

Messrs. *P. R. Dass*, *Naresh Chandra Sinha* and *Siva Narain Bose*, for the Appellant.

Messrs. *Jeyaswal* and *Harihar Prosad Singh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff from the order of the learned District Judge confirming the order of the Munsif, dismissing the plaintiff's suit to eject the defendants from a holding. The suit is brought by the proprietors of the Motihari Concern Limited, through their attorney Mr. Irwin, and their contention is, that the holding was surrendered to them by the previous tenant, one Sakhi Chand, in 1901. The defendants claimed to be in possession as the plaintiff's tenants in virtue partly of a purchase in 1897 from one Mathuni Lal, who, as they assert, was the tenant at that time, and partly by auction-purchase. But the principal defence was that the plaintiffs had recognised the defendants as their tenants. Admittedly the defendants had deposited in Court under the provisions of section 61 of the Bengal Tenancy Act the rent for the years 1310 and 1311 *Faslis* and that deposit was withdrawn by the plaintiffs' *am-mukhtear* one Padarat Lal, in the year 1909. The finding of the learned Judge, agreeing with that of the Munsif, was, that the rents so deposited were withdrawn by the plaintiff's *am-mukhtear* that the *am-mukhtear* had authority to make that withdrawal, that the plaintiff was bound by the act of his *am-mukhtear*, and that accordingly the plaintiff had recognised the defendants as their tenants. The appellants before me contest the finding that the plaintiff is bound by the act of his *am-mukhtear* Padarat. It is said that the power-of-attorney, in virtue of which Padarat made the withdrawal, conferred upon him no power to acknowledge as tenants the defendants, who were mere trespassers. It is also said that it was not within the scope of the agent's power to withdraw moneys deposited by persons who were mere trespassers and not tenants. The appellants relied upon the cases of *Bhojohuree Bunick* v. *Aka Golam Ali* (1); *Moharani Beni Pershad Koeri* v. *Goberdhan Koeri* (2) and *Sri Maharani Beni Pershad Koeri* v. *Ramdahin Pandey* (3) to show that the landlords' agent had no authority to bind them. These cases were considered in the decision of *Sudaman Jamadar* v. *Behari Mahton* (4), where it was pointed out that no inflexible rule of law could be laid down on the subject, it was there said that when a question arises as to the authority of an agent to bind the landlord, it must be decided on the particular facts as in every other case regarding the scope of the authority of an agent to bind his principal. It was held in that case that the landlord had failed to show that his agent acted beyond the scope of his authority, and that he was bound by the act of his *gomashta* accepting rent from the transferee of a non-transferable occupancy holding. It is contended by the learned Counsel for the appellants, that the circumstances of that case were very different from those of the present case. No doubt, the circumstances were in some respects stronger because it was said that presumably the landlord had enjoyed the rents which were paid by the transferees. In the present case it would appear from the plaintiffs' cash-books that they did not receive the money withdrawn by their agent, who is since dead. But, as already indicated, the question as to the scope of Padarat's authority must be decided upon the particular facts of this case. It was contended for the appellants on the authority of passages contained in sections 359 and 432 of Volume I of Halsbury's Laws of England, that the onus lay on the defendants to prove that the agent had authority to recognise them as tenants, I am unable to accede to that proposition. When the defendants had proved, as admittedly they did, that they had deposited the rent of the disputed holding, and that the deposit had been withdrawn by the plaintiff's agent, they had discharged such onus as lay upon them. It was then for the plaintiffs to show that the withdrawal was outside the scope of their agent's authority. The general power-of-attorney in virtue of which Padarat acted, was not produced before the Munsif, it is said to have

(1) 16 W. R. 97.

(2) 6 C. W. N. 823.
(3) 10 C. W. N. 216.
(4) 10 Ind. Cas. 456; 15 C. W. N. 953.

been examined by the learned Judge. It is produced and tendered in evidence in this Court. The learned Counsel for the defendants has objected somewhat faintly to the receipt of this document in evidence; but both sides have referred to its terms and have based their arguments thereon. I have admitted the document in evidence, but I am unable to find that it affords any support to the plaintiff's case. It was executed by Mr. Irwin in favour of Padarat in the year 1900 and recites as part of the business which the executant has to transact, the necessity to withdraw money deposited in the Courts, it appoints Padarat as *mukhtear-am*, for the purpose, amongst other duties, of withdrawing money deposited by tenants, and also other sums deposited to the credit of the *'kothi'* in the Courts. No doubt the power conferred by this document must be strictly construed. It is pointed out by the learned Counsel for the plaintiff, that it includes no express authority to withdraw deposits by trespassers. I should scarcely expect it to include any such stipulation. On the other hand it is to be remembered, that resort to the deposit procedure is only made in cases where some dispute exists between the landlord and the tenant. Mr. Irwin must have been well aware of the nature, extent and importance of the duties which he empowered his agent to perform, and he must have been well aware that he would be bound by any recognition of a tenant's status effected by his attorney. In these circumstances it is to be supposed, that had Mr. Irwin desired to reserve such powers of recognition to himself, he would have inserted in the document a clear stipulation to that effect. The learned District Judge has found that although the plaintiffs assert that the withdrawal by Padarat was done dishonestly or carelessly, they have adduced no evidence whatever in support of that assertion. He has also found that Padarat who was a practising *mukhtear* was regularly in the habit of withdrawing money from the Civil Court on behalf of the plaintiffs. Having regard to the terms of the power-of-attorney and to the evidence regarding the duties performed by Padarat under that power, I am of opinion that the plaintiff has altogether failed to shew that in withdrawing the deposit in question, Padarat acted beyond the scope of his authority. I am, therefore, of opinion, that no exception can be taken to the finding of the learned District Judge that the plaintiffs are bound by that withdrawal. It is conceded by the learned Counsel for the appellants, that if the act of Padarat came within the scope of his authority, acceptance of rent by him from the defendants amounted to a recognition by plaintiffs of the tenancy set up by the defendants. It was further contended for the appellants that they were entitled to an adjudication upon their alternative prayer for assessment of rent at the rate of Rs. 100, per *bigha*, and for Rs. 550 as *salami* by way of compensation for the alteration of the status of the disputed holding. Now as the Munsif has pointed out, this prayer was not based upon any provisions of the Bengal Tenancy Act, and in view of the finding that the defendants have been recognised by the plaintiffs as their tenants, it is obvious that the plaintiffs could not succeed upon that alternative prayer. The prayer, moreover, was based solely upon the allegation that the defendants had converted an agricultural holding into a building site by the erection of houses thereon. The learned Judge has, however, found that the buildings existed upon the land previous to the defendants' purchase. That finding concludes the appellants as regards their claim for assessment of rent.

The appeal must accordingly be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 419 OF 1914*.

January 27, 1916.

Present:—Mr. Justice Imam.

J. I. J. HYAM AND ANOTHER—PLAINTIFFS

versus

THE BENGAL STONE CO. LD.—DEFENDANT.

Account, suit for, costs of suit pending reference for account.

*The report of this case has been taken from the Calcutta Weekly Notes with permission—*Ed.*

HYAM J. I. J. *v.* BENGAL STONE CO., LTD.

In a suit for accounts where the defendant resisted plaintiffs' claim for an account, costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account. [p. 86, col. 1.]

This was a suit for an account from the defendant company, carrying on business as builders and contractors, for moneys received from the plaintiffs on account of the construction of two buildings constructed by the defendant-company for the plaintiffs.

In January 1909, the defendant-company contracted with the plaintiffs to construct for them two buildings in Calcutta, *viz.*, premises No. 27 Park Street and premises Nos. 294/295 Bow Bazar Street on the basis of actual cost plus 10 per cent. profit on the actual cost, and received from the plaintiffs Rs. 50,000 on account, and a mortgage for Rs. 2,50,000 on the Bow Bazar premises, and afterwards on the 22nd August 1911, upon the completion of the buildings, a further sum of Rs. 2,80,000. When the defendant-company received this last payment of Rs. 2,80,000, they had not yet submitted their bill to the plaintiffs for the cost of the work, and they on the same day, *i.e.*, on the 22nd August 1911, took the following letter from the plaintiffs on an 8 annas stamp paper, the letter being drawn at the office of the defendant-company's solicitors and signed by the plaintiffs when they were not represented by their own solicitors.

12, HASTINGS STREET,
Calcutta, 22nd Aug. 1911.

To

THE BENGAL STONE COMPANY, LTD.

Dear Sirs,

In consideration of the Bengal Stone Company, Limited, this day re conveying and releasing the premises Nos. 294/295, Bow Bazar Street, mortgaged by us to the Bengal Stone Co., Ltd., we hereby admit and acknowledge that the said reconveyance and release only relates to the said premises Nos. 294 and 295, Bow Bazar Street, and we hereby undertake to pay to the said Bengal Stone Co., Ltd., not later than the 31st December 1911 any sum which may hereafter be found to be due from us to the said Bengal Stone Co., Ltd., under or in connection with the agreement, dated the 21st January 1909, and made between the said Bengal Stone Co., Ltd, of the one part and ourselves of the other part.

We hereby also agree to forego any and all claims that we may have had or have against you in respect of delays in completion of the buildings at Park Street and Bow Bazar and will only make such corrections in your bills and accounts as we may find to be erroneously or excessively charged. All other items of the contract agreement, dated 21st January 1909, to be considered as in force.

Yours faithfully,
(Sd.) J. I. J. HYAM,
(Sd.) HARRY JONES by his attorney, J. I. J. Hyam.

On the 25th August 1911, the defendant company submitted their bill of costs amounting to Rs. 3,57,301-6-11, but did not furnish a detailed account of the measurements of the quantities of work done, inspite of repeated demands, but offered their books of account for plaintiffs' inspection and the vouchers for payments made for materials used in the construction of the buildings. The plaintiffs contended that the sum of Rs. 2,80,000 and the letter of the 22nd August were taken from them under circumstances which amounted to coercion, and they engaged an engineer to measure up the buildings and were advised that the defendant company were overpaid, and the plaintiffs brought their suit for an account from the defendant company as to the actual cost of the buildings and of the moneys received on account thereof. The defendant-company in their written statement resisted the plaintiffs' claim for an account on the ground, amongst others, that by reason of the letter of the 22nd August there was an account stated between the parties.

Mr. Justice Imam, before whom the suit was tried, decreed the plaintiffs' suit and ordered a reference for account before the Official Referee, holding, however, that the facts of the case did not amount to coercion in law.

Mr. *Zorab* (with him *M. S. Hyam*), appeared, for the Plaintiffs.

Mr. *Pearson* (with him Mr. *Surita*), appeared for the Defendant-Company.

Mr. *Hyam* for the Plaintiffs: Your Lordship will allow me my costs.

[IMAM, J.—Should not costs be reserved until the accounts are taken? Generally costs are reserved in such cases.]

Mr. *Hyam*.—I submit I am entitled to my costs irrespective of the result of the reference. The substantial question in the case was account or no account. I asked for an account, the defendant-company resisted my claim and lost, and costs should follow the event. Where a reference for an account is an incidental relief, costs are reserved pending the Referee's report. Here the plaintiffs' very claim was for an account, and they have succeeded in their claim. In *Sellar* v. *Griffin* (1), defendant denied plaintiffs' right to an account, and, an account being directed, costs up to and including the hearing were given to the plaintiff by the decree ordering the reference. In *Hurrinath Rai* v. *Krishna Kumar Bakshi* (2), Lord Hobhouse, in the Privy Council, stated the principle as to costs in such cases as follows:—"And inasmuch as the defendant has taken the course of denying . . . his accountability *in toto*, he should have been ordered to pay the whole costs of the suit. If he had been truthful, he should have submitted at once to an account and thus saved great expense," and the same principle is illustrated in *Boynton* v. *Richardson* (3), *Collyer* v. *Dudley* (4) and *Jefferys* v. *Marshall* (5).

Mr. *Pearson*, for the Defendant-Company.—In *Jellicoe* v. *Price* (6), costs were reserved pending the reference for an account. This is the general rule. *Sellar* v. *Griffin* (1), *Collyer* v. *Dudley* (4) and *Jefferys* v. *Marshall* (5) were exceptional cases. But plaintiffs should be deprived of their costs although successful on the issue as to account, because they charged coercion and failed on that issue. In their charge of coercion they made unfounded aspersions on the character of the defendants. That is misconduct and sufficient cause to deprive them of their costs. In *Huxley* v. *West London Extension Railway Company* (7), Lord Halasbury laid down the principle in such cases as follows:—"Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly good cause for depriving the plaintiff of his costs." Plaintiffs in charging coercion have increased the costs of this litigation and should be deprived of their costs. Similarly Lord Watson says in the same case at page 33: "Good cause, in my opinion, embraces everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense." In any event the defendant company should get the costs on the issue of coercion on which they have succeeded. *Parker* v. *McKenna* (8).

Mr. *Hyam* in reply.—*Jellicoe* v. *Price* (6) was itself an exceptional case. The Vice-Chancellor in reserving costs did not disapprove of the decision in *Collyer* v. *Dudley* (4). A successful party can only be deprived of his costs for misconduct or for other sufficient cause. There is no misconduct found against the plaintiffs here, neither is there any sufficient cause to deprive them of costs. In *Huxley* v. *West London Extension Railway Company* (7) plaintiff made an extravagant and extortionate claim and tried to support it by fraudulent statements and dishonest acts and by evidence which the jury disbelieved. In *Parker* v. *McKenna* (8), charges of grave and deliberate fraud were made which turned out to be entirely without foundation. None of these strictures are applicable to the present case. *Per contra* the defendant-company, in obtaining the letter of the 22nd August in the absence of the plaintiffs' solicitors, were themselves guilty of such misconduct

(1) (1863) 11 W. R. 583.

(2) 14 C. 147 at p. 158; 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751.

(3) (1862) 31 Beav. 340; 54 E. R. 1170; 135 R. R. 457.

(4) (1823) T. & R. 421; 2 L. J. (o. s.) Ch. 15; 37 E. R. 1163.

(5) (1870) 19 W. R. 94.

(6) (1841) 1 Y. & C. C. C. 74; 62 E. R. 796.

(7) (1889) 14 A. C. 26 at p. 32; 58 L. J. Q. B. 305; 60 L. T. 642; 37 W. R. 625.

(8) (1874) 10 Ch. App. 96 at p. 120; 44 L. J. Ch. 425; 31 L.T. 739; 23 W. R. 271.

as to deprive them of their costs on the issue of coercion on which they succeeded. Daniell's Chancery Practice, 8th Ed., page 1036 (*b*).

IMAM, J.—The plaintiffs will get their costs up to and including the hearing on scale No. 2.

Messrs. *Jones & Co.*, for the Plaintiffs.

Messrs. *Orr, Dignam & Co.*, for the Defendant-Company.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 39 OF 1916.

June 5, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

Chaudhri NIADER SINGH—DEFENDANT—APPELLANT

versus

Musammat GANGA DEI—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 62, 29—*Compensation for wrongful seizure, suit for, nature of—Damages for tort in detinue or trespass - Proof, necessity of—Money had and received, suit for.*

Compensation for wrongful seizure is another way of saying damages for tort in detinue or trespass. There can only be wrongful seizure when the property was in the possession of the person who is setting up the wrong. An action for detinue involves proof of right to actual possession and of deprivation of possession.

Therefore, a suit to recover from the defendant certain money which has been received by the defendant in the form of rent paid to the defendant through the Court under a decree entitling the defendant to receive such rent as against tenants, but in respect of property of which the plaintiff was entitled to possession and also to receipt of rent, is not an action for compensation for wrongful seizure of moveable property under legal process within the meaning of Article 29 of Schedule I of the Limitation Act, 1908, but is an action for money had and received by the defendant for the use of the plaintiff and is governed by Article 62 of Schedule I of the Act.

First appeal from the order of the Assistant Sessions and Subordinate Judge, Meerut, dated the 17th December 1915.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.

WALSH, J.—This case has been thoroughly argued. But really the point is hardly open to discussion. The plaintiff sues to recover from the defendant certain money which has been received by the defendant, in the form of rent paid to the defendant through the Court under a decree entitling the defendant to receive such rent as against tenants, but in respect of property of which the plaintiff was entitled to possession, and also to receipt of rents. It is suggested that for such an action the Limitation Act provides one year's limitation by reason of the terms of Article 29, that is to say, it is an action for compensation for wrongful seizure of moveable property under legal process. It is nothing of the kind. The moment one appreciates you apply the test of the distinction between tort and contract, all difficulty disappears. Assuming for a moment that such money can be moveable property, it is obvious that it has never been in the possession of the plaintiff at all. Compensation for wrongful seizure is another way of stating a claim for damages for tort in detinue or trespass. There can only be wrongful seizure when the property was in the possession of the person who is setting up the wrong. An action for detinue involves proof of right to actual possession, and of deprivation of possession. In the case now before the Court there is no seizure; there is no tort, that is to say, there is nothing wrongful in the sense in which it is used in the Article. There is no claim for compensation, and I very much doubt whether rents payable under these circumstances are moveable property at all. It is quite clear that money received by *B* from a third person to which *A* is rightfully entitled is money which, from the date of its receipt by *B*, *B* is under an implied contract to pay to *A*. The cause of action which *A* has for that implied contract has always been known to the Common Law as an action for money had and received by the defendant for the use of the plaintiff. That is what the present suit is really for, and Article 62 of the first Schedule to the Limitation Act is the appropriate Article. The decision in *Jagjivan Javherdas* v. *Gulam Jilani Chaudhri* (1), is bad law. The appeal must be dismissed with costs.

SUNDAR LAL, J.—I am of the same opinion.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 B. 17.

BISWAMBHAR LAL *v.* JHULAN RAM TEWARI.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 241 OF 1913.

May 16, 1916.

Present:—Mr. Justice Mullick.

Babu BISWAMBHAR LAL—DEFENDANT No. 1—APPELLANT

versus

JHULAN RAM TEWARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Prior and puisne encumbrances—Puisne mortgagee in possession under his mortgage-decree—Subsequent decree by prior mortgagee and purchase in execution sale—Ejectment of puisne mortgagee, suit for—Redemption—Limitation Act (IX of 1908), Sch. I, Arts. 137, 138, 144.

A property which was subject to two several mortgages, the first usufructuary and the second simple, was purchased by the puisne mortgagee in execution of a decree for sale obtained by him in January 1898. The prior mortgagee sued on his mortgage without impleading the puisne mortgagee, brought the property to sale in 1898, and got symbolical possession on 2nd August 1901. The sale was confirmed on 31st August 1901. He sued to eject the puisne mortgagee on 20th February 1911:

Held, (1) that the plaintiff could not eject the defendant if the latter was willing to redeem; [p. 87, col. 2.]

Har Pershad Lal v. *Dalmardan Singh*, 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371, referred to.

(2) that Article 144 of the Limitation Act applied to the suit and not Article 137 or 138. [p. 87, col. 2.]

Articles 137 and 138 of the Limitation Act do not apply where possession has already been delivered by Court. [p. 88, col. 1.]

Mr. *Muhammad Mustfa Khan*, for the Appellant.

Messrs. *Harnandan Sahay* and *Mritunjoy Lal*, for Deputy Registrar, for the Respondent.

JUDGMENT.—The plaintiffs took an usufructuary mortgage of a 6-pies share from the defendants on the 20th September 1882, the sum borrowed being payable on the 24th September 1885. The defendants took a simple mortgage of 10 annas of the same village on the 23rd June 1893 and in execution got possession of 7 annas in January 1898 and of remaining 3 annas in 1899. The plaintiffs sued upon their mortgage in 1894, brought the property to sale in 1898 and got symbolical possession on the 2nd of August 1901. The sale was confirmed on the 31st August 1901. Finding the defendants in possession the plaintiffs brought the present suit on the 20th of February 1911 for recovery of possession. Defendant No. 1 contested the suit. A number of minor defendants who are the heirs of defendant No. 12 who is alleged to have been a purchaser of a part of the *Mauza* from defendant No. 1, are represented before me by the Deputy Registrar, but they did not appear in the lower Courts and the learned Vakil representing them says that he is not interested in the result of this appeal, because no reliefs have been claimed against him. Both the lower Courts have decreed the suit and hence this second appeal by the defendant No. 1.

The sole contention of the learned Vakil for the appellant is that the suit is barred either under Article 137 or 138 of the Limitation Act. It is contended that the plaintiffs' decree was a money-decree under section 68 of the Transfer of Property Act, that all that he purchased at the sale of the 30th of August 1898, was the equity of redemption, and that as he was not a party to the puisne mortgagee's suit, he is only entitled to redeem the latter. It is contended that in any event the learned Munsif's decree directing that the puisne mortgagees may redeem the plaintiff on payment of Rs. 1,260 with interest is wrong. Now it appears that the plaintiffs' decree was a decree for sale under section 67 of the Transfer of Property Act. The *zarpeshgi* was a mortgage and the mortgaged properties were security for the payment of the consideration. The plaintiffs' decree was a mortgage decree and what he purchased was the 6-pies share in the property subject to the charge of defendant No. 1 whom he did not implead in his suit. But defendant No. 1 has already been in possession since 1898. The plaintiffs are not entitled to eject him from the land, if he is willing to redeem. *Har Pershad Lal* v. *Dalmardan Singh* (1).

On the point of limitation also I think the Courts below have applied the correct Article, namely, Article 144. The plaintiffs are entitled to 12 years from the 21st August 1901 on which date they discovered the adverse possession of the defendant. Article 138 cannot possibly apply because that Article relates only to a disturbance of possession by the judgment-debtor. In the present case the plaintiffs' possession was resisted by 3rd party. More-

(1) 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371.

over Articles 137 and 138 do not apply where possession has already been delivered by Court.

I think upon the authorities the plaintiffs are entitled to possession, but that defendant No. 1 has a right to redeem. The learned Vakil for the appellants contends that he ought not to be compelled to redeem for Rs. 1,260 but should only pay Rs. 1,000, which was the principal of the plaintiffs' *zarpeshgi*. It appears, however, that the amount of Rs. 1,260 was arrived at on compromise in plaintiffs' mortgage suit and that upon the bond the amount to which he was entitled was much greater. So the decree made by the Munsif in the present suit is to the advantage of the defendant. Calculating upon the bond he would have to pay a much larger sum. No other points have been argued and the result is that the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 718 OF 1915.

February 10, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

KADIRVELU CHETTY *alias* MANNAPPA CHETTY AND ANOTHER—DEFENDANTS—PETITIONERS

versus

NANJUNDAIYAR AND OTHERS—PLAINTIFFS—RESPODENTS.

Civil Procedure Code (Act V of 1908), ss. 9, 92, 115—Preliminary issue regarding maintainability of suit—Revision—Civil suits, what are—Ubhayakar's *right, if civil in nature*—Dharmakarta, *if can impose conditions on* Ubhayakar—*Religious Endowments Act (XX of 1863), ss. 14, 18—Suits, to enforce privileges to worship—Sanction, if necessary for institution.*

A right to worship is a civil right, and may be enforced in Court as nobody can prevent a worshipper from proceeding to the temple and worshipping the deity. [p. 89, col. 2.]

Vengamuthu v. *Pandaveswara*, 6 M. 151, referred to.

Obiter dicta.—Where the claim is made to an office emoluments, however insignificant the emoluments may be, the plaintiff is entitled to seek the aid of the Court to have his right established. [p. 89, col. 2.]

Where a right has been acquired or exercised hereditarily for performing certain festivals in the temple and where such right is negatived by the *Dharmakarta*, the person whose rights have been so infringed, is entitled to ask the Court to have that right declared in his favour. [p. 89, col. 2.]

Chunnu Dat Vyas v. *Babu Nandan*, 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529; *Tholappala Charlu* v. *Venkata Charlu*, 19 M. 62; 5 M. L. J. 209 and *Srinivasa* v. *Tiruvengada*, 11 M. 450, referred to.

Subbaraya Mudaliar v. *Vedantachariar*, 28 M. 23; 14 M. L. J. 171 and *Karuppa Goundan* v. *Kolanthayan*, 7 M. 91, distinguished.

Even though a person is hereditarily entitled to perform a festival, the *Dharmakarta* may impose a condition on him, *viz*, that it is open to him (the *Dharmakarta*) to receive contributions from others to perform the festival on a grander scale than that person is really able to do. [p. 90, col. 2.]

There are three classes of cases which concern rights to enforce privileges in a temple. (1) The object of a suit may be to secure certain advantages to a trust, in which case, any two persons, with the sanction of the Advocate General or the Collector of the District concerned, can institute a suit in that behalf. (2) The Religious Endowments Act empowers persons who have an interest in the temple to go to a Court of law for a declaration that the trustee is bound to carry out certain duties. (3) The third class of cases is where individuals can claim rights, either as citizens, or as having a hereditary right, to worship in a temple or perform certain festivals. In such a case the suit is really for a direction that the officer in charge of the trust should perform the duties according to *mamool* and the sanction of the Advocate-General or the District Judge is not required for its institution either under section 92, Civil Procedure Code, or sections 14 and 18 of the Religious Endowments Act, 1863. [p. 90, col. 2.]

Krishnaswami Iyengar v. *Rangasawmy Iyengar*, 5 Ind Cas. 76; 7 M. L. T. 248; 19 M. L. J. 743; *Subbaraya Mudaliar* v. *Vedantachariar*, 28 M. 23; 14 M. L. J. 171 and *Syed Amin Sahib* v. *Ibram Sahib*, 4 M. H. C. R. 112, followed.

Quære.—Whether section 115, Civil Procedure Code, 1908, warrants interference by a High Court with a ruling by a lower Court on a preliminary issue, although it goes to the maintainability of the suit? [p. 89, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Dharmapuri, dated the 4th August 1915, in Original Suit No. 292 of 1915.

FACTS.—The suit was for a declaration of the right of the plaintiffs to perform the *Kalayana Utsavam* in the temple of Sri Paravasudeva Swami at Dharmapuri on the day of the yearly car festival, according to their means and in accordance with the *Shastras*, for a perpetual injunction restraining the defendants (the *Dharmakartas*) from interfering with that right, for a mandatory injunction directing the defendants to pronounce on the appropriate occasion at the close of the festival, that the plaintiffs are the persons who performed the festival and for damages for loss of materials and for loss of reputation and worry of mind

caused by the defendants' action in refusing to permit the plaintiffs to perform the festival. The defendants contended that the suit was bad for want of the preliminary sanction under section 18 of the Religious Endowments Act. A preliminary issue was framed on the point and the District Munsif held that sanction was not necessary. The defendants thereupon preferred this revision petition to the High Court.

Mr. *K. R. Subrahmanya Sastriar*, for the Respondents, raised a preliminary objection that no revision lay but the petition was allowed to be argued on the merits.

Mr. *V. C. Seshachariar*, for the Petitioners:—The suit is not one of a civil nature and so is not cognisable by the Court at all. *Vasudev* v. *Vamnaji* (1); *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (2); *Subbaraya Mudaliar* v. *Vedantachariar* (3); *Karuppa Goundan* v. *Kolanthayan* (4) and *Vaidinatha Thambiran* v. *Chandrasekara Dikshitar* (5). Moreover the sanction of the District Judge ought to have been obtained prior to institution of the suit as it is covered by sections 14 and 18 of the Religious Endowments Act.

Mr. *K. R. Subrahmanya Sastriar* argued *contra* and relied upon the cases reported as *Samaram Singaracharier* v. *Krishnaswami Iyengar* (6); *Venkatesha Mallia* v. *Bammampalli Ramayya* (7); *Vengamuthu* v. *Pandaveswara* (8) and *Krishnaswami Iyengar* v. *Rangasawmy Iyengar* (9).

Mr. *V. C. Seshachariar* briefly replied.

JUDGMENT.—This is a suit by the plaintiffs against the petitioners, who are the trustees of a *Vishnu* temple, for a declaration that the plaintiffs are entitled to perform a festival which they had been doing for a long time, without hindrance on the part of the trustees.

A preliminary issue was taken at the suggestion of the trustees as to whether this suit falls under the Religious Endowments Act, and as such, is not maintainable without the sanction of the District Court, or of the Advocate-General. The Munsif came to the conclusion that the suit was maintainable. Against his decision on the preliminary issue Mr. Seshachariar has preferred this Civil Revision Petition. The first question that suggests itself is whether section 115 warrants interference by this Court with a ruling on a preliminary issue, although it goes to the maintainability of the suit. I do not think it necessary to express any opinion on that question because on the merits I am of opinion that the decision of the District Munsif is right.

There are really two questions which have been argued; *first*, whether the right claimed by the plaintiffs is a civil right, and *secondly*, whether supposing it is a civil right, the sanction of the District Court should have been obtained under Religious Endowments Act before the institution of the suit. Upon the first of these questions there have been conflicting views to some extent, but upon certain essential points there is no difference of opinion. If the right litigated is a right to worship, it is a civil right, and nobody can prevent the worshipper from proceeding to the temple and worshipping the deity. See *Vengamuthu* v. *Pandaveswara* (8). Where the claim is made to an office emoluments, however insignificant the emoluments may be, the plaintiff is entitled to seek the aid of the Court to have his right established. There are numerous cases on the point. A third class of cases arises where a right has been acquired or exercised hereditarily for performing certain festivals in the temple and where such right is negatived by the *Dharmakarta*. In such cases, the person, whose rights have been infringed, is entitled to ask the Court to have that right declared in his favour. It was pointed out in a very recent case, *Channu Dat Vyas* v *Babu Nandan* (10), that the right to perform festival in a temple will be regarded as a civil right, although, if it is unconnected with a temple, Courts will not entertain the claim. This is also the view taken in this Court in *Tholappala Charlu* v. *Venkata Charlu* (11). There it was pointed out by the learned Judges of this

(1) 5 B. 80.
(2) 10 B. 233.
(3) 28 M. 23; 14 M. L. J. 171.
(4) 7 M. 91.
(5) 15 M. L. J. 458.
(6) 4 Ind. Cas. 874; 19 M. L. J. 513.
(7) 26 Ind. Cas. 202; 27 M. L. J. 241; 38 M. 1192.
(8) 6 M. 151.
(9) 5 Ind. Cas. 76; 19 M. L. J. 743; 7 M. L. T. 248.
(10) 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529.
(11) 19 M. 62; 5 M. L. J. 209.

Court that if the right is connected with a temple no question of emolument arises, and it is a civil right which can be enforced in a Court of Law.

Mr. Seshachariar has drawn my attention to *Subbaraya Mudaliar* v. *Vedantachariar* (3). The suit in that case was to enforce a right unconnected with any office in the temple and was not connected with the performance of any festival. The learned Judges held that such a suit is not a suit of a civil nature. As regards *Karuppa Goundan* v. *Kolanthayan* (4), it is enough to say that that also was a case where there was no right to any office in the temple, nor were emoluments claimed from the temple. I am doubtful as to whether the position taken in that case can be regarded as good law having regard to the fact that *prasadams* like *thulasi* and the right to be served with holy water first in a *Vishnu* temple, have been regarded as civil rights. I doubt whether the right to receive sacred ashes and the claim to precedence to receive betel-nut do not stand on the same footing. However that may be, the case of *Karuppa Goundan* v. *Kolanthayan* (4) does not affect the present case.

On the other hand in *Vengamuthu* v. *Pandaveswara* (8) where a dancing girl claimed a right to worship the deity and she was denied that right, it was held that she could maintain a suit. A case very much in point is *Srinivasa* v. *Tiruvengada* (12). In that case the plaintiffs complained that the defendants were interfering with their right to receive crown and water at a certain festival. Collins, C. J., and Parker, J., came to the conclusion, after a review of the earlier authorities, that that was a civil right. There was no question of office or emoluments in that case. It was regarded purely as a civil right which the parties are entitled to enforce in a Civil Court.

For these reasons, I am of opinion that the right claimed is a civil right.

The question whether the *Dharmakartas* can impose certain conditions or not, is a question to be gone into on the merits. Notwithstanding that the plaintiffs are entitled to bring this suit, it may be that the *Dharmakartas* can insist upon the observance of certain conditions: For example, one of the conditions may be that it is open to the *Dharmakartas* to receive contributions from others to perform the festival on a grander scale than the plaintiffs are really able to do. That is not a matter with which I am concerned at present. I, therefore, agree with the District Munsif on this point.

Upon the second question also I agree with him. Mr. Seshachariar argues that the reliefs claimed in the suit are covered by sections 14 and 18 of the Religious Endowments Act and as the sanction of the District Court was not obtained prior to the institution of the suit, the suit should be dismissed. There are three classes of cases which concern rights to enforce certain privileges in a temple. The object of a suit may be to secure to the trust certain advantages: any two persons with the sanction of the Advocate-General, or the Collector of the District concerned, can institute a suit in that behalf. The Religious Endowments Act empowers persons who have an interest in the temple to go to a Court of Law, for a declaration that the trustee is bound to carry out certain duties. There is a third class of cases where individuals can claim rights, either as citizens, or as having a hereditary right, to worship in a temple, or perform certain festivals. It is really a direction that the officer in charge of the trust should perform the duties according to *mamool*, and such a right as this does not require the sanction either of the Advocate-General or of the District Judge for its institution. This is the view taken in *Krishnaswami Iyenger* v. *Rangasawmy Iyengar* (9). That was also the view taken in *Subbaraya Mudaliar* v. *Vedantachariar* (3). The District Munsif draws attention to an earlier case in this Court in *Syed Amin Sahib* v. *Ibram Sahib* (13). All these cases make it clear that where an individual right is to be enforced, neither section 92 of the Civil Procedure Code, nor sections 14 and 18 of the Religious Endowments Act, will apply.

The decision of the District Munsif is right for all these reasons. I, therefore, dismiss this petition with costs.

Petition dismissed.

(12) 11 M. 459.

(13) 4 M. H. C. R. 112.

SHYAMA SUNDARI GHOSE *v.* ASWINI KUMAR CHAKRAVARTI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3291 OF 1914.

June 21, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

Srimati SHYAMA SUNDARI GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ASWINI KUMAR CHAKRAVARTI AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Plaint, amendment of, in second appeal, if allowable —Suit, nature of, change of.

The High Court in second appeal refused to allow a plaintiff to amend his plaint and to litigate the suit as a suit for rectification of a decree founded on a mistake, where the original suit which was to set aside the decree as based on fraud was dismissed by the first Appellate Court on the ground that no fraud was committed by the defendant but that errors in the decree were due to mistakes of both parties. [p. 92, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 12th August 1914, reversing that of the Munsif, 4th Court, Munshigunj, dated the 8th of August 1913.

FACTS of the case appear clearly from the judgment.

Babus *Ram Chandra Majumdar* and *Panchanan Ghose*, for the Appellants.—A suit is maintainable for the rectification of judgment and decrees. Section 9, Code of Civil Procedure, does not bar such a suit.

Refers to *Jogeswar Atha* v. *Ganga Bishnu*(1), *Golab Koer* v. *Badshah Bahadur* (2), *Maruti* v. *Rama* (3).

That such a suit lies is also apparent from the provisions of Article 96 of the 1st Schedule of the Indian Limitation Act.

Babu *Gunada Chandra Sen* (with him Babu *Biraj Mohan Mozumdar*), for Deputy Registrar, for the Respondents.—The relief sought for is an equitable relief. Now the Court of Appeal below has found as a fact that the appellants have suffered no injury by the previous decree. Then again the appellants have not exercised due diligence. Hence the appellants are entitled to no relief.

(1) 8 C. W. N. 473.
(2) 2 Ind. Cas. 129. 10 C. L. J. 420; 13 C. W. N. 1197.
(3) 21 B. 333.

JUDGMENT.—In a previous partition suit between the parties, the preliminary decree was prepared by consent. A Civil Court *amin* made the final partition according to the preliminary decree and there was an appeal against the final decree by some of the appellants, if not all. In that appeal, none of the grounds that are urged in this case, were raised and the final decree was confirmed on appeal.

The plaintiffs now bring this suit on the ground that the local investigation by the *amin* was superintended by defendant No. 1 that they left the whole matter to the superintendence of defendant No. 1 as he was acquainted with the property and as they had confidence in him but that the defendant No. 1 in collusion with the *amin* had made a wrong partition by excluding portions of the property under partition and including in the partition, lands that belonged to other properties. On these grounds, they sue for a declaration that the final decree in the partition suit was null and void.

The first Court gave a decree to the plaintiff. The second Court has found that there was no fraud by defendant No. 1 or by the Civil Court *amin* as found by the Court of first instance but that there were certain errors which must have been introduced by mistakes of both parties. These errors were that two plots Nos. 7 and 17 not belonging to the property were included in the partition. The learned Subordinate Judge has held that as regards the properties excluded from the partition, the plaintiff is entitled to sue for a fresh partition as they still remain parts of the joint property. As regards the two plots that are included in the partition without belonging to the property, the learned Judge's finding is that the plaintiffs have suffered no injury by the erroneous inclusion of other lands not belonging to the *mahal*. It is necessary to explain this; it arose in this way. In the previous partition, the *amin* wrongly included plots Nos. 17 and 7, plots Nos. 17, 13, and 14 were treated as of disputed possession and divided amongst the several co-sharers. The plaintiffs obtained a very small part of plot No. 17. As regards Chak No. 7 it is not allotted to the plaintiff so that even if it belongs to other parties, it does not in any way hurt the plaintiff that

it has been considered a part of the *mahal* and divided. As regards plot No. 17, we have further to remark that at the previous partition it was known to the parties that either the title to, or possession of, this property, and plots Nos. 18 and 19 were disputed and notwithstanding that the plaintiffs were satisfied with a share in the same and they took the risk of the title being disputed by the neighbouring proprietors with the chance of their being able to succeed against them. They were disabused, however, in the survey proceedings; the matter has been allowed to rest for several years and the parties have been in possession of their shares. They want now to set aside the partition and to have a new partition.

We think that, under the circumstances the Subordinate Judge was right in dismissing their suit, specially as the main object, namely, that of setting aside the decree as based on fraud, fails according to his finding. That being so, it would perhaps be straining the law a bit if we were to allow him to amend the plaint at this stage and litigate the suit as a suit for rectification of a decree founded on a mistake. We decline to do so on the ground first that the inclusion of No. 7 does not hurt the plaintiff and it will not be right to allow him to re-open the whole proceedings. As regards the three properties which have not been divided and which are found to belong to the *mahal* in dispute, he has the right to have a partition if he likes according to his share.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1921 OF 1914.

March 23, 1916.

Present:—Mr. Justice Seshagiri and Mr. Justice Bakewell.

BALUSU VEERARAGHAVALU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BOPPANA MANIKYAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Warranty—Exchange of immoveable property prior to enactment of Transfer of Property Act—Compensation, claim for, for breach of warranty of title—Law applicable—Application of Common Law rule—'Equity and good conscience'—Real Property Act (8 & 9 Vic. c. 106)—Transfer of Property Act (IV of 1882), s. 119—Letters Patent, s. 21—Exchange of property transferred by Hindu widow—Caveat emptor, doctrine of, extent of.

The law applicable to exchanges of immoveable property effected prior to the enactment of the Transfer of Property Act is the Common Law of England and not the Statute Law embodied in the Real Property Act (8 & 9 Vic. C. 106) [p. 94, col. 1; p. 95, col. 1.]

An exchange of property effected prior to 1882 implied warranty of title. An exchange implied both a condition for re-entry on the land given in exchange and also the right to obtain compensation for breach of the warranty. [p. 93, col. 2.]

The state of the law in England as to the nature and extent of warranties of title on transfers of real property and Parliamentary enactments relating to and laying down the laws applicable to India prior to the passing of the Transfer of Property Act reviewed by Seshagiri Aiyar, J. [p. 93, cols. 1 & 2; p. 94, cols. 1 & 2.]

Stephen's Commentaries of the Laws of England, Vol. I, page 410; Coke on Littleton, Vol. I, sections 64 & 65; *Bustard's* case, 4 Coke's Reports 121 *(a)*; 76 E. R. 1114; *Attorney-General* v. *Vigor*, (1803) 8 Ves. 256; 32 E. R. 352; Morley's Digest, Vol. I, page 23 referred to.

Per *Seshagiri Aiyar, J.*—It is clear that the highly technical enactment of 1845 (8 & 9 Vic. C. 106) which required the execution of a deed to evidence an exchange, was not extended to India. The Act of 1781 which looked with disfavour at the introduction of the English Statute Law into India laid down that, as far as practicable, the Courts should administer Indian law to Indians. There is nothing in Hindu Law which militates against a warranty being implied as between the parties to a contract of exchange. From the fact that, in the Transfer of Property Act of 1882, the principle of implied warranty in sales and exchanges was recognized it may be inferred that the Legislature intended to preserve to the parties the English Common Law right as to warranty. [p. 94, cols. 1 & 2.]

Where there is nothing to indicate on the face of a deed evidencing a transfer by a Hindu widow or on proper enquiries by the transferee that the widow was not exercising the power which she has of disposing of the property for purposes binding on the estate, it cannot be contended that the privilege of *caveat emptor* applies. [p. 95, col. 1.]

Per *Bakewell, J.*—The rule laid down in section 119 of the Transfer of Property Act is one of 'equity and good conscience' which under clause 21 of the Letters Patent the High Court may apply to exchanges effected prior to the enactment of the Transfer of Property Act. [p. 95, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 339 of 1913, preferred against that of the District Munsif, Gudivada, in Original Suit No. 527 of 1910.

BALUSU VEERARAGHAVALU *v.* BOPPANA MANIKYAM.

Mr. *T. Prakasam*, for the Appellants.
Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The facts of the case are practically undisputed. The father-in-law of the 1st defendant purchased from a Hindu widow certain properties. He gave them in exchange for some other properties to the brother of the 1st plaintiff. A reversioner of the Hindu widow sued to set aside the original alienation. After some contest, the plaintiffs entered into a compromise with him by which they retained a portion of the properties exchanged on payment of a further consideration to the reversioner. There is no question of want of honesty or of diligence on the part of the plaintiffs in entering into this compromise. The Subordinate Judge has found that point in favour of the plaintiffs. The suit is brought in the alternative either for the restoration of the lands which the 1st plaintiff's brother gave in exchange or for compensation for breach of warranty or title. In this second appeal, we are only concerned with the second relief. The exchange is evidenced by an unregistered document of the 25th September 1880, two years before the Transfer of Property Act was passed. No question of its admissibility in evidence has been argued. The only point for consideration is whether there was an implied warranty of title at the time of the exchange.

It is clear that after the Transfer of Property Act, there would be a warranty of title. It is also clear that up to the passing of the Real Property Act of 1845 (8 and 9 Victoria Chapter 106), there was an implied warranty of title in England in regard to exchanges. As pointed out in Stephen's Commentaries of the Laws of England, Volume I, page 410, before the Statute of Frauds, no writing was necessary to evidence an exchange. By the Common Law of England, all that was necessary to effect an exchange was that there should be mutual taking of possession. In Coke on Littleton Vol. I, sections 64 and 65, the Common Law of England as to exchange is thus stated:—"So alwaies it behoveth that in exchange the estates of both be equal, *viz.*, if the one hath a fee simple in the one land, that the other shall have like estate in the other land, and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, etc., and so for other estates". And this statement as to equality is thus commented upon: Equality in lands is threefold, *viz.*, *First*, equality in value: *Secondly*, equality in quantity of estate given and taken. *Thirdly*, equality in quality or manner of the estate given and taken". As a corrollary from this statement of the law, it was held, in a very early case known as the *Bustard's* case (1) that title was warranted by the parties to the exchange. The report says: "And after many arguments at the Bar and Bench in divers several terms, it was adjudged for the plaintiff; and in this case four points were resolved *per totam curiam*. I. That in every exchange lawfully made, this word *excambium* implies itself *tacite* a condition, and also a warranty, the one to give re-entry, and the other voucher and recompence, and all in respect of the reciprocal consideration, the one land being given in exchange for the other: but it is a special warranty, for upon the voucher, by force of it, he shall not recover other land in value, but that only which was by him given in exchange; for inasmuch as the mutual consideration is the cause of the warranty, it shall, therefore, extend only to land reciprocally given and not to other land; and this warranty runs only in privity, for none shall vouch by force of it but the parties to the exchange, or their heirs and no assignee: but the assignee shall rebut by force of it, although the exchange was without deed." According to this statement of the law, there can be compensation for breach of warranty, or re-entry on the land exchanged and the right of their reliefs can be exercised only by the parties or their heirs: but it cannot be assigned or devised. *Attorney-General* v. *Vigor* (2). It may be necessary to mention that the Statute of Frauds (29 Charles II, Chapter IV, section 1) considered writing necessary to evidence an exchange. None the less, it was held in the Equity Courts that if the exchange was completed by possession, a good title passed. See 24 Halsbury's Laws of England, page 295 (cases quoted at foot-note Q). By section 3 of the Real Property Act of

(1) 4 Coke's Reports 121 (*a*); 76 E. R. 1114.
(2) (1803) 8 Ves. 256; 32 E. R. 352.

1845, a deed was required to effect a conveyance, a partition or an exchange. The same Act declared that there was no warranty of title on an exchange. This Act applied only to England and not in Ireland or Scotland. This summary of the state of the law in England necessitates the consideration on whether before the Transfer of Property Act was passed in this country, the Common Law of England was in force, or the Statute Law, embodied in the Act of 1845.

When the Mayor's Courts were established in 1726, the Charter of George I expressly declared that "all the Common and Statute Law at the time extant in England shall be introduced into the Indian Presidencies". Thereafter, no English Statute Law was to be applied in India unless it was specially extended to this country. Morley's Digest, Volume I, page 23. It is open to argument whether the *Mofussil* Courts had the same authority to administer the English Common and Statute Law under the Charter of George I. But I see no reason to think that the *Mofussil* Courts were not administering the same principle of equity and good conscience which guided the Mayor's Courts. Cowell in his history and constitution of the Courts and Legislative Authorities in India points out what laws applied to India up to 1834: "*First*, there was the whole body of English Statute Law existing in 1726 so far as it was possible, which was introduced by the Charter of George I, and which applied, at least, in the Presidency Towns. *Secondly*, all English Acts subsequent to that date which are expressly extended to any part of India. *Thirdly*, the Regulations of the Governor-General's Council which commence with revised Code of 1793, containing forty-eight regulations, all passed on the same day (which embraced the results of twelve years' antecedent legislation), and were continued down to the year 1834".

It is clear that the highly technical enactment of 1845 which required the execution of a deed to evidence an exchange was not extended to India. The Act of 1781 which was intended to curtail the powers of the English Judges and which looked with disfavour at the introduction of English Statute Law into this country laid down that as far as practicable the Courts should administer Indian Law to Indians. So far as I am aware, there is nothing in the Hindu Law which militates against a warranty being implied, as between the parties to a contract of exchange. From the fact that, in the Transfer of Property Act of 1882, the principle of implied warranty in sales and exchanges was recognised, it may be inferred that the Legislature intended to preserve to the parties the English Common Law right as to warranty. English deeds and conveyances are drawn up by skilled draftsmen and consequently the parties may be held to be dealing with each other at arm's length. In this country, documents are drawn up by persons who have only the great wisdom of the proverbial schoolmaster. More recently, the drafting has got into the hands of quacks who have neither common sense nor a knowledge of the law. Under these circumstances, the Indian Legislature has thought it advisable to introduce the principle of implied warranty in sales and exchanges. I have no reason to think that between 1845 and 1882, the Courts in this country imported the highly artificial rule of the English Real Property Act. My conclusion is, that when the parties exchanged their properties in 1880, they impliedly covenanted good title.

As against this position, Mr. Ramadoss, and Mr. Prakasam who argued this case dispassionately and mainly with the object of assisting the Court in solving a very difficult question of law, contended that the warranty of title under the Common Law was only to ensure re-entry and not to obtain compensation. The decision in *Bustard's* case (1) is directly against this contention, the next contention was that an implication of warranty is opposed to section 92 of the Indian Evidence Act. It is enough to say in answer to this argument that warranty is not a term of the contract or grant. Nor does the decision of the Bombay High Court in *Shivram* v. *Bal* (3), denying a warranty as to sales decisive of the question. The last argument was rested upon the well-known case, *Soper* v. *Arnold* (4). It has not been established

(3) 26 B. 519; 4 Bom. L. R. 310.
(4) (1889) 14 A. C. 429; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449.

that the 1st plaintiff's brother was aware of any defect of title in the property he got. It is true that a widow has only a limited power of alienation. But where there is nothing to indicate on the face of the document or on proper enquiries that the widow was not exercising the power which she has of disposing of the property for purposes binding on the estate, it cannot be contended that the principle of *caveat emptor* applies. No attempt has been made, in this case, to prove that the plaintiff's father wilfully shut his eyes to the defect in the title or neglected the opportunities he had for making *bona fide* enquiries. I am, therefore, of opinion that the special contentions of Mr. Ramadoss have no force.

The Subordinate Judge has found that the plaintiff will be entitled to Rs. 875 as damages, in case he is entitled to any. In reversal of the decrees of the Courts below, a decree will be given for this amount with interest at 6 per cent. per annum from the date of the plaint.

Parties will pay and receive proportionate costs throughout.

BAKEWELL, J.—The question in this case is whether any or what warranty of title should be implied upon an exchange of lands effected prior to the passing of the Transfer of Property Act, 1882. Under the English Common Law, an exchange implied a condition for re-entry upon the land given in exchange, and also a warranty, and it was not material that the party evicted had notice of the title paramount, [*Bustard's* case (1)], and this rule has been followed in section 119 of the Transfer of Property Act, 1882. Under clause 21 of the Letters Patent this Court must apply the law or equity or rule of good conscience which the Court of first instance ought to have applied, and I am prepared to accept the rule laid down in that section as one of equity which ought to have been applied to this case.

The argument, however, of the learned Counsel for the appellant apparently was that the English Law as to the transfer of land had been applied to the Northern Circars, and I think that he failed to show any authority for this proposition. The Charters of the Mayor's Court of Madraspatam were only intended to apply to the administration of justice in the Presidency Town and the Court established apparently resembled the Consular Court.

The Charters which abolished the Mayor's Court established only local Courts in the Presidency Town (Shaw's Charters of the Madras High Court). I agree with the order proposed by my learned brother.

Appeal allowed;
Suit decreed.

V.R.P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 448 OF 1915.

June 15, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

THE ALLAHABAD BANK, LIMITED—PLAINTIFF—APPELLANT

versus

MOTI LAL BARMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 10—Mortgage suit—Account in preliminary decree, if adjusted once for all—Money paid by mortgagee after preliminary decree either for rent or for supporting his title to mortgaged property, if can be added to mortgage money.

Where in a preliminary decree in a mortgage suit a Court instead of directing an account to be taken inserts the actual amount the mortgagor is liable to pay, the account is not adjusted once for all but may vary from time to time. [p. 96, col. 2.]

If after the preliminary decree in a mortgage suit the mortgagee pays to the landlord the rent due in respect of the mortgaged property, or properly spends any money either for supporting or defending the title to the mortgaged property the amount so paid should be added to the amount found due on the mortgage in the preliminary decree, even though there was no express covenant in the mortgage-bond entitling the mortgagee to add such amount. [p. 97, col. 1.]

Semble.—After the preliminary decree in a mortgage suit the mortgagee is not bound to leave the mortgaged property in jeopardy (for non-payment of rent) until the Court decides the matter one way or the other (by the final decree). [p. 97, col. 1.]

Appeal against the decree of the Subordinate Judge, Howrah, in Hooghly, dated the 20th of August 1915.

FACTS of the case appear clearly from the judgment.

ALLAHABAD BANK, LTD. *v.* MOTI LAL BARMAN.

Mr. *B. C. Mitter* and Babu *Ambica Pada Chowdhry*, for the Appellant.—The sum must be added to the preliminary decree. Cited *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (1), *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (2), *Rakhohari Chattaraj* v. *Bipra Das Dey* (3). The other party say that no remedy can be had in this suit, but *vide Oxenham* v. *Ellis* (4), Daniell's Chancery Practice, 1225. Not only mortgagees in possession but other mortgagees also have the right, *vide* Dr. Ghose on Mortgage, pages 304, 305 *vide* also section 72 of the Transfer of Property Act.

Dr. *Dwarkanath Mitter* (with him Babus *Debendra Nath Mundal* and *Satindra Nath Mukerji*), for the Respondent.—There is no authority for the proposition that where a sum might be added to the preliminary decree, the final order is regarded as an order in execution. He referred to Order XXXIV, rules 4 and 5 also rule 10 of the Civil Procedure Code. The appellant can seek to recover the sum by a separate suit under section 69 of the Indian Contract Act, but he cannot get a decree for this sum by adding to the preliminary decree.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned Subordinate Judge of Howrah, dated the 10th August 1915. The appeal is preferred nominally against a decree absolute in a suit for sale brought to enforce a mortgage security. On the 25th February 1913, the first defendant along with the second defendant who is a surety for him executed in favour of the plaintiff-appellant, The Allahabad Bank Limited, a mortgage for Rs. 55,918-15-9. A suit was subsequently instituted by the Allahabad Bank and a preliminary decree was passed on the 10th September 1914. That preliminary decree found the sum of Rs. 67,990-0-9 as due to the plaintiff Bank and fixed a period of two months for redemption. The decree being made *ex parte* the defendant No. 1 applied to set it aside. That application was unsuccessful and the order was upheld by the High Court. Then on the 6th January 1915, there was an order relating to the payment by the plaintiff Bank of rents in arrears which the mortgagor did not pay. On the 28th January 1915 the plaintiff Bank applied to the learned Subordinate Judge for the appointment of a Receiver. That was refused and, upon appeal to the High Court, that order was set aside. On the 19th February 1915, the plaintiff Bank paid to the landlord—the property included in the mortgage being a leasehold property—the sum of Rs. 8,087-5-6 in respect of rent. Thereupon he applied to the learned Subordinate Judge for leave to add the money so paid to the amount due on the mortgage. But the learned Subordinate Judge on the 20th August 1915, refused that application on the ground that there was no express covenant in the mortgage-bond entitling the plaintiff to add such arrears to the amount due on his mortgage. In substance, the appeal is preferred against the order.

Under Order XXXIV, rule 2, Code of Civil Procedure, in a suit either for foreclosure or sale when the plaintiff succeeds the Court has either to direct an account to be taken of what is due to the plaintiff for principal and interest upon the mortgage security and for the costs of the suit or to find the sum due. But as a matter of practice the latter course is followed in the Courts in *moffussil*. The learned Judge in this case having by his judgment decided that the plaintiff is entitled to succeed proceeds to calculate the amount due upon his mortgage and instead of directing an account to be taken, he inserts in the preliminary decree the actual amount which the defendant is liable to pay. That, of course, is a method which has certain advantages.

That the account is not adjusted once for all appears quite clear from the other rules of the Order. For instance, Order XXXIV, rule 10, mentions the final adjustment of the amount. So, the amount may from time to time vary. The present application is to add this money that was spent for the preservation of the property to the amount due on the mortgage. The mortgage is a mortgage of a leasehold property. The mortgagor was bound by the terms of the law to pay the rent becoming due under the lease and it has always been

(1) 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R. 92.
(2) 30 C. 794; 7 C. W. N. 609.
(3) 31 C. 975.
(4) (1854) 18 Beav. 593; 52 E. R. 233; 104 R. R. 540.

held that money so paid by the mortgagee can be added to the amount due on the mortgage. That is the view expressed by Sir Rash Behary Ghose in his treatise on the Law of Mortgage in British India and it may also be found in any text book on the subject. The same view has been supported in many decisions of this Court and I am not satisfied that Dr. Mitter's view that the cases in the Madras and the Bombay High Courts really cast a doubt upon that view at all is tenable. There cannot be, I think, any doubt that in the account the mortgagee can claim money properly paid by him for either supporting or defending the title to the mortgaged property. Money paid for rent has always been held to be part of the mortgage-money. It seems to me that, in substance, that is what the plaintiff has been asking for in this case, namely, to be allowed to add the money that he has paid to the landlord for rent in respect of the mortgaged property. If that is so, that money is a portion of the money secured by the mortgage. That being so, of course, the question that Dr. Mitter has raised about the final decree in a foreclosure suit being really a matter in execution cannot possibly arise.

The *next* point is a question of fact, namely, whether this money was, in fact, paid for the preservation of the property. The rent was paid obviously to preserve the property. It is said that the landlord having obtained a rent-decree could only execute that decree in a particular way. Whether that is so or not, it does not matter. I do not think that the mortgagee is not authorised to preserve the property from being lost for non-payment of rent. Dr. Mitter has cited no authority that the mortgagee is bound to leave the property in jeopardy until the Court decides the matter one way or the other. I see no reason why we should lay down for the first time such a rule. I think the learned Subordinate Judge was manifestly wrong in not allowing the plaintiff the money which he has clearly paid for the purpose of preserving the property. I think the present appeal ought to be allowed and this amount of Rs. 8,087 5·6, which has been paid by the plaintiff mortgagee for the rent of the property, ought to be added to and form a part of the money found due on the mortgage. That being so, the present appeal must be allowed. The defendant No. 1 respondent must pay to the plaintiff-appellant his costs in this Court and in the lower Court incurred in the application. These costs will be added to the mortgage security. The period of redemption is also extended to three weeks from this date.

TEUNON, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 210 OF 1914.

May 30, 1916.

Present:—Mr. Justice Mullick and Mr. Justice Kingsford.

DASARATH SAHU AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Land Acquisition Act (I of 1894), s. 3 (a)—"Land," meaning of—Things attached to earth, whether within the Act.

Though the term 'land' in section 3 (*a*) of the Land Acquisition Act is defined as including things attached to the earth, the Act does not contemplate the acquisition of things attached to the land without the land itself. It is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act. [p. 98, col. 1.]

Shyam Chunder Mardraj v. *Secretary of State*, 35 C. 525; 12 C. W. N. 569; 7 C. L. J. 445, referred to.

Appeal from a decision of the District Judge, Patna, dated the 19th March 1914.

Messrs. *Pugh* and *K. P. Jayaswal*, for the Appellants.

The Deputy Government Advocate, for the Respondent.

JUDGMENT.

KINGSFORD, J.—This is an appeal from the order of the District Judge confirming the award of the Deputy Collector upon a reference at the instance of the appellants under the Land Acquisition Act.

The subject-matter of the acquisition consisted of two houses situated upon plots of land admittedly appertaining to the Bankipore Jail, and the property of the

Secretary of State. The contention of the appellants was, that they had a permanent interest in the lands. The case for Government was, that the appellants were mere tenants-at-will, and that they were liable to eviction upon payment of compensation for the houses. The Secretary of State accordingly sued to eject the appellants from the holdings, but in view of the acquisition proceedings he allowed the suit to be dismissed for default. The Deputy Collector thereupon acquired the houses but not the lands.

Before the District Judge the appellants contended that they were entitled to compensation for the land. They also objected to the amount of compensation awarded for the buildings. Mr. Pugh, who appears for the appellants before us, has not pressed the question of valuation of the buildings, but he contends that, as the appellants claim a permanent interest in the land, the Deputy Collector ought to have acquired it, leaving the question of apportionment as between the parties to be decided by a subsequent reference under the provisions of section 30 of the Act.

The proceedings appear to have been misconceived from the outset. No doubt the definition in section 3 (*a*) of the Act includes in the word 'land' things attached to the earth, but the Act does not contemplate the acquisition of things attached to the land without the land itself. The law upon this point has been clearly laid down in *Shyam Chunder Mardraj* v. *Secretary of State* (1), where it was held that Government could not use the Land Acquisition Act for the purpose of acquiring fishery rights over land which was already the property of Government. It was pointed out that it is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act.

The proceedings were therefore without jurisdiction, and the appeal is incompetent and is dismissed, each party bearing his own costs.

MULLICK, J.—I agree.

Appeal dismissed.

(1) 35 C. 525; 12 C. W. N. 569; 7 C. L. J. 445.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 341 OF 1914.

November 2, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PANDIRI VEERAMMA—DEFENDANT No. 2 —APPELLANT

versus

MANDAVILI SUBBA RAO AND OTHERS— PLAINTIFF AND DEFENDANTS NOS. 4 AND 1— RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 46—Wrongful seizure of moveables—Attachment of moveables by issue of prohibitory order—Compensation, suit for—Limitation Act (IX of 1908), Sch. I, Arts. 29, 36, 42, 46, 62, 120—Injunction.

A suit for compensation for wrongful seizure of moveables is governed by Article 29 of Schedule I of the Limitation Act. [p. 99, col. 2.]

Narasimha Rao v. *Gangaraju*, 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 590, followed.

A suit for compensation for wrongful attachment of moveables by the issue of a prohibitory order is governed by Article 36 and not by Article 42, 46, 62 or 120. [p. 101, col. 2.]

An attachment by a prohibitory order is not an injunction within the meaning of Article 42. [p. 101, col. 2.]

Yellammal v. *Ayyappa Naick*, 22 Ind. Cas. 870; 26 M. L. J. 166 (1914) M. W. N. 348; 1 L. W. 162; 38 M. 972, explained.

Essoo Bhayaji v. *SS. "Savitri"*, 11 B. 133; *Mahomed Syad Phaki* v. *Nawoji Balabhai*, 10 B. 214; *Jadu Nath* v. *Hari Kar*, 1 Ind. Cas. 788; 36 C. 141; 9 C. L. J. 109; *Mangun Jha* v. *Dolhin Gulab Koer*, 25 C. 692; 2 C. W. N. 265, *Ram Narain* v. *Umrao Singh*, 29 A. 615; A. W. N. (1907) 194; 4 A. L. J. 548, referred to.

Article 36 of Schedule I of the Limitation Act is a general Article for suits for compensation for all possible acts and omissions commonly known as torts, that is, wrongs independent of contract and which are not provided for by other Articles. [p. 102, col. 1.]

Second appeal against the decree of the District Court of Godavari at Rajahmundry, in Appeal Suit No. 122 of 1909, preferred against that of the District Munsif, Rajahmundry, in Original Suit No. 12 of 1908.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The 2nd defendant is the appellant. The plaintiff's case might be summarised thus:—(*a*) The 1st defendant on the 19th January 1905 wrongfully attached, in execution of his decree against one B. V. Narasimham, certain timber logs belonging to the plaintiff. (*b*) The 2nd defendant brought Original Suit No. 8 of 1905 against that same

debtor, B. V. Narasimham, got an order for attachment before judgment of these same logs belonging to the present plaintiff and had them attached by a prohibitory order directed against the Village Munsif, the 3rd defendant, with whom the logs had been left in pursuance of the first attachment made at the instance of the 1st defendant. (*c*) Though the attachments were all released soon after (on 8th March 1905 and 24th January 1905), the 1st defendant brought a suit contesting the order of release passed in the plaintiff's favour and his suit was finally disposed of on appeal in plaintiff's favour only in December 1907. (*d*) Though the cause of action first accrued when the attachments were made in January 1905, cause of action must be deemed to have continued till December 1907 when, in the suit brought by the 1st defendant, it was finally decided that the logs belonged to the plaintiff and not to the 1st and 2nd defendants' debtor, B. V. Narasimham.

The present suit was brought in January 1908 within three years of the attachment but more than two years after the properties were released both from the attachment by seizure at the instance of the 1st defendant and from the attachment by prohibitory order at the instance of the 2nd defendant.

The learned District Judge at the end of paragraph 5 of his judgment says:—"The attachment was made at the instance of the 1st defendant and by the instrumentality of the 2nd defendant and his clerk. It was illegal both in its inception and execution and what followed afterwards was a natural consequence." The District Judge thus correctly apprehended the suit as a suit for compensation for loss caused by the illegal attachments effected by the defendants Nos. 1 and 2.

The learned District Judge, who first dealt with this case, held that there was no conspiracy between the defendants Nos. 1 and 2 in effecting their separate attachments (one attachment being in execution of the 1st defendant's decree against Narasimham and the other attachment having been by a prohibitory order obtained before judgment in 2nd defendant's separate suit against Narasimham). The Judge thereupon dismissed the suit as bad for misjoinder of parties and causes of action. On second appeal to the High Court, Sankaran Nair, J., and myself held that there was no misjoinder because the facts to be proved as against the 1st and 2nd defendants arose out of the same series of acts and transactions and as common questions of law and fact are involved. (See Order I, rules 3, 5 and 7, Civil Procedure Code.) We, therefore, remanded the case for disposal on the merits. As far as I recollect after reading the remand order passed by Sankaran Nair and myself, I think we never meant to disturb the finding of fact arrived at by the learned District Judge, who first dealt with the case, that the 1st defendant was not liable for the 2nd defendant's prohibitory attachment before judgment in the 2nd defendant's suit nor was the 2nd defendant liable for the 1st defendant's attachment in execution of the 1st defendant's decree.

I might add that as a Court of second appeal, we had no power to disturb that finding of fact.

On remand, however, the District Court presided over by another District Judge has found conspiracy established as between the defendants Nos. 1 and 2 and has made both of them liable for the wrongful attachment issued at the instance of each. I do not think the District Judge was justified in going behind the finding of fact arrived at by his predecessor, a finding which was not disturbed by the High Court.

I shall assume, however, that the District Judge was entitled to come to a different finding from that of his predecessor. The 2nd defendant is the only appellant before us and on the above assumption, he is liable for the attachment effected by the 1st defendant by actual seizure. The Full Bench decision in *Narasimha Rao* v. *Gangaraju* (1) is clear authority that Article 29 (which provides a period of one year in respect of a suit for compensation for wrongful attachment under legal process *by seizure of moveables*) applies to such a suit as this. Hence the plaintiff's claim against the 2nd defendant (appellant before us), so

(1) 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 590.

far as it is based on the attachment effected in the 1st defendant's suit against B. V. Narasimham, is barred by limitation. Mr. Rangachariar for the plaintiff (respondent) relied upon an injunction obtained in March 1906, Exhibit U, (by the 1st defendant) as one of his causes of action. I need only say that this injunction order of 16th March 1906 obtained by the 1st defendant is mentioned nowhere in the plaint. Paragraphs 2, 3 and 8 of the plaint clearly indicate that the suit is for damages for the tortious conduct of the defendants Nos. 1 and 2 in having the plaintiff's logs wrongfully attached in January 1905.

It is clear that the claim of the plaintiff against the 2nd defendant is narrowed to the damages sustained by the plaintiff on account of the 2nd defendant's own act in having attached before judgment the plaintiff's logs on the 20th January 1905 through a prohibitory notice issued to the Village Munsif of Badampudi with whom the plaintiff's logs were then in deposit. The attachment by prohibitory order was released on the 24th January 1905 itself. If this suit is not barred by limitation, the plaintiff is entitled to damages caused to him by the wrongful attachment which continued between the 20th and 24th January 1905. The two questions thus remaining for consideration are, (1) whether the claim of the plaintiff against the 2nd defendant in respect of this wrongful attachment is barred by limitation; (2) what damages is plaintiff entitled to get from the 2nd defendant on account of this attachment? (I shall assume without deciding that a plaintiff *C*, whose moveables are attached at the instance of *A* as if they belonged to *A*'s debtor *B* when they did not so belong to *B*, is entitled to be awarded compensation without proving malice or want of reasonable and probable cause in the action of *A*.)

As I said already, the attachment before judgment was not effected by actual seizure but by following the procedure mentioned in Order XXI, rule 46, clause (1) (*c*) (*iii*). Article 29 of the Limitation Act says that the limitation for a suit "for compensation for wrongful seizure of moveable property under legal process" is one year from the date of the seizure. It was held by the Full Bench in *Yellammal* v. *Ayyappa Naick* (2) that "where a debt is attached under Order XXI, rule 46, clause 1 (*a*) (*i*)," that is, by written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof, "there is no seizure of moveable property within the words of Article 29." Sir Arnold White, C. J., says:—"In the case of moveable property the broad distinction seems to be that when the property is in the possession of the judgment-debtor at the time the order of attachment is made, the procedure is by seizure, actual or constructive. * * * When the property is not in the possession of the debtor, the procedure is by way of prohibitory order. * * * I think this case" (that is the case of a debt in which the creditor and the debtor are prohibited) "is distinguishable from *Narasimha Rao* v. *Gangaraju* (1), where the majority of the Court were of opinion that Article 29 applied. There the attached property was ordinary moveable property". For the above reasons, the Full Bench held that Article 29 could not apply, as an attachment effected by prohibitory order of a debt is not wrongful seizure of moveable property. If the opinion in that case is deemed to rest upon the distinction between "ordinary moveable property" and a debt, that case is not an authority for the proposition now contended for by Mr. Rangachariar that even where ordinary moveable property is attached by a prohibitory order and not by actual seizure, the case does not come within Article 29 which uses the words "wrongful seizure of moveable property". I shall take it, however, that not only in the case of debts but also in the case of ordinary moveable property where the attachment is made not by actual seizure but by prohibitory order under Order XXI, rule 46, clause (1) (*c*) (*iii*), Article 29 does not apply. Which Article, then, of the Limitation Act, applies to such a case? Mr. Rangachariar contends that Article 42 would apply. Article 42 provides three years' limitation for compensation for injury caused by an injunction wrongfully obtained. Can an attachment obtained in the shape of a prohibitory order

(2) 22 Ind. Cas. 870; 26 M. L. J. 166; (1914) M. W. N. 348; 1 L. W. 162; 38 M. 972.

be treated as coming within the word "injunction" in Article 42? As stated in *Chanmalapa Chenbasapa Tenguikai* v. *Abdul Vahab Muhamed Hussen* (3), the meaning of a legal word used in the Limitation Act, and the Civil Procedure Code, (both of which Acts mainly relate to procedure and have been passed and amended from time to time by the Legislature almost simultaneously) should be taken as identical. In the Civil Procedure Code, the word "injunction" has a distinctly separate signification from the word "attachment" (see for instance, section 95, clause 2, where the words are 'for compensation in respect of such arrest, attachment or injunction;" also Order XXXIX, rules 1 to 5, which relate to injunction, Order XXXVIII, rules 5 to 12, which relate to attachment before judgment and the rules in Order XXI relating to attachments after decree. I am, therefore, unable to accept the argument of Mr. T. Rangachariar that as certain kinds of injunction are orders prohibiting the doing of certain acts, prohibitory orders under rule 46 are also injunctions. In the case of *Surajmal Chunilal* v. *Manekchand Kapurchand* (4) the suit was instituted by the plaintiff to recover damages and compensation in respect of an attachment before judgment of certain rubies belonging to the plaintiff. The attachment was made in 1896 and it was raised in December 1901. The suit was brought in 1902. Batty, J., held that "Article 29 does not appear to apply, for it implies actual seizure under legal process." And in that case evidently, the attachment was by prohibitory order to the person in possession of the jewels. Then the learned Judge considered Article 42. (The report in the middle of page 707 mentions Article 49 instead of 42 by clerical mistake, the learned Judge having already dealt with Article 49 in the beginning lines of page 707, even before dealing with Article 29.) The learned Judge says: "The Indian Statute Book aims at uniformity of legislative expression and it seems doubtful whether it was intended in Article 42 to class together orders differentiated in the Code, providing for them not only by distinct names but by the procedure preliminary to their issue (see sections 484 and 494), (by) the mode of operation (see sections 486 and 268 and section 492), (by) the conditions of removal (see section 488 and section 496), and (by) the grounds for compensation (see section 491) when injury is caused by the attachment and not by the bare order or (as in section 497) injunction is the subject of compensation. I, therefore, think it doubtful whether Article 42 applies in this case." As I have said already, I do not think that Article 42 relating to injunction applies to an attachment by a prohibitory order. Then Mr. Rangachariar fell back upon Article 49, which relates to a suit for other specific moveable property, or for compensation for wrongfully detaining the same. To use the words of Batty, J., at line 6 of 6 Bombay Law Reporter, page 707 [*Surajmal Chunilal* v. *Manekchand Kapurchand* (4)], "I do not think the present suit can be described without strain of words as one for specific moveable property or for compensation for wrongfully taking or detaining the same." Mr. T. Rangachariar lastly relied upon Article 62 and Article 120, which Articles were referred to in the decision of *Yellammal* v. *Ayyappa Naick* (2). But the suit in that case was not framed as a suit for compensation for injury caused by a wrongful attachment but for the recovery of money which a debtor paid into Court under a garnishee order and which the defendant (decree-holder) obtained from Court, though it belonged to a third person (plaintiff) and not to the judgment-debtor. The learned Judges held that the suit fell directly within Article 62, which relates to a claim for the recovery of money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The present suit can, by no stretch of language, be deemed to be a suit for the recovery of the plaintiff's money which went into defendant's hands. Hence Article 62 can have no application. As regards Article 120, it should not be applied till all the other Articles are exhausted. If Article 29 does not apply (of which I am not quite sure), Article 36 seems to me to clearly apply to this case. That is the residuary Article in respect of suit for compensation for any malfeasance, misfeasance or non-feasance independent of contract not especially provided for by any

(3) 8 Ind. Cas. 645; 12 Bom. L. R. 977 at p. 982; 35 B. 139.

(4) 6 Bom. L. R. 704 at p. 707.

of the other Articles and the term is two years to commence from the date "when the malfeasance or misfeasance or non-feasance took place." As said in Rustomji's edition of Limitation Act, Article 36 is a general Article for suits for compensation for all possible acts and omissions commonly known as torts, that is, wrongs independent of contract and which are not provided for by other Articles. See *Essoo Bhayaji* v. *SS. "Savitri"* (5), *Mahomed Sayad Phaki* v. *Navroji Bhalabhai* (6), *Jadu Nath* v. *Hari Kar* (7), *Mangun Jha* v. *Dolhin Galab Koer* (8), *Ram Narain* v. *Umrao Singh* (9). Mr. Rangachariar relies on *Yellammal* v. *Ayyappa Naick* (2) for his contention that Article 36 does not apply. But as I said before, the claim dealt with in that case was a claim for recovery of the plaintiff's money which had gone into defendant's hands, and it was on that ground that that Article was held not to apply. On the other hand, in the case of *Surajmal Chunilal* v. *Manekchand Kapurchand* (4) which resembles the present in many respects (as it was also a suit for compensation for damages for wrongful attachment before judgment by a prohibitory order), Article 36 was held to apply. If Article 36 applies and even if an attachment by a prohibitory order constitutes a continuing wrong till the attachment is removed (and not a completed wrong on the very date of attachment as in the case in which the attachment is by actual seizure to which Article 29 applies), the final date of the cause of action was the 24th January 1905 when the prohibitory order was withdrawn. The present suit brought in January 1908, more than two years afterwards, is, therefore, barred by Article 36. On my above view that the suit is barred by limitation, it is unnecessary to go into the second question as to the damages due to the plaintiff in respect of the attachment which continued for less than five days, that is, between 20th and 24th January 1905. If it was necessary to go into that question, it would be very difficult to hold that, on account of such damages, the whole of the value of the attached moveables could be awarded against the 2nd defendant as has been done by the learned District Judge.

In the result, I would, reversing the decree of the lower Courts so far as the claim of the plaintiff against the 2nd defendant is concerned, dismiss the plaintiff's suit as against the 2nd defendant with 2nd defendant's costs throughout.

NAPIER, J.—I concur.

Appeal allowed;
Suit dismissed.

V.R.P.

(5) 11 B. 133.
(6) 10 B. 214.
(7) 1 Ind. Cas. 788; 36 C. 141; 9 C. L. J. 109.
(8) 25 C 692; 2 C. W. N. 265.
(9) 29 A. 615; A. W. N. (1907) 194; 4 A. L. J. 548.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2916 AND 3529 OF 1913.

June 6, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

IN No. 2916 OF 1913

ALI SHEIKH—PLAINTIFF No. 2—APPELLANT

versus

IMAM ALI SARKAR AND ANOTHER—DEFENDANTS—RESPONDNENTS.

IN No. 3529 OF 1913

IMAM ALI SARKAR—DEFENDANT No. 1—APPELLANT

versus

KALAM SHEIK AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Evidence of conduct, admissibility of, to show that mortgage is really kobala—*Relinquishment of tenancy in favour of creditor, if could be made by application for mutation of names.*

Evidence of conduct is admissible to show that a document which was on the face of it a *kot kobala* (mortgage) was in reality a *kobala* (deed of sale). [p. 104, col. 1.]

Khankar Abdur Rahman v. *Ali Hafez*, 28 C. 256; 5 C. W. N. 351, followed.

When a debtor after having executed a *kot kobala* of a holding applies to the landlord for mutation of the name of the creditor as the *de facto* tenant and such application is accepted by the landlord, the effect is to render the transaction a complete alienation of the holding and the debtor is not entitled to redeem. [p. 104, col. 1.]

Appeals against the decrees of the Officiating Sub-Judge, Mymensingh, dated the 14th July 1913, modifying those of the Munsif, Mymensingh, dated the 21st August 1912.

FACTS of the case appear fully from the judgment.

S. A. No. 3529 OF 1913.

Babu *Abinash Chandra Guha*, for the Appellant.—The lower Appellate Court was wrong in holding that section 92 of the Indian Evidence Act was a bar to the *kot kobala* being treated as a *kobala*.

Evidence of conduct and acts of the parties have always been held to be admissible to show the real nature of the transaction.

The decision of the Judicial Committee in *Balkishen Das* v. *Legge*(1) has not effected any change in the law. [See *Khankar Abdur Rahman* v. *Ali Hafez* (2); *Mahomed Ali Hossein* v. *Nazar Ali* (3).]

Relinquishment by the sole recorded tenant bound his unrecorded co-sharers. [Cites *Jagattara Dassya* v. *Daulati Bewa* (4).]

Babu *Bimal Chandra Das Gupta*, for the Respondents.—The trend of decisions up to *Balkishen Das* v. *Legge* (1) has been that although oral evidence was inadmissible for the purpose of contradicting, varying, etc, the terms of a written contract, evidence of subsequent conduct and surrounding circumstances would be admissible to show what the real nature of the transaction was. After *Balkishen's* case (1) all the other High Courts have held that evidence of conduct would be excluded equally with other oral evidence. In the Calcutta High Court, there has been some divergence. The case reported as *Lakhatullah* v. *Bishambar Roy* (5) lays down that evidence of conduct is nothing else than oral evidence and is as such also excluded.

My further submission is that this question does not at all arise in this case. It was not the defendants' case that the *kot kobala* though purporting to be a *kot kobala* was really intended to operate as a *kobala*.

There is no evidence on the record in support of this contention of the defendants.

So the point does not arise and cannot be allowed to be raised at this stage.

A finding upon the question of relinquishment is conclusive. Question of representation is always a question of fact and law. It was not the case of the defendants that the relinquishment was made by plaintiff No. 2 as representing himself and his co-sharers. This is a new case sought to be raised now.

S. A. No. 2916 OF 1913.

Babu *Bimal Chandra Das Gupta*, for the Appellant.—Deed of *istafanamah* was inadmissible in evidence for want of registration and could not affect the bonds in suit. [See Registration Act, sections 17 and 49, and *Imam Ali* v. *Baij Nath Ram Sahu* (6).]

Findings are not sufficient to establish a valid relinquishment.

Relinquishment consists of:

(1) Execution of the deed.

(2) Delivery of the deed by the tenant and acceptance thereof by the landlord.

As regards (1) the finding is conclusive and cannot be challenged. As regards (2) there is no express finding and there is no evidence on the record to prove delivery of the *istafanamah* by plaintiff No. 2 and acceptance thereof by any one on behalf of the landlord.

Babu *Abinash Chandra Guha*, with him Babu *Biraj Mohan Mojumdar* for the Deputy Registrar, for the Respondents. - The pleadings might be defective but the point was raised and gone into. In the *mofussil*, the pleadings are seldom artistically drawn up.

Want of registration of the *istafanamah* did not stand in the way of my clients; the lower Appellate Court finds relinquishment and apart from the *istafanamah* there must have been verbal relinquishment.

JUDGMENT.—The plaintiffs Nos. 1, 2 and 3 executed a *kot kobala* in respect of an ancestral holding of their own in favour of defendant No. 1. In consequence of there being no custom in the locality of a transfer of such holdings, it is said that the device of a *kot kobala* was adopted although the transaction was a sale. The first Court held that no evidence was admissible to prove that, although the document purported to be a *kot kobala*, the transaction was in reality a sale. The second Court held under section 92 of the Evidence Act that evidence to prove that it was a *kobala* was not admissible. It finds, however, from the conduct of the

(1) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 52?; 7 Sar. P. C. J. 601.
(2) 28 C. 256; 5 C. W. N. 351.
(3) 28 C. 289; 5 C. W. N. 326.
(4) 2 Ind. Cas. 695; 13 C. W. N. 1110; 37 C. 75.
(5) 6 Ind. Cas. 577; 12 C. L. J. 646.
(6) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.

parties, that the *kot kobala* was really intended to operate as a *kobala*.

There is some divergence of opinion in the different High Courts with regard to the question, whether evidence is admissible to prove that a document purporting to be a mortgage is really a sale. In our Court, however, there is a preponderance of authority on the point that evidence of conduct is admissible to show that what was on the face of it a mortgage, was in reality a *kobala*. We may refer to the case of *Khankar Abdur Rahman* v. *Ali Hafez* (2). The learned Subordinate Judge also has, in one part of his judgment, considered the conduct of the parties, and upon a consideration of the conduct of the parties and the evidence thereon he has come to the conclusion that the *kot kobala* was really intended to be a *kobala*.

Then comes the question of relinquishment. We have examined the papers. The paper is not in the nature of a relinquishment but in the nature of an application for mutation of names, stating that the creditor had paid the money and that the tenants had executed a deed of *kot kabala* but it was arranged that the creditor was to pay the arrears of rent and was to be the *de facto* tenant. This seems to have been accepted by the *zemindar* in whose *serishta* the son of the creditor, defendant No. 2, was entered as a tenant. The effect of the whole transaction was that there was a sale of this ancestral holding by the plaintiff in favour of the defendant No. 1 in the name of the son of the defendant No. 2 and that was recognised by the landlord. It does not at all affect the matter that the application for mutation of names was made by the plaintiff No. 2 alone. The finding is that the relinquishment by plaintiff No. 2 in favour of the landlord was in pursuance of an arrangement between the plaintiff on one side and the defendant No. 1 on the other side; in the result, there was a complete alienation of the holding and the plaintiffs are not entitled to redeem.

In this view of the case, S. A. No. 3529 of 1913 is decreed with costs and S. A. No. 2915 of 1913 is dismissed without costs.

Appeal No. 3529 *allowed;*
Appeal No. 2915 *dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 300 OF 1914.

April 17, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

SUBBIAH CHETTY *alias* SUBRAMANIAM CHETTY AND OTHERS —DEFENDANTS—APPELLANTS

versus

KUPPAMMAL—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 67—Mortgage, construction of—Suit for interest alone—Covenant for payment of periodical interest and enhanced interest on default—'Contract to the contrary'—Right of suit.

If there is an absolute covenant in a deed of mortgage prohibiting the mortgagee from suing before the principal becomes due, he cannot sue for the interest before that date. In the absence of such a prohibition, the mortgagee is entitled to sue for interest, though the principal may not become payable for a considerable time. [p. 105, col. 1.]

A stipulation in a deed of mortgage that interest is to be paid on specified dates and, on default, at a higher rate, is a 'contract to the contrary,' to which the provisions of section 67 of the Transfer of Property Act do not apply. [p. 104, col. 2; p. 105 col. 1.]

Kannu v. *Natesa*, 14 M. 477, distinguished.

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 181 of 1913, preferred against that of the Court of the Additional District Munsif, Tirupur, in Original Suit No. 1531 of 1912.

Mr. *G. Krishnaswamy Ayyar*, for the Appellants.

Dr. *S. Swaminathan*, for the Respondent.

JUDGMENT.—We see no reason to differ from the conclusion of the Court below that there was no good ground for adjourning the case.

On the merits Mr. G. Krishnaswamy Ayyar raised practically a new point. His contention is that so long as the date fixed for the payment of the principal money has not arrived, it is not open to the mortgagee to sue for interest alone. He relies on the provision for enhanced interest, as pointing to the inference that interest also became payable on the date that the principal fell due. As we read the document, it is clear that there was a distinct contract to pay interest every month and a further stipulation that the monthly interest should be at a higher rate, in case the payment of interest was not regular. Thus there was "*a contract to the contrary*"

and consequently section 67 of the Transfer of Property Act does not affect the question. The decision in *Kannu* v. *Natesa* (1) proceeded on the construction which the learned Judges placed on the particular document before them. That decision is not a general pronouncement on the construction of section 67. On the other hand, the passage in Fisher on Mortgages at page 372 enunciates the true principle applicable to such cases. If there is an absolute covenant prohibiting the mortgagee from suing before the principal becomes due, he cannot sue for the interest before that date. But if there is no such prohibition, although the principal may not become payable for a considerable time, the mortgagee is entitled to sue for the interest without waiting for the due date. We accept this proposition. In this view, the decision of the Court below is right. We dismiss the second appeal with costs. Time for the payment of the decree amount is extended to three months.

Appeal dismissed.

(1) 14 M. 477.

V. R. P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 156 OF 1915.

February 1, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

HIRA LAL—DEFENDANT—APPELLANT

versus

MAHARAJ SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), *ss.* 181, 182—*Appeal from order of remand—Practice, uniform, desirability of —Civil Procedure Code (Act V of* 1908), *O. XLI, r.* 23.

Under the provisions of the Agra Tenancy Act no appeal lies from an order of remand passed by a District Judge under the provisions of Order XLI, rule 23, Civil Procedure Code. [p. 105, col. 2.]

Zahur Ali v. *Sher Ali*, A. W. N. (1906) 5; 3 A. L. J. 20; 28 A. 283; *Gulzari Lal* v. *Latif Husain*, 35 Ind. Cas 27; 14 A. L. J. 84; 38 A. 181, followed.

The desirability of the Courts of co-ordinate jurisdiction following cognate decisions on matters of practice pointed out. [p. 106, col. 1.]

First appeal from an order of the Additional Judge, Farrukhabad, dated the 8th May 1915.

Mr. *Vishun Nath*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This appeal, along with Nos. 157, 158 and 159, registered and filed to this Court as first appeals from order, arise out of certain litigation in the Revenue Courts. The suit was by a landholder against a person in possession of land held rent free and the principal relief sought was an order for resumption of the same. The Assistant Collector dismissed the suit, but incidentally came to a finding that the defendant was holding the land in suit rent free under a judicial decision and was, therefore, not liable to pay the revenue assessed thereon. Apparently the Assistant Collector found it necessary to determine this further point, after he had held that the land was not liable to resumption, because of the alternative prayer at the end of the plaint for any other relief which might be deemed beneficial to the plaintiff in the Court's opinion. The plaintiff appealed to the District Judge, who agreed with the Assistant Collector that the land was not liable to resumption. He differed from the Assistant Collector, however, in holding that the land must be deemed to be held by the defendant in proprietary right and that the defendant was liable to pay the revenue assessed thereon. He then proceeded to pass an order embodying the conclusions at which he had arrived, but closing with an order of remand, purporting to be passed under the provisions of Order XLI, rule 23, of the Code of Civil Procedure, returning the case to the Court of first instance with directions to proceed to dispose of the suit completely by determining the revenue payable by the defendant in accordance with the provisions of section 158 of the Agra Tenancy Act.

The defendant having come to this Court in appeal, a preliminary objection has been taken to the effect that no appeal lies. Under the provisions of the Tenancy Act no appeal lies from an order of remand passed by a District Judge under the provisions of Order XLI, rule 23, of the Code of Civil Procedure. This is apparent from a consideration of the provisions of sections 181 and 182 of the Tenancy Act itself, and has been repeatedly affirmed by this Court, as in the case of *Zahur Ali* v.

Sher Ali (1) and in that of *Gulzari Lal* v. *Latif Husain* (2). The question before us is, not whether the order of the District Judge is a proper one, or one which he ought to have passed under the provisions of Order XLI, rule 23, but whether an appeal lies in law against that order. An appeal cannot lie unless the Legislature has seen fit to provide for it and it seems to us, after a full consideration of the arguments, that we should adhere to the previous decisions of this Court in holding that the case is one in which an appeal is not provided for by the Statute. We would further point out the desirability of the Courts of co-ordinate jurisdiction in the same Province following cognate decisions on matters of practice. It is absolutely impossible for legal advisers of parties to know what steps to take and how to advise their clients, unless they know what the practice of a Court is, and this they cannot know if a Court is constantly distinguishing it. We think, following the decisions which have been referred to, that this preliminary objection may be justified on one short ground. It is not denied, and could not be contested, that, if this had been an order remanding the whole suit, no appeal could be brought. The appellant's case is clearly not stronger because it was an order remanding only a part of the suit. We, therefore, dismiss this and the connected appeals with costs.

Appeal dismissed.

(1) 28 A. 283; A. W. N. (1906) 5; 3 A. L. J. 20.
(2) 35 Ind. Cas. 27; 14 A. L. J. 84; 38 A. 181.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 112 OF 1914.

March 7, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

MAHOMED HANIF SAHIB AND OTHERS—DEFENDANTS NOS. 3, 4, 6, 7 AND 8—APPELLANTS

versus

ANAGAPPA MUDALI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2, 5 AND 1.—RESPONDENTS.

Specific Relief Act (I of 1877), s. 54, illus. (p)—Declaratory decrees, form of—Specific determination of rights in dispute—Larger relief than in plaint, award of, illegal—Injunction, grant of, against a community, when permissible—Penal Code (Act XLV of 1860), s. 296, effect of, on declaratory decrees of Civil Courts.

Courts, by their decrees, should determine the rights of parties as definitely as the evidence before them will permit, but a decree is not illegal merely because it is not more specific. [p. 107, col. 1.]

Muthialu Chetty v. *Bapun Sahib* 2 M. 240; *Sundram Chetti* v. *Queen and Ponnusami Chetti* v. *Queen*, 6 M. 20; 2 Weir 77, referred to.

A declaratory decree of a Civil Court should not be treated as authorizing an act which is *per se* a criminal offence, but in a dispute between two rival religionists where one of them is charged with an offence under section 296, Indian Penal Code, a decree declaring the rights of either party is one of several circumstances which might be considered in deciding the guilt or innocence of the accused. [p. 107, col. 2; p. 108, col. 1.]

Public Prosecutor v. *Sunku Seethiah*, 6 Ind. Cas. 774; 7 M. L. T. 430; 21 M. L. J. 71; 11 Cr. L. J. 400; 34 M. 92, distinguished.

An injunction against a community is not illegal when the community is sued in a representative capacity and such an injunction is clearly within the scope of section 54 of the Specific Relief Act. [p. 108, col. 1.]

Sadagopa Chariar v. *Krishnamoorthy Rao*, 30 M. 185; 17 M. L. J. 240; 2 M. L. T. 204; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 9 Bom. L. R. 663; followed.

Where the relief claimed in the plaint in a suit brought by the Hindus against the Muhammadans was to restrain the latter by an injunction from interfering with the former's celebration of the *Muriamman* festival in a *medai* near a mosque with music playing, but the decree extended the scope of the injunction by the words "and to carry on the procession with music without any restriction as to time", implying thereby a right to go in possession with music past the mosque to the *medai*:

Held, that the decree awarded a larger relief than that claimed in the plaint and the word "carry on the procession" with music must be expunged therefrom. [p. 107, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Appeal Suit No. 59 of 1913, preferred against that of the District Munsif, Srirangam, in Original Suit No. 226 of 1911.

Mr. *Zynuddin* (with him Mr. *C. V. Ananthakrishna Iyer*), for 3rd, 4th and 6th to 8th Defendants.

The Government Pleader, for 1st Defendant.

Mr. *T. R. Venkatarama Sastri* (with him Mr. *S. Parthasarathy Iyer*), for the Plaintiffs.

JUDGMENT.—The appellants in this second appeal, representing the Muhammadan residents of Lalgudi, appeal against a decree of the Subordinate Judge of Trichinopoly granted in favour of the respondents, who sued as representatives of the Hindu residents of the same village. The decree in question declares the rights of the

plaintiffs (respondents) in connection with the celebration of the annual Mariamman festival at the "Mariamman Medai" and gives an injunction forbidding interference by the defendants (appellants).

The dispute arises out of the proximity of the Medai to a Muhammadan mosque, and the alleged interference with worship of the latter incidental to the use of music by respondents in connection with their festival.

The *first* objection taken by appellants is that the decree of the Subordinate Judge is illegal, inasmuch as it goes beyond the general nature of the decree granted in a somewhat similar case by this Court [*vide Muthialu Chetty* v. *Bapun Sahib* (1)]. No doubt the decree now under appeal is not more specific; but it is not on that account illegal. It is desirable that the Court by its decree should determine the rights in dispute as definitely as the evidence before it will permit; and we can find nothing either in the judgment in *Muthialu Chetty* v. *Bapun Sahib* (1), or in the later judgment in *Sundram Chetti* v. *Queen* and *Ponnusami Chetti* v. *Queen* (2) in which its meaning was discussed and explained, to suggest that the learned Judges who decided those cases took a different view.

The *next* objection has more force. The Subordinate Judge has altered the decree granted by the District Munsif; and it is urged that the alteration introduced into the declaratory portion goes beyond the plaint prayer, and the findings. The Munsif's decree declared that the plaintiffs are entitled "to celebrate the Mariamman festival at the plaint Medai without any restriction as to the time for playing music." The Subordinate Judge's decree purports to confirm that of the Munsif, in so far as the latter declares the plaintiffs' right "to celebrate the Mariamman festival in question and to carry on the procession with music without any restriction as to time." Appellants' Vakil points out that the Munsif's decree said nothing about the procession (to and from the Mairamman Medai), and that the right to take the procession with music past the mosque is distinguishable from the right to play music at the Medai; and argues that the first mentioned right is not included in the plaint prayer, nor covered by the frame of the 3rd issue.

It is open to argument whether the plaint prayer was intended to cover the procession incidental to the ceremony (*vide* paragraph 2 of the plaint); though the concluding words of paragraph 12 (*a*) are against such an interpretation. The issue is also somewhat ambiguous. But the finding of the Munsif (*vide* paragraph 20 of his judgment) is certainly confined to proceedings at the Medai itself; and so is his decree. Plaintiffs' memorandum of objections to this decree preferred to the Subordinate Judge only deals with costs and the refusal of an injunction; it is not pleaded that the decree was inadequate to meet the plaint prayer. Nor is this point dealt with in the Subordinate Judge's judgment. The Subordinate Judge accepts the Munsif's finding on the 3rd issue and assigns no reason for modifying the terms of the declaration. In fact from the wording of paragraph 5 of the judgment it would seem that the Subordinate Judge was unaware that he was effecting any modification; and was under a misapprehension as to the exact terms of the Munsif's decree. However this may be, we think the alteration introduced cannot be supported; and the form of the Munsif's decree must be restored.

The *next* objection is that both decrees are illegal in that they may be regarded as authorising an act, which is declared criminal by section 296, Indian Penal Code. It is, of course, unnecessary to say that a declaratory decree of a Civil Court should not be treated as authorising an act which is *per se* a criminal offence. Appellants' Vakil argues, relying on *Public Prosecutor* v. *Sunku Seethaiah* (3), that the word "voluntarily" in section 296, Indian Penal Code, simply means "knowingly" and that any disturbance of a religious assembly is always a criminal offence, if caused "voluntarily" in this sense of the word. In spite of one or two passages in the judgment, we take leave to doubt whether the learned Judges intended to lay down so broad a proposition. The facts of the case before them were very simple; the disturbance was made during

(1) 2 M. 140.
(2) 6 M. 203; 2 Weir 77.
(3) 6 Ind. Cas. 774; 7 M. L. T. 430; 21 M. L. J. 71; 11 Cr. L. J. 400; 34 M. 92.

hours which had been notified by the District Magistrate to the knowledge of accused as those during which divine worship was carried on in the mosque. Great stress is laid on this, both in setting out the facts at the commencement of the judgment and in applying the previous rulings in *Muthialu Chetty* v. *Bapun Sahib* (1) and *Sundram Chetti* v. *Queen* and *Ponnusami Chetti* v. *Queen* (2). It is not necessary for us in the present connection to interpret the words of section 296, Indian Penal Code. In disposing of a charge under that section which might arise out of this dispute in future, the existence of a declaration such as has been prayed for is doubtless only one of several factors which might have to be considered in deciding the guilt or innocence of the accused. But we are clear that there is no conflict between such a declaration and the section quoted; and no reason why on this score the declaration should be refused.

Lastly, the objection is taken that no injunction should have been granted against a community. The injunction is granted against defendants Nos. 2 to 8 "as representatives of the Muhammadan community of Lalgudi." This is the capacity in which they were sued; and if they can be sued in a representative capacity (which is not denied), it is impossible to see why an injunction should not be granted against them in the same capacity. That an injunction can be granted against a community so vaguely defined as "the inhabitants of a village" would appear from illustration (*p*) to section 54, Specific Relief Act; and in a similar case to this, decided by the Privy Council [*Sadagopa Chariar* v. *Krishnamoorthy Rao* (4)], no such objection appears to have been taken. The injunction may stand.

The decree of the lower Appellate Court must be modified by the omission of the words "and to carry on the procession with music"; and with this modification is confirmed.

Appellants and the respondents Nos. 1 to 6 will each bear their own costs in this Court. Appellants will be liable for the costs of the 7th respondent.

Appeal dismissed; Decree modified.

V.R.P.

(4) 30 M. 185; 17 M. L J. 240; 2 M. L. T 204; 4 A. L. J. 333, 11 C. W. N. 585; 5 C. L, J. 566; 9 Bom. L. R. 663.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 201 OF 1908.*

March 7, 1911.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

CHITRAVELU SERVAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAMANNA IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Lease constituted by a number of documents—Registration—Tank-bed lands, grant of, whether valid.

Section 17 of the Registration Act does not apply to a lease which is constituted by a number of documents, none of which taken singly can be regarded as a lease. [p. 109, col. 1]

Syed Sufdar Reza v. *Amzad Ali*, 7 C. 703; 10 C. L. R. 21; *Lall Jha* v. *Negroo*, 7 C. 717 and *Rajah of Venkatagiri* v. *Narayana Reddi*, 17 M. 456; 4 M. L. J. 198, distinguished.

A grant of tank-bed lands by a *zemindar* for cultivation is not illegal. [p. 109, col. 2.]

Appeal against the decree of the Subordinate Judge's Court of Madura (East) in Original Suit No. 100 of 1906.

Mr. *C. S. Venkatachariar*, for the Appellants.

Mr. *K. Srinivasa Aiyangar* for Mr. *S. Srinivasa Aiyangar* and Mr. *G. Krishnaswami Aiyangar*, for the Respondents.

JUDGMENT.—The plaintiffs sue the defendants for recovering possession of certain land, which, according to them, was granted by the *Zemindar* of Ramnad in 1869 to one Pachamuthu and subsequently passed to the plaintiffs by transfer. The land formed originally part of the bed of a tank, but as the *zemindar* thought it unnecessary to have so extensive a bed for the tank, he granted the land for cultivation. The defendants denied the grant of 1869 and the possession of the grantee and the subsequent transferees including the plaintiffs, and contended that the grant, even if true, was illegal and void and that the suit was barred by limitation. The Subordinate Judge decided all the questions in the plaintiffs' favour and gave them a decree for possession. Three points have been argued before us in appeal.

The *first* point is that the grant was a lease in writing, and being unregistered could not confer a valid title on the grantee. The only documents that have been filed to prove the

*[*Vide* 33 Ind. Cas. 440, where this case is referred to.—*Ed.*]

original grants are Exhibits Q and Q1. Of these, Exhibit Q1, dated the 16th December 1868, is an order addressed by the *zemindar*'s *sheristadar* to the Tahsildar directing him to report what land was available for being granted and what rate of rent should be charged. Exhibit Q, dated the 2nd March 1869, is an order by the Tahsildar to an Inspector ordering him to register the lands "according to the list herein enclosed relating to the description of the land and to collect *tirva* according to the rate fixed." It makes reference to previous orders including Exhibit Q1, according to which the lands were given on 'pathadappu' to the *darkhastdar*. The contention in the lower Court was that Exhibits Q and Q1 together constituted an instrument of lease and required to be registered. Before us Mr. Venkatachariar urged that these two documents together with the other documents referred to in Exhibit Q1 constituted the lease requiring to be registered under section 17 of the Registration Act, the necessity for the change in the contention apparently being that in neither Exhibit Q1 nor Exhibit Q is there language importing any leasing. The other orders referred to in Exhibit Q were not put in evidence, and it is impossible to say what their exact contents were. We are, however, of opinion that there is no foundation for the contention that if a person acquires the rights of a lessee under a number of instruments none of which would constitute a lease, all of them should be lumped together and the whole transaction rejected as invalid in law under section 17 of the Registration Act. That section states what particular instruments are compulsorily registrable and affords no foundation for the argument that though none of a number of instruments require registration, there is some aggregate instrument arising out of them requiring registration. Three (? four) cases, *Syed Sufdar Reza* v. *Amzad Ali* (1), *Maharaja Luchmissur Singh* v. *Musammat Dakho* (2), *Lall Jha* v. *Negroo* (3) and *Rajah of Venkatagiri* v. *Narayana Reddi* (4) were relied on in support of the contention, but none of them is of any help to the appellants. Briefly put, they hold that if a proposal and acceptance together constituting a lease are contained in one single instrument, that instrument should be registered under section 17. But they are also clear authority for the position that, if there is no one instrument which can be regarded as a lease, then section 17 has no application. A passage from Woodfall's Landlord and Tenant at page 103, 18th Edition, was also relied on. But it has no application to this case at all, as it merely lays down that a memorandum required by the Statute of Frauds for the validity of a transaction may be shown to be contained in more instruments than one taken together. This contention must fail also.

The *second* point argued is that a grant of tank-bed land by a *zemindar* for cultivation is illegal. No authority is cited for this position. It is not contended that the *ryots* of the lands commanded by the tank have any ownership or interest in the bed of the tank, which would make a transfer by the *zemindar* invalid. They may be entitled to get a sufficient supply of water for the cultivation of their lands. How this right is to be enforced it is unnecessary to consider in this case. The Subordinate Judge has found that the grant was due to the fact that the area of the tank was too extensive for the lands that were cultivated under it and that a sufficient area was reserved at the time of the grant. No attempt has been made to show that this conclusion is not correct. The *ryots* made no complaint of insufficiency of water in the tank in consequence of the grant. There is no evidence of any custom prohibiting the transfer. The order of Mr. Lee Warner, while he was superintending the management of the estate, cannot affect the *zemindar's* legal power to make the transfer. This contention must also fail.

The *last* point argued is that the grant is void for indefiniteness. This contention was not raised in the lower Court, and there is no substance in it. The grant was taken in the lower Court to have conferred on the transferee a perpetual right. There is no reason shown for holding this view to be erroneous, but we do not feel called upon to decide its exact character. We are of opinion that the plaintiffs' title to the land sued for has been

(1) 7 C. 703; 10 C. L. R. 21.
(2) 7 C. 708; 10 C. L. R. 127.
(3) 7 C. 717.
(4) 17 M. 456; 4 M. L. J. 198.

established. The appeal must be dismissed with costs.

Appeal dismissed.

V. R. P.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3324 OF 1915.

March 29, 1916.

Present:—Mr. Justice Rattigan.

NATHU MAL—JUDGMENT-DEBTOR—APPELLANT

versus

PALA MAL—DECREE-HOLDER—RESPONDENT.

Execution—Ex parte *decree, proceedings in execution of—Setting aside of* ex parte *decree, effect of—Subsequent decree on merits, whether revives previous proceedings—Limitation Act (IX of* 1908*), Sch. I, Art.* 182.

Applicant having obtained an *ex parte* decree on the 29th May 1906 sued out execution. On the 23rd October the *ex parte* decree was set aside and a decree passed on the merits. Prior to this, however, there had been an application for attachment and sale of the judgment-debtor's property and although on the 27th August an order for sale had been passed, proceedings were stayed till the disposal of the application to have the *ex parte* decree set aside. After this various orders for sale were made and set aside, the last application being dated the 8th April 1911. It appeared that no proper application for execution was presented to the Court since the *ex parte* decree was set aside up till the 11th January 1913:

Held, (1) that all the previous applications and proceedings that took place under the *ex parte* decree became null and void where it was set aside and that they were not revived when the decree on the merits was passed; [p. 110, col. 2.]

(2) that, therefore, the present application was time-barred and the applicant could not obtain execution. [p. 110, col. 2.]

Chettiattil Muhamod v. *Kunhi Koru*, 29 M. 175, followed.

Miscellaneous first appeal from the order of the District Judge, Gujrat, dated the 28th January 1914.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—On the 29th May 1906 Pala Mal obtained an *ex parte* decree for Rs. 515 and costs. The same day he applied in the ordinary manner for execution, but the application was eventually consigned to the record room. On the 1st of October 1906 the judgment-debtor applied to have the *ex parte* decree set aside and the application was granted on the 6th of October, and on the 23rd October a decree in favour of Pala Mal was passed on the merits. Prior to this there had been an application for attachment and sale of the judgment-debtor's property and on the 27th of August 1903 an order for sale had been passed. By a subsequent order, proceedings were directed to be stayed until disposal of the judgment-debtor's application to have the *ex parte* decree set aside. On the 23rd October 1906, immediately after the decree had been passed in his favour, the decree-holder is said to have made an oral application for the sale of the property which had been attached under the previous *ex parte* decree. After this various orders for sale were made and set aside;and on the 8th of April 1911 a fresh application for execution was filed, but as no property was forthcoming, the application was consigned to the record room on the 22nd of April 1911. Finally, the present application for execution was presented to the Court on the 11th of January 1913 and the plea of the judgment-debtor is that the application is time-barred, inasmuch as the previous application of the 8th of April was also barred by time. As a matter of fact, there has been no application for execution of decree (complying with the terms of section 235 of the Civil Procedure Code, 1882) presented to the Court since the *ex parte* decree was set aside, and Mr. Nanak Chand's contention on behalf of the respondent is that the applications and proceedings that took place under the former *ex parte* decree were all revived and continued when the decree on the merits was passed on the 23rd of October 1906. With this contention I cannot agree, and the decision of the Madras High Court in *Chettiattil Muhamod* v. *Kunhi Koru* (1) supports the view that all the previous applications and proceedings became null and void when the *ex parte* decree was set aside and that they were not revived when the decree on the merits was passed.

Upon this view of the case it is clear that the present application for execution is time-barred, and I accordingly accept this appeal and reject the decree-holder's application

(1) 29 M. 175.

for execution. Respondent must pay costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 116 OF 1915.

April 28, 1916.

Present:—Mr. Justice Abdur Rahim and Sir William Ayling, Kt.

SURYADEVARA SEETARAMAYYA—PLAINTIFF—APPELLANT

versus

SURYADEVARA KOTAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Document, construction of—Mortgage—Cash consideration—Repayment in kind in monthly instalments, stipulation for—Whole amount payable on default—Penal clause, interpretation of—Penalty, relief against—Contract Act (IX of 1872), ss. 37, 74—Evidence Act (I of 1872), s. 92.

A deed of mortgage which was executed for Rs. 1,500, being the amount found due by the mortgagor on a settlement of accounts, provided for its repayment in 10 yearly instalments each of 7½ *putties* of paddy. Then the deed provided that, on default of delivery of the paddy in any of the instalments, the *total* amount with interest at one per cent. per mensem was immediately payable:

Held, per curiam, that extrinsic evidence of the intention of the parties was inadmissible to construe the document. [p. 112, col. 2; p. 113, col. 1.]

Per *Abdur Rahim, J.*—On a proper reading of the document the parties intended that, by the delivery of each instalment as provided, 1/10th of the entire debt including the principal and interest or profits was to be discharged, and that on default of payment of any instalment, the balance of the principal amount and not the balance of paddy was payable. [p. 112, col. 2.]

Per *Ayling, J.*, dissenting.—On the principle that the party breaking a primary term of a contract should not be placed in a more favourable position than the party entitled to enforce it, the intended effect of the covenant was that the mortgagors were to be liable for the total of the unpaid instalments of paddy on default of any one instalment. [p. 113, col. 2.]

The primary proviso that, in consideration of the former debt, defendants should deliver ten annual consignments of 7½ *putties* of paddy, is enforcible under the explicit terms of section 37 of the Contract Act and cannot be relieved against as a penalty under section 74 of the Act. [p. 114, col. 1.]

Bouwang Raja Challaphroo Chowdhury v. *Banga Behary Sen*, 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311; *Velchand Chhaganlal* v. *Lieut. A. Flagg*, 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18; *Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose*, 12 C. 225; 12 I. A. 215; 4 Sar. P. C. J. 652; 9 Ind. Jur. 437; *Khagaram Das* v. *Rama Sankar Das Pramanik*, 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775; *Kirpa Ram* v. *Sami-ud-din Ahmad Khan*, 25 A. 284; A. W. N. (1903) 44; *Lalli* v. *Ram Prasad*, 9 A. 74; *Avathani Muthukrishnier* v. *Sankaralingam Pillai*, 18 Ind. Cas. 417; 13 M. L. T. 20; 24 M. L. J. 135; 36 M. 229, explained and distinguished.

The proviso for payment of the total of the unpaid instalments on default of any one instalment might be regarded as penal and the proviso for payment of interest on such instalments is undoubtedly penal; but in granting relief against the penalty the Court must not give plaintiff less than he would be entitled to if the document had contained no stipulations at all for consequences of breach. [p. 113, col. 2; p. 114, col. 1.]

On the face of it, section 74 of the Contract Act has reference not to the primary term of the contract but to stipulation as to the consequences of a breach.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Guntur, in Appeal Suit No. 646 of 1911, preferred against that of the District Munsif, Tenali, in Original Suit No. 222 of 1910.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The *first* question we have to decide in this second appeal is one of the construction of Exhibit A, the mortgage-bond executed by the respondents in favour of the appellant. Regarded from the point of view of one party or the other, the question is not free from difficulties. The instrument is one of simple mortgage which recites that on taking account of the debts due by the respondents, Rs. 1,777 were still owing to the appellant, that for Rs. 277 out of this amount, the respondents executed a promissory note and for the balance Rs. 1,500, Exhibit A was executed by them. They agreed to pay, in satisfaction of the amount, 75 *putties* of paddy in 10 instalments of 7½ *putties* each every year. The first payment was to be on the 6th March 1905 and the last on the 26th March 1914. Then the deed provides: "Should default occur in giving the paddy in any of these instalments, we shall on demand pay the whole amount with interest at one per cent. per mensem notwithstanding the instalments still remaining to run." It goes on to say: "We have mortgaged the property described in the subjoined schedule for that amount till this debt is repaid

and have retained it in our possession. We shall, therefore, fully discharge the said debt according to the said instalments by the mortgaged property, by our other properties and by ourselves, and we shall redeem your mortgage."

It is clear that the expectation of the parties was, that the debt would be discharged by delivery of grain in the course of 10 years. But there is no stipulation that the borrower was to be precluded from discharging that debt and redeeming the property before the expiration of 10 years. Nor is there anything to prevent his paying the amount due in money if he was able to do so.

The question that has arisen is, the respondents having made default in delivering the sixth instalment of paddy, does the document entitle the appellant to demand delivery of the remaining instalments of grain at once or their value in money, or is he entitled only to payment of so much of the principal which is not satisfied by previous instalments already delivered, with interest at twelve per cent? That depends on the meaning of the clause above set out. Does the stipulation to pay the "whole amount with interest at one per cent. per mensem" refer to the remaining instalments of paddy or the balance of the debt? The vernacular word in the original which has been translated as "amount" is "*motham*" which, I understand, means "total." Whether it is an apt word to use in this connection or not, it means the balance which is left unpaid. That might apply either to the instalment of paddy or the balance of the principal amount. The words "interest at one per cent. per mensem" would undoubtedly be more appropriate if what was intended to be payable was money and not grain. There is no price fixed for the paddy nor any procedure laid down for its valuation. A reading of the whole instrument suggests that the payment in paddy was regarded as more convenient to the borrower, although the quantity to be delivered in different instalments would amount to much more than interest calculated at twelve per cent. The fact that for a portion of the debt a promissory note was executed and no stipulation is made in the document to debar payment of the debt in money at any time convenient to the debtor tends to strengthen this inference. It is true, on the other hand, that it is nowhere mentioned that each instalment of paddy was to be deemed equivalent to payment of 1/10th of the debt. But having regard to the fact that the instalments were absolutely equal in quantity and to be paid about the same time of the year, the inference is strongly suggested that that is what was intended. It could not, of course, have been intended that each instalment was to represent 1/10th of the principal amount only; that is, Rs. 150, for the value of $7\frac{1}{2}$ *putties* would admittedly be at least double that amount. What the parties contemplated apparently was that by the delivery of each instalment as provided, 1/10th of the entire debt including the principal and interest or profits was to be discharged. If this reading of the mortgage-deed is right, all that the appellant is entitled to, is half of the principal amount with interest at twelve per cent. This is the interpretation placed upon the document by both the lower Courts. The District Munsif was undoubtedly wrong in admitting extrinsic evidence of the intention of parties and relying upon it in construing the document, and the Subordinate Judge has perhaps mixed up the question of hardship a little too much with the question of interpretation. But I am of opinion, for the reasons which I have stated, that their construction of Exhibit A is right. In that view, the question as to whether the stipulation in the sense contended for on behalf of the appellant would be penal and should be relieved against, does not call for decision. The appeal shall, in my opinion, be dimissed with costs.

AYLING, J.—The *first* question for decision in this appeal relates to the construction of the clause in Exhibit A which provides for the consequences of default on the part of defendants in paying any of the ten instalments on the due dates. The document begins (in effect) by acknowlegment by defendants of a debt of Rs. 1,500 due by them to plaintiffs. It provides that this shall be discharged by 10 annual payments of $7\frac{1}{2}$ *putties* of *kusuma* paddy (worth on an average about Rs. 450). Then comes the disputed clause which runs: "Should default occur in giving the paddy in any of these instalments, we shall on demand pay the whole amount with interest

at 1 per cent. per mensem notwithstanding the instalments still remaining to run." Lastly the document declares a simple mortgage of the plaint property for the above debt.

The rival theories as to the proper construction of the disputed clause are thus summarised by the Sub-Judge: "The plaintiff's case is that it means the money value of the instalments of paddy remaining unpaid on the date of default, while the defendants contend that it means the remaining principal sum, taking each instalment of it to be Rs. 150." Both Courts have accepted the defendants' interpretation; and I am very loath to upset their decision. But it seems to me to have been arrived at on a very inadequate consideration of the terms of the document itself, and chiefly on the strength of oral evidence and on considerations of what is hard and what is reasonable, which have little or no bearing on the point at issue.

The District Munsif says he has read the mortgage document very carefully, and then briefly remarks that the plaintiff's contention is "preposterous"; he then passes to the oral evidence of various witnesses as to what it was that the parties agreed to. This has to be determined from the written document, not from independant oral evidence: and the Munsif's construction of the document, from which, the Sub-Judge says, he is not prepared to differ, is no construction at all. The Sub-Judge fortifies his decision by pointing out that on the plaintiff's construction, the bargain would appear to be a very hard one indeed for defendants, which may be true. But he has failed to notice that if defendants' construction be adopted, the effect of the clause would be to put it in defendants' power at any time to entirely rid themselves of the hardship, and place themselves in an extremely favourable position by the simple process of breaking the primary term of their contract. This could hardly have been the intended effect of a clause, which must, from its nature, have been introduced for the protection of the plaintiff. The Sub-Judge refers to the provision for interest and the absence of provision for valuing the paddy in default; both pertinent remarks, but not, in my opinion, of much weight. Interest can be calculated in paddy as well as in money: and the natural valuation is the market value at the time. These remarks do not furnish sufficient ground for refusing to accept what seems to be the only intelligible meaning of the clause. The word translated "amount" is "*motham*", which really means "total" (*vide* Brown's Telugu Dictionary) and read with reference to the preceding words it can only refer to the "total" of the unpaid instalments. The use of the word "*motham*" is incomprehensible on defendants' interpretation. The latter is, moreover, built upon a theory that Rs. 150 should be assumed to be the principal sum of each instalment in the event of default a theory which is in violent contradiction of the known value of the grain, and of which the document contains not even a hint.

It seems to me that the only possible interpretation of the disputed clause is that suggested by plaintiff.

The *next* question is to what extent is the contract enforcible, and to what extent should it be relieved against.

Its terms may be conveniently broken up thus:

(A). The primary proviso that in consideration of the former debt, defendants should deliver 10 annual consignments of $7\frac{1}{2}$ *putties* of paddy.

(B). A proviso that in default of payment of any instalment all the unpaid instalments should be deemed to be due.

(C). A proviso for payment of interest at 1 per cent. per mensem of such instalments.

Now of these three terms of the contract, (C) is undoubtedly a penal clause covered by section 74 of the Contract Act: and looking to illustration (*g*) to that section, I am not prepared to say that (B) might not be similarly regarded. But in considering what relief should be granted, and what would be reasonable compensation for the breach of contract, it seems to me essential to observe one limitation: relief must not be carried to such an extent as to place the party committing the breach in a better position, and the other party in a worse position, than they would be in if the breach had not been committed. If term (A) is enforcible, then any relief against term (B) must not be

allowed to infringe it. The Courts must not give plaintiff less than he would have been entitled to if the document had contained no stipulations at all for consequences of breach. This would undeniably be the effect of the lower Appellate Court's decree; which gives plaintiff very much less than he would be entitled to under term (A) without any breach at all. Section 74 authorises the Court to reduce the compensation to what is reasonable. It may conceivably be reasonable to reduce the compensation to vanishing point; it cannot be reasonable to reward the defaulter for his breach.

The decree of the lower Appellate Court can, in fact, only be upheld on the view that term A itself can be relieved against by the Court: and this is, in fact, contended by Mr. Ramadoss for respondents. He has quoted various rulings some of which tend no doubt to support this contention; but, with all respect to them, he seems to me to have quoted no authority binding upon us which would justify us in disregarding the plain words of section 37 of the Contract Act. "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law." The words "other law" presumably mean some statutory enactment. It is not seriously contended that the present case is governed by any such, or by any of the sections of the Contract Act itself. There is no plea of coercion, fraud, undue influence, etc., on account of which the Act provides for the invalidating of a contract; on the face of it section 74 has reference not to the primary term of the contract but to stipulation as to the consequence of a breach.

The contention is that in spite of the explicit words of section 37, a Court has power to decline to enforce a contract on the ground that the terms thereof are harsh and unconscionable. *Bowang Raja Challaphroo Chowdhury* v. *Banga Behary Sen* (1) (not reported in the authorised series) is referred to as a case in which the Calcutta High Court actually declined to enforce a contract on this ground. The provisions of the contract for interest, it may be remarked, worked out at the astounding rate of 5,858 per cent. per annum: and one may fairly conjecture whether the facts and legitimate inference from them would not bring the case under section 16 or some cognate section of the Act, although the learned Judge chose to deal with it, following the precepts contained in the rulings of English Courts. *Velchand Chhaganlal* v. *Lieut. A. Flagg* (2) is a case not dissimilar to the present one, in which the Subordinate Judge had given relief against a clause corresponding to what I have called clause (A). His decree was confirmed by the High Court on appeal. There is no indication in the report of the grounds on which either the Subordinate Judge or the learned Judges of the High Court proceeded as regards this clause. The judgment simply deals with the applicability of section 74 of the Contract Act to the following clause providing for consequences of breach.

The next case, to which I shall refer and which demands closer attention, is the decision of the Privy Council in *Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (3), in which their Lordships intimated for the guidance of the Courts, in future litigation, that they might be prepared to apply the equitable principles enunciated in *Beynon* v. *Cook* (4) to a case in which fraud and undue influence were not found to be proved.

This case is the strongest case in respondents' favour, affording, as it certainly does, some support to the view that the provisions of the Contract Act as to the enforceability of contracts are not exhaustive. But while treating it with the respect and attention which necessarily attaches to every pronouncement of their Lordships of the Privy Council, I may venture to point out that this question of how far the provisions of the Contract Act were exhaustive was not, so far as appears from the report, directly argued. As a fact, since the pronouncement of this judgment (1885), section 16 of the Contract Act has been recast by Act VI of 1899: and a notable change has been made by the addition of clause 3.

(1) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

(2) 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18.

(3) 12 C. 225; 12 I. A. 215; 4 Sar. P. C. J. 652; 9 Ind. Jur. 437.

(4) (1875) 10 Ch. App. 389; 23 W. R. 531; 32 L. T. 353.

It seems probable that this clause was added especially to meet the case of unconscionable bargains of the class dealt with in *Beynon* v. *Cook* (4) as surmised by Sir F. Pollock (*vide* Pollock and Mulla's Indian Contract Act, pages 85—86). I certainly think that as the law now stands, a Court should hesitate to infer from this pronouncement of the Privy Council that it was justified in travelling outside the scope of the Contract Act in a case easily distinguishable from the one therein dealt with. I may quote the closing words of their Lordships' judgment:—

"This equitable doctrine appears to have a strong application *to the facts of this case*, where we have the borrower, a *purdanashin* lady; the lender, her own *mukhtar*, under the cloak of a *benamidar*; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances." The facts, above set forth, would be sufficient to bring the case under section 16 as it now stands. There is nothing to correspond with them in the present case; and as I have already stated, section 16 has not been in the present case, and is not now, relied on.

The latest Calcutta case, *Khagaram Das* v. *Rama Sankar Das Pramanik* (5), is of no use to respondents. It deals with the rate of interest on default: the learned judges do not base their decision outside section 74; and Mookerjee, J., also applies section 16.

Kirpa Ram v. *Sami-ud-din Ahmad Khan* (6) is undoubtedly an authority in respondents' favour. The learned Judges, while quoting *Beynon* v. *Cook* (4), simply rely on the practice of that Court in giving relief in cases of unconscionable bargains; they give no other reason for disregarding section 37 of the Contract Act. How far the practice of the Allahabad High Court has been affected by the peculiar circumstances of that Province, will be apparent from the judgment of Mahmood, J., in *Lalli* v. *Ram Prasad* (7)—one of the cases quoted in *Kirpa Ram* v. *Sami-ud-din Ahmad Khan* (6) (see pages 79 and 80). The learned Judge no doubt speaks of India as (in that respect) homogeneous; but in this Presidency, as far as I am aware, neither the Legislature nor the Courts have ever treated the agricultural population as entitled to particularly indulgent consideration on the grounds indicated.

Mr. Ramadoss has not been able to quote any authority of this Court in his favour, although he has drawn our attention to the remarks of Sadasiva Aiyar, J., in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (8). The reference to the Full Bench in that case (to which I was a party) related solely to the applicability of section 74 of the Contract Act to a certain class of cases. The judgment of my learned brother Sadasiva Aiyar, J., undoubtedly indicates a sympathetic desire to apply such powers of relief as the Courts possess in the broadest spirit; but I do not understand him as saying that these powers are independent of legislative enactments or the provisions of the Contract Act. The same remark applies to the judgments of the other learned Judges. Sundara Aiyar, J., on page 265 draws a very clear distinction between primary and secondary contracts, which seems to me to support the views I have endeavoured to express on the present question.

Giving full weight and consideration to all the above decisions, I do not think a Court is justified in ignoring the clear provisions of section 37 of the Contract Act, by arrogating to itself powers of relief not conferred by that Act, or by other legislative enactments.

I do not think it necessary to consider whether the principles laid down in *Beynon* v. *Cook* (4) would cover the present case, if we were at liberty to apply them without regard to the provisions of the Act. I very much doubt if they would: but I prefer to rest my decision on the simple ground that respondents are not entitled to relief under this or any other Act, and that section 37 prevents the application of any other equitable principle.

(5) 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775.
(6) 25 A. 284; A. W. N. (1903) 44.
(7) 9 A. 74.
(8) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

As a result I would, in supersession of the decree passed by the Subordinate Judge, give appellant a decree for what he would be entitled to under the primary term of the contract (A); that is, 37½ *putties* of paddy valued at the market rate prevailing when each of the last 5 instalments fell due. Interest should run at 6 per cent. per annum from the date on which each fell due: and each party should pay and receive proportionate costs throughout.

BY THE COURT.—The appeal will be dismissed with costs under section 98 (2) of the Code of Civil Procedure.

Appeal dismissed.

V. R. P.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 292 OF 1915.

March 1, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

GODIMELLA RANGAMMA AND OTHERS—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

PANCHANGAM NARASIMHACHARYULU AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 3 TO 13—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s* 11, *expl.* (6), *O. I, r.* 8—*Suit litigated* bona fide *for community or section of public—Subsequent suit for same relief — Addition of new plaintiff—Prior suit instituted without Court's sanction under O. I, r.* 8—*Addition of individual to common rights*—Res judicata.

Explanation 6 to section 11, Civil Procedure Code, makes no reference to Order I, rule 8, and it is not, therefore, confined to cases in which permission to sue in a representative character is obtained under the latter rule. [p. 119, cols. 1 & 2; p. 120, col. 1.]

Baiju Lal Parbatia v. *Bulak Pathuk*, 24 C. 385; *Srinivasa Chariar* v. *Raghava Chariar*, 23 M. 28 at p. 32; 7 M. L. J. 281 and *Thanakoti* v. *Muniappa*, 8 M. 496, not followed.

Varanakot Narayanan Namburi v. *Varanakot Narayanan Namburi*, 2 M. 328, followed.

The decision in a suit based on a common or public right does not cease to be *res judicata* in a subsequent suit, based on the same cause of action and praying for the same relief, by the mere addition of a new plaintiff in the latter suit, provided his interests are identical with those of the plaintiff in the prior proceedings. [p. 118, col. 2.]

Madhavan v. *Keshavan*, 11 M. 191; *Chandu* v. *Kunhamed*, 14 M. 324, followed.

Somasundara Mudali v. *Kulandaivelu Pillai*, 28 M. 457 at p. 464; 14 M. L. J. 404, explained and distinguished.

Where persons litigate *bona fide* for a common right, the non-payment of the proper Court-fee or the addition of an individual relief will not render inoperative the rule of *res judicata* under section 11, explanation (6), in a subsequent suit where the common right alone is re-litigated. [p. 119, col. 1.]

One of the *agraharamdars* of a village sued to establish a right of way to himself and to recover certain village sites from two trespassers on behalf of all the *agraharamdars*. The other *agraharamdars* were made *pro forma* defendants and they were *ex parte*. The suit was dismissed. The 4th defendant in that suit brought the present suit against the same persons for recovery of the village sites alone, making the other *agraharamdars* as defendants Nos. 3 to 13. These latter remained *ex parte*. After the settlement of issues, the 2nd plaintiff, who was not a party to the previous proceedings, was brought on record. Defendants Nos. 1 and 2 pleaded that the suit was barred as *res judicata*. It was urged for plaintiffs that section 11, explanation (6), was inapplicable as (1) the previous suit was not sanctioned by Court under Order I, rule 8, (2) the proper Court-fee was not paid in that suit, (3) the reliefs in the two suits were not identical, (4) the parties were not the same:

Held, disallowing plaintiffs' objections, that the suit was barred as *res judicata*. [p. 119, cols. 1 & 2; p. 120, col. 1.]

Per *Moore, J.*—The conditions under which a decision in a suit of the kind mentioned in explanation (6) to section 11, Civil Procedure Code, may constitute *res judicata* against persons not expressly named therein are (1) that there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit; (2) that the parties not expressly named in the suit must be interested in such right, if right to relief can be said to be claimed "in common" only between parties who would be benefited by such relief if granted, or who have such an interest in the right claimed that they could join as co-plaintiffs. [p. 119, col. 2.]

Appeal against the order of the Court of the Subordinate Judge, Masulipatam, in Appeal Suit No. 38 of 1915, preferred against the decree of the Court of the Additional District Munsif, Masulipatam, in Original Suit No. 97 of 1912 (Gudivada).

Mr. *V. Subramaniyam Pantulu*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 and 2 are the appellants. The 1st plaintiff brought the suit for recovery of possession of the plaint sites (*a*) and (*b*) for himself and for the other *agraharamdars* of the village (defendants Nos. 3 to 13) on the following allegations:— (*a*) That the *agraharamdars* gave the suit sites for

temporary residence to one Tulasi Lakshmanacharyulu, and (*b*) that the defendants Nos. 1 and 2 are in wrongful possession after the death of Tulasi Lakshmanacharyulu.

The reliefs prayed for are for ejecting the defendants Nos. 1 and 2 from the suit sites and for delivery of possession of the said suit sites jointly to the plaintiff and to the defendants Nos. 3 to 13.

One of the defences raised by the defendants Nos. 1 and 2 was, that the present suit is barred as *res judicata* by reason of the decision in a prior suit brought by another *agraharamdar*, Venkatacharana Charyulu (Original Suit No. 78 of 1910 of the Gudivada District Munsif's Court). The present 1st plaintiff was the 4th defendant in the former suit. That suit was also directed against the present defendants Nos. 1 and 2 and the prayer of that plaint was for establishing the joint right of the plaintiff therein (along with the *agraharamdars*) in the suit sites and his exclusive right of way over the sites and also for *ejecting the defendants Nos.* 1 *and* 2 *from the suit sites and for delivery of joint possession of the entire suit sites to the plaintiff along with the defendants other than* Nos. 1 *and* 2 and for an injunction as regards the right of way. It is thus clear to me that the substantial relief claimed in this suit was included among the reliefs prayed for in the other suit, the relief being the delivery of possession of the sites to all the *agraharamdars*, though the prior suit included one or two reliefs in which one of the *agraharamdars* alone was interested. In the former suit, the *agraharamdars*, who were made defendants Nos. 3 to 16, remained *ex parte* and there can be no reasonable doubt that they supported the plaintiff in that suit. That suit was dismissed on the merits and there is no allegation or suggestion in the plaint in this suit that the former suit was not litigated in good faith. In the present suit also, the other *agraharamdars* (defendants Nos. 3 to 13) allowed the suit to proceed *ex parte* and the defendants Nos. 1 and 2 alone were the contesting defendants. During the pendency of the present suit in the District Munsif's Court, another *agraharamdar* was added as the 2nd plaintiff on the record. He is the first respondent before us. He was added after the issues were framed in the case. The learned District Munsif applied explanation 6 to section 11, Civil Procedure Code, corresponding to explanation 5 to old section 13, and held that as the plaintiff in the former suit of 1910 litigated *bona fide* in respect of the private right claimed in common for himself and the *agraharamdars* over the plaint sites and as the present 1st plaintiff was one of the *ex parte* defendants in the former suit, the judgment in the former suit was *res judicata* in favour of the defendants Nos. 1 and 2 in the present suit. He, therefore, dismissed the suit with costs.

The learned Subordinate Judge on appeal held (*a*) that if the 1st plaintiff alone had continued on the record as the sole plaintiff, the suit would, no doubt, be barred as *res judicata*; (*b*) that as the 2nd plaintiff, though one of the *agraharamdars*, had not been made a party in the suit of 1910 but was allowed to come in as the 2nd plaintiff in this suit, the bar of *res judicata* no longer applied; and (*c*) that as the addition of the 2nd plaintiff as a party to the record was made by an order of the District Munsif and as it would be very hard upon the 2nd plaintiff to tell him now that he should seek his remedy by a separate suit, the Subordinate Judge found himself obliged to decline to remove the 2nd plaintiff (appellant) from the list of the plaintiffs. On these conclusions the Subordinate Judge reversed the decree of the District Munsif and remanded the suit for disposal according to law.

Mr. Subramaniyam Pantulu for the appellants (the defendants Nos. 1 and 2) contended before us (*a*) that the Subordinate Judge ought to have under section 105, clause 1, Civil Procedure Code, corrected the error made by the District Munsif in adding the 2nd plaintiff on the record and (*b*) that even if the error was not corrected and even if the 2nd plaintiff was allowed to remain on the record, the decision in the former suit was *res judicata* by explanation 6 to section 11 of the Civil Procedure Code.

Explanation 6 to section 11 is as follows:—"Where persons litigate *bona fide in* respect of a public right or of a private right claimed

in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." It seems to me that on the plain words of the explanation, the two plaintiffs (including the 2nd plaintiff) cannot be allowed to re-open the right of the *agraharamdars* which was negatived in the former suit.

Mr. Ramadoss for the respondents contended on three different grounds that the judgment in the former suit was not *res judicata*. Those three grounds are (1) explanation 6 to section 11 makes the decision in the first suit *res judicata* only if the first suit was a representative suit brought after permission obtained from the Court under Order I, rule 8 (old section 30). (2) The former suit in 1910 was brought by the then plaintiff not in the interests of all the *agraharamdars*, but only in the interest of himself solely and the reliefs in the two suits being different, explanation 6 did not apply. (3) The expression "private right claimed in common" found in the explanation 6 can be applied only to cases of private right claimed on behalf of the undivided members of a joint Hindu family or on behalf of the members of a Malabar Tarwad, and not in respect of a right claimed in common by *agraharmdars* who have distinct shares in the village sites.

As regards the *first* ground, there are no doubt observations in a Calcutta case that explanation 5 to old section 13 should be read with section 30 of the old Code and that if permission was not obtained under section 30, the decision in the first suit will not be *res judicata* where the second suit is brought by another co-sharer. [See *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* (1) at the bottom of page 389 and at the tops of page 390.] There is also a casual observation of Shephard, J., in *Srinivasa Chariar* v. *Raghava Chariar* (2) that if section 30 had not been followed, the judgment did not bind the persons whose names were not on the record. But it seems to me that the weight of authority in Madras is in favour of giving a liberal construction to the provisions of the Civil Procedure Code embodied in explanation 5 to section 13 of the former Code (now reproduced in explanation 6 to section 11). The intention of the Legislature to give a liberal construction is further indicated by the fact that while explanation 5 to section 13 of the old Code confined itself to "private" rights, the present explanation 6 to section 11 includes public rights also. In *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (3) it was distinctly held that explanation 5 to section 13, Civil Procedure Code, was not limited to the case of suits brought with the permission of the Court under section 30 and though the decision in that case was doubted as regards certain other points decided in it, this particular *dictum* seems not to have been overruled in any subsequent case. In *Madhavan* v. *Keshavan* (4) it was held that where one of five trustees brought a suit to set aside an alienation of trust property and failed, another trustee who was not a party to the former suit was barred by section 13, explanation 5, of the old Code from again litigating the right of the trust. This case again has never been overruled. In *Chandu* v. *Kunhamed* (5) it was held that explanation 5 to section 13 barred other co-sharers when one co-sharer had failed in a former suit. This case of *Chandu* v. *Kunhamed* (5) was no doubt dissented from in the Full Bench case of *Somasundara Mudali* v. *Kulandaivelu Pillai* (6) on another point, namely, that if the former suit by one of the sharers was confined to the relief in respect of his own individual share, the other co-sharers were not bound so far as their shares were concerned from litigating the same matters. But in *Somasundara Mudali* v. *Kulandaivelu Pillai* (6) though Mr. T. V. Seshagiri, Aiyar (now Mr. Justice Seshagiri Aiyar) argued for the appellant (see page 459) that explanation 5 to section 13 should be confined to cases where under section 30 of the Code leave to sue had been obtained, the judgment of the Full Bench makes no reference to this contention but the case was decided on the other contention, namely, that where in the first suit, the whole relief common to all

(1) 24 C. 385.
(2) 23 M. 28 at p. 32; 7 M. L. J. 281.
(3) 2 M. 328.
(4) 11 M. 191.
(5) 14 M. 324; 1 M. L. J. 529.
(6) 28 M. 457 at p. 464; 14 M. L. J. 404.

the shares was not the subject-matter of the litigation, the other co-sharers will not be barred by explanation 5 to section 13. Explanation 6 to section 11 makes no reference to Order I, rule 8, and I, therefore, overrule the first contention of Mr. Ramadoss.

Coming to the *second* head of his contention, I have read the plaint and the judgment in the former suit carefully and though the plaintiff in that case also sued for his individual right in respect of a right of way, so far as possession of the sites and the establishment of the right to the sites are concerned, he clearly litigated *bona fide* in the interests of all the *agraharamdars* and if he (Mr. Ramadoss argues) did not pay proper Court-fees on the value of the entire rights of the *agraharamdars*, that circumstance would not (in my opinion) prevent his suit from being one brought in respect of a right common to him and the other *agraharamdars*, so long as the relief claimed included the common rights. The addition of an individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the *agraharamdars* (which is also the right claimed in the present suit) from being *res judicata* in the present suit. The relief claimed in the former suit in respect of the recovery of the sites was not the relief of a partition of the sites and possession of the plaintiff's individual share alone, but it was the relief of possession to be given to the plaintiff and all the other *agraharamdars* jointly, which relief is identical with the relief claimed in the present suit.

Coming to the *third* ground of contention, there seems to me to be nothing in it. Mr. Ramadoss's attempt to confine explanation 6 to section 11 to the rights of a joint Hindu family and to the rights of a Malabar Tarwad, to joint trusteeship rights, etc., is not supported either by the plain words of the explanation or by the decided cases, many of which are cases of co-sharers. I would, therefore, allow the appeal and setting aside the order of the learned Subordinate Judge restore the decree of the District Munsif, dismissing the suit with costs in all Courts payable to the defendants Nos. 1 and 2.

MOORE, J.—I agree.

The Subordinate Judge was, I think, wrong in holding that the decision in the former suit, Original Suit No. 78 of 1910, did not operate as *res judicata* as the plaintiff in that suit "was not suing in a representative character as provided under Order I, rule 8, of the Civil Procedure Code but only in his own rights."

Explanation 6 to section 11 of the Civil Procedure Code provides that where persons litigate *bona fide* in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

The conditions under which the decision in such a suit may constitute *res judicata* against persons not expressly named in that suit are:—

(1) that there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit;

(2) that the parties not expressly named in the suit must be interested in such right, if right to relief can be said to be claimed "in common" only between parties who would be benefited by such relief if granted, or who have such an interest in the right claimed that they could join as co-plaintiffs. *Somasundara Mudali* v. *Kulandaivelu Pillai* (6).

The 2nd plaintiff, who is one of the *agraharamdars*, is clearly a person interested in the right claimed on behalf of all the *agraharmdars*. A reference to the plaint in Original Suit No. 78 of 1910 shows that, although the plaintiff asked for a permanent injunction restraining defendants Nos. 1 and 2 from interfering with his exclusive right of way for his carts, cattle and men over the site to his field, he also sued to establish his joint right to the plaint site and to recover joint possession along with defendants Nos. 3 to 16 by ejecting defendants Nos. 1 and 2.

The joint right which the plaintiff claimed is identical with the relief sought for in the present suit, and he was clearly litigating *bona fide* in the interests of all the *agraharamdars*.

I am unable to agree with the Subordinate Judge that explanation 6 to section 11 of the Civil Procedure Code must be treated as confined to cases in which permission to

sue in a representative character is obtained under Order I, rule 8, of the Civil Procedure Code.

In some of the cases which arose under the Code of 1882, the opinion was expressed that explanation 5 to section 13 of the Civil Procedure Code was confined to cases where leave to sue had been obtained under section 30 of the Civil Procedure Code. [See *Thanakoti* v. *Muniappa* (7).]

On the other hand, as pointed out by my learned brother, the decision in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (3), where it was held that explanation 5 to section 13 was not limited to the case of a suit under section 30 of the Civil Procedure Code, and *Madhavan* v. *Keshavan* (4) have not been overruled. In *Somasundaram Mudali* v. *Kulandaivelu Pillai* (6), on which the Subordinate Judge relies the learned Judges did not express any opinion on the question whether explanation 5 to section 13 of the Civil Procedure Code must be confined to cases where leave to sue has been obtained under section 30 of the Civil Procedure Code, but based their decision on the ground that the relief claimed in the former suit, if granted, would not have benefited the plaintiff in the latter suit and it could not, therefore, be said to have been claimed "in common" under explanation 6 of section 11 of the Civil Procedure Code.

Appeal allowed; Suit dismissed.

V. R. P.

(7) 8 M. 496.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1410 OF 1915.

January 20, 1916.

Present:—Mr. Justice Shadi Lal.

CHAIN SUKH—DEFENDANT.—APPELLANT

versus

GOPI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Vacant site—Possession follows title—Burden of proof.

In the case of a vacant site possession follows title and it is for the party alleging to have acquired title to prove that he acquired ownership thereof by adverse possession. [p. 120, col. 2.]

Second appeal from the decree of the Subordinate Judge, 1st Class, Hissar, with appellate powers, dated the 3rd December 1914, reversing that of the Munsif, 2nd Class, Hissar, dated the 1st October 1914.

FACTS of the case material for report are as follows:—

The plaintiffs-respondents, who were proprietors of the village Kohali, sued the defendant-appellant for possession of a vacant site situated in the village, on the ground that the latter had taken forcible possession of the site in suit which had been lying vacant since the death of Chhajju and Baga who had originally built a house thereon and lived there as tenants (*ryots*) till *Sambat* 1927. The defendant Chain Sukh pleaded that he was a collateral of Chhajju and Baga, that after their death he succeeded them and that the house had been in his possession since 1927. The learned Subordinate Judge decreed the suit of the plaintiffs holding that the defendant had failed to prove that he was the collateral of Chhajju and Baga and that he had been in possession of the site in dispute since the death of Chhajju and Baga.

In appeal the defendant-appellant contended that the lower Appellate Court was wrong in thinking that the *onus* lay on the appellant of proving his possession of the house in suit for over 12 years inasmuch as the burden of proof lay on the plaintiffs-respondents to prove that they had been in possession of the land and were dispossessed by the appellant.

Mr. *Marghub Ahmad*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—It is undisputable that the plaintiffs, as the proprietors of the village, are the owners of the site in dispute, which is a part of the *abadi*, and the only point for determination is whether they have lost their title by lapse of time. Now, it appears that Chhajju and Baga, who were non-proprietors, built a house on the land but they died long ago, and even the widow of Chhajju abandoned the house as far back as *Sambat* 1927. The building then fell down, and the site must be presumed to have come back into the possession of the owners.

In the case of a vacant site, the general rule is that possession follows title, and it is for the defendant-appellant to prove that he acquired ownership thereof by adverse possession. I do not consider that Article 142 of the Limitation Act is applicable to the

facts of the case, and it is clear that no adverse possession for the statutory period has been established.

The decree of the lower Appellate Court is, therefore, maintained, and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 259 TO 261 OF 1914.

April 7, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

PRESIDENT OF THE DISTRICT BOARD, TANJORE—PLAINTIFF—APPELLANT IN ALL

versus

IN A. A. O. No. 259 OF 1914

KANNUSWAMI THONDAMAN—DEFENDANT—RESPONDENT

IN A. A. No. 260 OF 1914

RAMASWAMI SETHURAN—DEFENDANT—RESPONDENT

IN No. 261 OF 1914

VEERASWAMY THONDAMAN—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 2 (15), (16) *(b)*, 6 (2), (4), 45, 153, 157, 163 (1)—*'Old waste'—Presumption—Admission of tenant to 'old waste'—Cultivation without landlord's permission—Subsequent acceptance of* sivaijama *from tenant, effect of—Eviction—Jurisdiction of Civil Court.*

The defendants cultivated land in an estate classed as old waste without the permission of the landlord. The land was in a village and it was cultivated from 1905 to 1908. The defendants applied for *pattas* in *Faslis* 1318 and 1320. The plaintiff-landlord agreed to their remaining upon the lands as *sivaijama* tenants paying the usual rent, but did not issue *pattas*. He refused to give them occupancy rights and reserved to himself the right to eject them at the end of each agricultural year if he did not renew the *sivaijama* tenancy for the next year. In a suit for eviction of the defendants, the plaintiff wishing to reserve the lands for forest purposes:

Held, (1) that there was a presumption that the suit land was 'old waste *ryoti* land' within the meaning of section 2 (3) of the Madras Estates Land Act; [p. 122, col. 2; p. 123, col. 2.]

(2) that defendants were 'admitted to possession' of the land and were 'ryots'; [p. 123, col. 1; p. 124, col. 1.]

(3) that the defendants were not liable to be ejected as trespassers under section 163 (1) of the Madras Estates Land Act, but that the suit was governed by sections 153 and 157 and should have been brought in the Revenue Court. [p 124, col. 2; p. 123, col. 2.]

Aleman Rama Rao v. *Secretary of State for India*, 24 Ind. Cas. 904; 1 L. W. 339; (1914) M. W. N. 388; *Ponnuswamy Padayachi* v. *Karupudayan*, 24 Ind. Cas. 217; 38 M. 843; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299, followed.

Per *Oldfield, J.*—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish his right to do so. [p. 122, col. 1.]

Srimath Kidambi Jagannatha Charyulu Ayyavarlu v. *Pidipiti Kutambarayadu*, 25 Ind. Cas. 891; 27 M. L. J. 233; 39 M. 21, referred to.

The burden of proving that a land comes within the exemptions in section 3 (16)(*b*) or 6 (4) of the Madras Estates Land Act lies on the party asserting it. [p. 122, col. 1.]

A landholder who has received the payment due under section 45 in respect of a person's occupation of old waste must be deemed to have admitted such person into possession of the old waste. [p. 123, col. 1.]

Section 163 confers a right of suit in a Civil Court only against those who are liable under section 45, but have made no payment, those who have made such payments being treated as having been admitted. [p. 123, col. 1.]

Persons who continue to hold after making the payment referred to in section 45 voluntarily and in consequence of the Collector's decision must be treated as holding on condition of making such payment and are, therefore, within the definition of 'ryot' in section 2 (15). Suits to eject them will, therefore, lie under section 153 in the Revenue Court. [p. 123, col. 1.]

The provisions of section 153 are not exhaustive of all possible cases of eviction. [p. 123, col. 2.]

Per *Sadasiva Aiyar, J.*—Actual cultivation by a tenant without his having been obliged to incur any extraordinary expense or trouble in bringing the land under cultivation is almost conclusive evidence that the land is cultivable land. The whole policy of the Madras Estates Land Act is in favour of raising a presumption that a land in an estate is *ryoti* land. [p. 123, col. 2.]

Sivaijama rent paid by a tenant is not in the eye of the law merely damages agreed upon between the landowner and the trespasser. It is rent payable by persons who are really entitled to be called 'tenants'. [p. 124, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suits Nos. 443 to 445 of 1913, preferred against those of the Court of the District Munsif, Tanjore, in Original Suits Nos. 98 to 100 of 1912.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

JUDGMENT.

OLDFIELD, J.—The plaintiff-appellant, a landholder, sued in the Civil Court to recover possession of land, on which the three defendants-respondents were alleged to have trespassed. The question is

whether the lower Courts were right in holding that the suit should have been brought in a Revenue Court on the ground that defendants were non-occupancy tenants of old waste, the Court of first instance applying section 153, and the lower Appellate Court section 157, Estates Land Act.

The facts are that defendants first cultivated their respective portions of the land without permission in *Faslis* 1315, 1317, 1318 respectively. They, however,applied for *pattas* in Exhibit E in *Fasli* 1318 and Exhibit E2, E3 in *Fasli* 1320, and payments were accepted from them: but no *pattas* were given them, the lower Appellate Court's reference to Exhibit D series as relating to the suit land being mistaken. In *Fasli* 1321 plaintiff decided to reserve the land for forest and directed the filing of the present suits to eject defendants.

It is well established, the latest decision being *Srimath Kidambi Jagannatha Charyulu Ayyavarlu* v. *Pidipiti Kutumbarayadu* (1) that it is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish his right to do so. Defendants, however, who have not appeared at the hearing of the appeal, could rely on the averments in the plaint, that the suit land was in a village, and that it was cultivated and, therefore, cultivable, as *prima facie* evidence that it was *ryoti* land; and it is not disputed that, if the land was *ryoti*, it fulfilled the requirements of the definition of "old waste."

Contra, however, plaintiff contends that the land is not *ryoti*, because it is of the description referred to either in section 2 (16) (*b*) or section 6 (4) of the Madras Estates Land Act. The lower Appellate Court dealt with the applicability of neither section and the Court of first instance only with that of the latter. But, as we are clear that neither applies, I do not stay to consider whether plaintiff is debarred from relying on them at this stage. The burden of proof that the land comes within one of these exemptions to the general rule is on him; and there is no evidence to discharge it. The only facts relied on are that the land is referred to in Exhibit E series as *poramboke*, that in Exhibit C plaintiff's *tahsildar* permitted cultivation on a charge of *sivaijama* assessment pending completion of the Vadavar project and that plaintiff, in Exhibit K in passing orders for the filing of these suits, included the land in a reserved list with the intention to apply the forest rules to it. But there is nothing in Exhibit E series to show that the land was of one of the descriptions of *poramboke* specified in section 2 (16) (*b*): there is no evidence as to the nature of the Vadavar project or the connection of this land with it: and, whatever the meaning of the expression in section 6 (4) "admission to waste land," the question of forest reservation arose, not at or before defendants' admission, but in connection with their eviction. In these circumstances the land must be treated as old waste *ryoti* land.

Plaintiff contends, next, that the section applicable to suits in respect of such land is section 163, not section 153 or 157 of the Madras Estates Land Act. The first mentioned cannot apply if defendants have been admitted as *ryots* by plaintiff and on the facts, the conclusion must be that they have been. Admission as a *ryot* is not defined in the Act. But admission to possession of *ryoti* land other than old waste is, as appears from the explanation to section 6 (2) of the Madras Estates Land Act, deemed to be entailed by the landholder's acceptance from the occupant of such land of a payment under section 45 of the Madras Estates Land Act. It is not clear how any distinction can be drawn between the admission of a person to possession of *ryoti* land referred to in section 6 (2) of the Madras Estates Land Act and his admission as a *ryot* referred to in section 163 of the Madras Estates Land Act, or why the method of admission defined in the one should not be utilised *mutatis mutandis*, when old waste is in question, in construing the other. On the other hand the reference in section 162 (2) of the Madras Estates Land Act to recovery of sums payable under section 45 of the Madras Estates Land Act entails that a person may be liable for such sums, when he has not been admitted as a *ryot*. The result, which is consistent with the

(1) 25 Ind. Cas. 891; 39 M. 21; 27 M. L. J. 233.

foregoing application of the explanation to section 6 (2) and with section 163 is accordingly that a person, from whom the landholder has received the payment due under section 45 in respect of his occupation of old waste, has been admitted to possession, and section 163 confers a right of suit in the Civil Court only against those who are liable under section 45, but have made no payment, those who have made such payment being treated as having been admitted. The payment under section 45 is referred to in the section itself as "rent"; and persons, who continue to hold after making a payment voluntarily and in consequence of the Collector's decision, must be treated as holding on condition of making such payment and are, therefore, within the definition of "ryot" in section 2 (15) of the Madras Estates Land Act. Suits to eject them will, therefore, lie under section 153 in the Revenue Court.

To apply the foregoing to defendants' payments, they are described in Exhibit C series made under *sivaijama* head: and I accept the conclusion as to the meaning of *sivaijama* reached in *Aleman Rama Rao* v. *Secretary of State for India* (2). There Sadasiva Aiyar, J., referred to the *sivaijama* grants in question as completed, though conditional, whilst Seshagiri Aiyar, J., described such grants as made, where permission is given to occupy land for a particular purpose or where there was an unauthorized occupation or one, which the authorities did not consider objectionable. That case dealt with land under the control of Government. But there is no reason for a different interpretation of the term when the land is in private ownership. The result is that acquiescence in the occupation and acceptence of rent are the essential features. They are present in the case before us and are sufficient to constitute an admission of defendants as *ryots*.

It is further essential to the application of section 153 that the ground, on which eviction is claimed, shall be such as it contemplates: and no doubt such cases as the present are not referred to specifically in it. But in this connection I follow Spencer, J., in the recently reported case of *Ponnuswamy Padayachi* v. *Karupudayan* (3), adopting his conclusion that the provisions of the section are not exhaustive of all possible cases of eviction. He has pointed out the absurdity of supposing that greater protection is afforded to tenures of long than of short duration: I, therefore, hold that section 153 is applicable to the suits and that they should have been brought before the Collector.

The appeals, therefore, fail and are dismissed.

SADASIVA AIYAR, J.—The only question in these appeals is whether the defendants are tenants of *ryoti* lands and whether the suits which were brought in the District Munsif's Court ought to have been brought in the Revenue Court. The respondents are not represented before us. It seems to have been assumed in the lower Courts (and nowhere denied), that the lands were cultivable lands and also that they were not private lands. I think the definition of *ryoti* land in section 2, clause 3, of the the Estates Land Act applies to these lands. Mr. L. A. Govindaraghava Aiyar for the appellant relies on the fact that there was an idea at one time of applying the forest rules (in connection with the project known as the Vadavar project) to these lands. But nothing came out of that idea and the lands have been actually under cultivation between 1905 and 1908. Though the lower Courts do not expressly find that the lands are *ryoti* lands and though the Act does not contain an express rule as to presumption in respect of the waste lands in estates, that they should be deemed to be cultivable waste, I think that actual cultivation by a tenant without his having been obliged to incur any extraordinary expense or trouble in bringing the land under cultivation is almost conclusive evidence that the land is cultivable land. The whole policy of the Act is in favour of raising a presumption that a land in an estate is *ryoti* land. See also section 23 of the Act. Sub-section 4 of section 6 is clearly confined to waste land which is admitted to be waste land other than *ryoti*

(2) 24 Ind. Cas. 904; 1 L. W. 339; (1914) M. W. N. 388.

(3) 24 Ind. Cas. 217; 38 M. 843; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299.

land and which is sought to be brought under the head of *ryoti* land by reason of its temporary letting by the landlord for cultivation.

Mr. Govindaraghava Aiyar's next argument is that even if the land was *ryoti* land, the defendants were not admitted as *ryots* by the landholder and, therefore, under section 163, clause (1), they are liable to be ejected as trespassers by suits brought in the Civil Court. If I understood him aright, he tried to make a distinction between the possession as a *ryot* of old waste and the possession as tenant of old waste. I confess that I am unable to understand the distinction. The definition of a *ryot* in clause 15 of section 3 does not support the existence of such a distinction. Next it was urged by him that the defendants were not admitted as *ryots* by a landholder but squatted upon the land of their own accord, and hence they are neither tenants nor *ryots* who can claim the benefit of sections 157 and 153 and that they are under the disability imposed upon them by section 163 (1), that disability entailing upon them the liability to be ejected for trespass in a Civil Court, whereas under sections 157 and 153, if they were tenants of old waste, they can only be ejected on some special grounds and even on such grounds, through suits in a Revenue Court. Though the defendants did squat at first upon the lands without permission, the landholder agreed to their remaining upon the lands as *sivaijama* tenants paying the usual rent; when he so agreed to treat them as tenants I think he did "admit" them as tenants. The repeated stress laid by Mr. Govindaraghava Aiyar on the word "*sivaijama*" has not convinced me that the agreement by which the plaintiff accepted the defendants as tenants (though he refused to give them occupancy rights and reserved to himself the right to turn them out of possession at the end of each agricultural year if he did not renew the *sivaijama* tenancy for the next year) was not an admission of the defendants into the tenancy of the lands. I am unable to accept his contention that the *sivaijama* rent paid by the tenants was in the eye of the law merely damages agreed upon between the landowner and the trespassers and that the said rent was paid as such damages by the said trespassers. No doubt section 45 speaks of rent payable by occupants of *ryoti* lands without the landlord's consent, but the word "rent" is sometimes loosely applied in English and Indian decisions for damages payable by trespassers and by persons whose term of tenancy had ceased (who are called again loosely "tenants holding over" and "tenants by sufferance") as well by persons who are really entitled to be called tenants. The damages payable by persons holding over are sometimes called "rent for use and occupation" and sometimes "damages or compensation for use and occupation". I have dealt recently with the difficulties caused by the use of the terms "tenants by sufferance", etc., and I do not wish to repeat myself. *Govindaswamy Pillai* v. *Ramaswami Aiyar* (4). In the result I agree with the lower Courts that sections 153 and 157 apply to the cases of the defendants and that section 163 (1) does not apply. The appeals will, therefore, be dismissed.

Appeal dismissed.

V.R.P.

(4) 34 Ind. Cas. 6; 3 L. W. 408; 30 M. L. J. 492.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 430 OF 1915.

April 25, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

MADDALA MADHAYARAYUDU—DEFENDANT No. 7—APPELLANT

versus

TANIKALLA SUBBAMMA—DEFENDANT No. 1—RESPONDENT.

Suit on mortgage for sale—Death of mortgagor pending suit—Wrong person brought on record as legal representative of deceased defendant—Decree for sale—Subsequent suit by puisne mortgagee for setting aside sale—Sale, whether nullity—Civil Procedure Code (Act V of 1908), s. 2 (11)—Legal representative, meaning of.

Prima facie no decree can be binding against a person who has not been represented in the suit; but if there is on the record some person who is interested in defending the suit, the fact that that person does not completely represent the deceased is not a ground for holding that the decree is not properly obtained. It cannot, however, be inferred from this that the decree in a suit prosecuted successfully against a person as the legal representative of a deceased, when he has absolutely no interest in the property which

is the subject-matter of the suit, is binding upon the estate of the deceased. [p. 125, col. 2; p. 126, cols. 1 & 2.]

Malkarjun v. *Narhari*, 25 B. 337; 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10 (P. C.); *Ramasawmi Chettiar* v. *Oppilamani Chetti*, 4 Ind. Cas. 1059; 33 M. 6; 6 M. L. T. 269; 19 M. L. J. 671; *Gnanambal Ammal* v. *Veerasami Chetty*, 31 Ind. Cas. 920; 29 M. L. J. 698; *Kaliappan Servai Karan* v. *Varadarajulu*, 3 Ind. Cas. 737; 33 M. 75; 6 M. L. T. 199; 19 M. L. J. 651; *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*, 26 M. 230; 12 M. L. J. 368; *Debi Singh* v. *Jia Ram*, 25 A. 214 at p. 220; A. W. N. (1903) 21; *Khiarajmal* v. *Daim*, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C W. N. 201; 32 I. A. 23; *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh*, 14 M. I. A 605; 17 W. R. 459; 10 B. L. R. (P. C.) 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912, referred to.

Under the enlarged definition of "legal representative" to be found in the Civil Procedure Code of 1908 a person in possession of the estate belonging to the deceased is competent to represent the deceased defendant. [p. 126, col. 1.]

Where, therefore, in a suit for sale on a mortgage, the mortgagee brought on the record as the legal representative of the mortgagor defendant his divided brother's son, though his right was a *spes successionis*, and not his daughter and obtained a decree for sale and purchased the property in Court-auction, and a puisne mortgagee sued to set it aside:

Held, that the puisne mortgage was entitled to do so and that the previous sale was a nullity and the puisne mortgagee was entitled to a decree for sale subject to the rights of the prior mortgagee. [p. 127, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry at Cocanada, in Appeal Suit No. 10 of 1914 (Referred Appeal No. 283 of 1912, on the file of the Subordinate Judge's Court at Cocanada), preferred against that of the Court of the District Munsif, Peddapur, in Original Suit No. 928 of 1914.

Messrs. *B. Narasimha Rao* and *D. Appa Rau*, for the Appellant.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—The property in dispute belonged to one Addanki Naganna. He first mortgaged it to the father of defendants Nos. 3 and 4 and subsequently to the plaintiff. The father of defendants Nos. 3 and 4 brought a suit on his mortgage against Naganna, the mortgagor (Suit No. 486 of 1897). Plaintiff was not a party to that suit. During the pendency of the suit Naganna died. The suit was continued against one Suryanarayanamurthy, the divided brother's son of the deceased Naganna. The 1st defendant is the daughter of Naganna. But she was not made a party to the suit after her father's death. A decree was obtained by the father of defendants Nos. 3 and 4 against Suryanarayanamurthy, and in execution of that decree, the equity of redemption in the property was purchased by the father of defendants Nos. 3 and 4. The 7th defendant's deceased father purchased it from the father of defendants Nos. 3 and 4 and has been in possession. The case for the plaintiff is that the decree obtained in the previous suit did not bind the first defendant, who alone was competent to represent her father, and that consequently the sale of the equity of redemption behind her back cannot bind either 1st defendant or the plaintiff. It may be stated here that the 2nd defendant is the widow of Suryanarayanamurthy, who was impleaded in the previous suit as the legal representative of the deceased Naganna.

The Subordinate Judge came to the conclusion that the decree in favour of the father of defendants Nos. 3 and 4 and the sale thereunder are not binding upon either the plaintiff or the first defendant and consequently gave a decree to the plaintiff for the sale of the properties.

The main contention raised in second appeal by Mr. Narasimha Rao is, that, as Suryanarayanamurthy was honestly impleaded as the legal representative of the deceased Naganna, the decree obtained in that suit is binding upon the plaintiff and 1st defendant. He, therefore, asks that his client should be allowed to redeem the plaint mortgage. *Prima facie* no decree can be binding against a person who has not been represented in the suit. To this well-known principle there are exceptions. In the *first* place, as pointed out by Mr. Ramesam, if a decree has been legally obtained against the proper person, it may be permissible in execution proceedings to implead a person as the legal representative and to carry on execution as against him although he is not the real representative of the deceased judgment-debtor. Of course the decree-holder must act honestly in selecting the legal representative. There must be due care and caution and want of *mala fides*. This was laid down by the Judicial Committee in *Malkarjun* v. *Narhari* (1) and

(1) 25 B. 337 (P. C.); 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10.

has been followed in all the High Courts. *Ramasawmi Chettiar* v. *Oppilamani Chetti* (2) has applied that principle in this Presidency. That was a case where after decree one of several persons who was entitled to represent the deceased judgment-debtor was brought on the record. It was held that such a person for all practical purposes fully represented the judgment-debtor. In the case of *Gnanambal Ammal* v. *Veerasami Chetty* (3) the widow was brought in as the legal representative. Under the enlarged definition of "legal representative" to be found in the Civil Procedure Code of 1908 a person in possession of the estate belonging to the deceased is competent to represent the deceased defendant. The decision in *Kaliappan Servai Karan* v. *Varadarajulu* (4) was also in execution.

There is another class of cases which is typified by *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (5), where the suit is brought against a proper defendant and after his death only some of the legal representatives are brought on the record, a decree given against such representatives would bind the others similarly situated. This position may be justified upon the analogy of section 11, explanation 6, Civil Procedure Code. The principle is that if there is on the record some person who is interested in defending the suit, the fact that that person does not completely represent the deceased is not a ground for holding that the decree is not properly obtained. Some observations in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (5) were relied upon as indicating that all that is required is that the plaintiff should act honestly in choosing any person as the legal representative of the deceased defendant and that so long as *mala fides* cannot be imputed to him, the decree obtained against the person whom he brings in would bind all the parties really entitled to the estate. The judgment must be read with reference to the facts decided and we are against allowing stray sentences to be detached from their context and to read into them a meaning which the judgment as a whole does not bear. The proposition contended for by Mr. Narasimha Rao would lead to this startling result, that a suit can be prosecuted successfully against a person who has absolutely no interest in the property which is the subject-matter of the suit and so long as the plaintiff has acted honestly the person who is really entitled to the estate will be bound by the decrees obtained in the suit. As pointed out by the learned Judge of the Allahabad High Court in *Debi Singh* v. *Jia Ram* (6), a result like this could not have been in the contemplation of the Legislature. On the other hand, the decision of the Judicial Committee in *Khiarajmal* v. *Daim* (7) shows that if, on the death of a defendant, his proper legal heir is not brought on the record as required by law, the decree in such a suit will not be binding upon the true heir. It is not clear, as pointed out in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (5), whether in the litigation which went up to the Judicial Committee in *General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (8) the question arose after decree or prior to decree and whether the person who was brought on record was in possession of the property as heiress of her husband. In any case the widow against whom the proceedings were continued had a "present interest" to protect and consequently that decision is within the principle enunciated in *Ramasawmi Chettiar* v. *Oppilamani Chetti* (2). The learned Counsel for the appellant argued that Suryanaryanamurthy, although a divided brother's son, had an interest in the property in dispute. We cannot accede to this contention. He had only a *spes successionis* and so long as the daughter was alive, he cannot be said to have had any interest in the property in dispute.

We think, therefore, that the Subordinate Judge is right in holding that the decree

(2) 4 Ind. Cas. 1059; 33 M. 6; 6 M. L. T. 269; 19 M. L. J. 671.
(3) 31 Ind. Cas. 920; 29 M. L. J. 698.
(4) 3 Ind. Cas. 737; 33 M. 75; 6 M. L. T. 199; 19 M. L. J. 651.
(5) 26 M. 230; 12 M. L. J. 368.
(6) 25 A. 214 at p. 220; A. W. N. (1903) 21.
(7) 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23.
(8) 14 M. I. A. 605; 17 W. R. 459; 10 B. L. R. (P. C.) 294; 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

obtained against Suryanarayanamurthy is not binding upon the 1st defendant or the plaintiff and that consequently the plaintiff is entitled, as the puisne mortgage, to sue for the sale of the property subject to the rights of the first mortgagee. The decree given in this case is, therefore, right. We dismiss the second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 222 AND 266 OF 1912.

May 8, 1916.

Present:—Mr. Justice Chaudhuri and Mr. Justice Newbould.

IN NO. 222

ASITA MOHAN GHOSE MOULIK—

PLAINTIFF—APPELLANT

versus

NERODE MOHAN GHOSE MOULIK—

DEFENDANT—RESPONDENT.

IN NO. 266

NERODE MOHAN GHOSE MOULIK—

PLAINTIFF—APPELLANT

versus

ASITA MOHAN GHOSE MOULIK—

DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Adopted son's right of inheritance when there is afterborn natural son—Sudras—Kayasthas, *if Sudras—Illegitimate son of Sudra—Dattaka Chandrika, authority of—Dedication, image of deity, if essential for.*

According to the law prevalent in Bengal *Kayasthas* are considered as Sudras. [p. 131, col. 2.]

Amongst Sudras no religious ceremony is necessary for an adoption. The giving and taking of a son are essential to give validity to adoption. *Putresthi jag* and *namakarana* are not essential. [p. 133, col. 1; p 134, col. 1.]

Raj Coomar Lall v. *Bissessur Dyal*, 10 C. 688 at p. 694, referred to.

Pollution on account of the birth of a relative at the time of an adoption does not vitiate the adoption amongst the Sudras, as such pollution is only a bar to religious acts and renders religious ceremonies inefficacious but does not affect the secular acts of gift and acceptance of a son—which alone are sufficient for making a valid adoption by the Sudras. [p. 135, col. 1.]

The Dattaka Chandrika is a work of undoubted authority in Bengal on the subject of adoption—its authority prevailing over other works on the same subject. [p. 135, col. 2; p. 136, col. 1.]

Rungama v. *Atchama*, 4 M. I. A. 1; 7 W. R. 57 (P. C.); 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 600; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397 at p. 437; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389; *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*, 14 B. 249; *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*, 26 I. A. 113; 21 A. 460; 22 M. 398; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M. L. J. 67; 7 Sar. P. C. J. 330; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412; 26 I. A. 153; 1 Bom. L. R. 311; 3 C. W. N. 454; 7 Sar. P. C. J. 474; *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*, 32 Ind. Cas. 403; 30 M. L. J. 193; 14 A. L. J. 185; 3 L. W. 259; 19 M. L. T. 193; 18 Bom. L. R. 172; (1916) 1 M. W. N. 258; 20 C. W. N. 702; 40 B. 270; 23 C. L. J. 395; *Baramanund Mahanti* v. *Krishna Charan Patnaik*, 12 Ind. Cas. 6; 14 C. L. J. 183 at p. 187, referred to.

Amongst Sudras an adopted son is entitled to share equally with the afterborn natural son in the rights to the ancestral, secular and *debutter* properties. [p. 136, col. 2.]

An *ekrar* executed by an adoptive father at the time of making an adoption that if a son is afterwards born of his loins, the adopted son and the afterborn natural son shall be equally entitled to all the moveable and immoveable properties that may be left by him, is valid and binding on his heir and legal representative. [p. 140, col. 1.]

Surendro Keshub Roy v. *Doorgasoondery Dossee*, 19 C. 513 at p. 526; 19 I. A. 108; *Bhala Nahana* v. *Parbhu Hari*, 2 B. 67, referred to.

Obiter.—The mere purchase of an estate in the name of a *thakur* (deity) does not prove its dedication. [p. 143, col. 2.]

A permanent image of a deity is not absolutely essential for a dedication of property to a *thakur*. [p. 144, col. 1.]

An illegitimate son of a Sudra has no right to a share of the father's properties in his lifetime but the father may, if he chooses, give him an equal share with his legitimate son and it is only upon the father's death that he becomes entitled to a moiety of the share of the legitimate son. [p. 138, col. 2.]

A Sudra father is not required by law to recognise an illegitimate son. [p. 138, col. 2.]

Amongst Sudras the son by a female slave is not legitimate and has no status as a son unless his father chooses to give it to him. [p. 138, col. 2; p. 139, col. 1.]

Appeals against the decrees of the Subordinate Judge, Birbhum, dated the 30th March 1912.

FACTS of the case appear clearly from the judgment.

Babu *Dwarkanath Chakravarty* (with him Babus *Karunamoy Bose*, *Hemendra Nath Sen*, *Torit Mohan Das* and *Bimal Chandra Das Gupta*, for the Appellant in Appeal No. 222 of 1912. Hindu Law certainly allows adoption, but always gives the adopted son an inferior place if a legitimate son is born afterwards. "* * * * *"

Vashista—If after adoption, a legitimate son is born, the adopted son shall partake of a fourth share.

With regard to the meaning of the "fourth share" there is some diversity of opinion. Dr. Wilson says (Wilson's Works, V, 52) that the variance is only apparent and that all the texts mean the same thing, *viz.*, that the property is to be divided into four shares, the adopted son getting one of these four. In the light of this remark there is no conflict between the view of Vashista quoted above and the view of Devala (cited in Dayabhaga, Chapter X) that the adopted son partakes of a third share.

One-fourth share is given to the adopted son by Mitakshara, I, 11 § 24, 25—Stoke's page 421; Dattaka Mimansa X, § 1—Stoke's page 628; Vyavahara Mayukha, IV, 5 § 25;—Stoke's page 6 i.

Dattaka Mimansa has got another explanation also of the text of Vashista—that the adopted son is to get one-fourth of what he would have got if he were a legitimate son, *i. e.*, $\frac{1}{4}$ of $\frac{1}{2}=\frac{1}{8}$.

One-third is given according to the following:—

Dayabhaga Chapter X, § 9—Stoke's page 301; Dattaka Chandrika V § 16, 17; Stoke's page 657.

All these divergences are due to the different interpretations put on the expression fourth share; it may mean fourth share of the entire estate or fourth share of the legitimate son's share or fourth share of what would have fallen to him if he were a legitimate son, and so on.

The passage of Devala quoted in Dayabhaga, which as Dr. Wilson's remarks show does not differ in substance from the passage of Vashista, has again itself been subjected to various interpretations by recent commentators and the view has sometimes been held by Courts that the adopted son is to get half of the share of the afterborn legitimate son [*Raghubanund Doss* v. *Sadhu Churn Doss* (1)]. But there is no uniformity of opinion; sometimes he has been given only one-fourth of the share of an afterborn legitimate son [*Birbhadra Rath* v. *Kalpataru Panda* (2)]. In Bombay, an adopted son has been given one-third of the share of the legitimate son [*Rukhab* v. *Chunilal Ambushet* (3)] and sometimes one-fourth [*Giriapa* v. *Ningapa* (4)].

(1) 4 C. 425; 3 C. L. R. 534.
(2) 1 C. L. J. 388.
(3) 16 B. 347.
(4) 17 B. 100.

Amidst all these diversities of opinion one fact stands out clear that the basis of all these views is in the text of Vashista and that of Devala which is at the bottom of the same.

Among various castes in Western India, on the birth of a legitimate son, the adopted son sometimes gets $\frac{1}{2}$, $\frac{1}{3}$, $\frac{1}{4}$ and sometimes a mere present only and is turned adrift—Steele, pages 47, 186.

A text ascribed to Briddha Gautama says that an adopted son and an afterborn legitimate son are to share equally. It has never been followed without some proviso as to good qualities. It may mean (as Dattaka Mimansa understands it) that if the legitimate son be devoid of good qualities, then alone are the shares to be equal; but as good qualities are always assumed, this text is of no practical importance. Or it may mean that if the adopted son be endowed with good qualities then the shares are to be equal, and as good qualities are to be presumed there should be equal division in every case—in this sense, it will come into conflict with the texts of Vashista and Devala and has never been followed.

Dayabhaga, the highest authority in Bengal in Chapter X, paragraph 7, quotes the text of Devala; in paragraph 9 makes all descriptions of sons other than legitimate to be sharers of a third part if a legitimate son is born afterwards and in paragraph No. 13 quotes with approval a passage from Katyayana to the same effect. There is not the slightest mention of the Sudra forming an exception to this general rule. Dattaka Chandrika which applies the text of Briddha Gautama to Sudras is in this respect in conflict with the highest authority in Bengal. Dattaka Chandrika owes its reputation to the adventitious circumstance of being very early translated into English under the auspices of the Government. Mr. Sutherland, the translator, was under the misapprehension that it was the work of the author of Smriti Chandrika. The importance attached to this work by Sutherland misled W. McNaghten and Sir J. Colville quotes the opinion of W. McNaghten in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (5). Mr.

(5) 12 M. I. A. 397 at p. 437; 10 W. R. 17 (P. C.); 1 B. L. R. 1 (P. C.); 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

Justice Knox of Allahabad, who is a Sanskrit scholar, for the first time tried in judicial circles to turn the tide and he is of opinion that the authority of Dattaka Chandrika and Dattaka Mimansa is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence [*Beni Prasad* v. *Hardai Bibi* (6)]. Edge, C. J., disputed the authority of Nandapandita in *Bhagwan Singh* v. *Bhagwan Singh* (7). Both these cases went to the Privy Council and their Lordships in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* and *Radha Mohan* v. *Hardai Bibi* (8) admit that Dattaka Chandrika "stands on the footing of a work by a learned man" and that "caution is required in accepting their glosses where they deviate from, or add to the Smritis", and their Lordships dissented from the joint opinion of Dattaka Mimansa and Dattaka Chandrika that an only son cannot be adopted, though with the help of the distinction between legal and moral injunctions; and yet in the same breath their Lordships say that they cannot concur with the view of Mr. Justice Knox that these works are open to criticism and support themselves by saying that that would disturb recognised law and settled arrangements.

Dattaka Chandrika has never been acted on by the people of the country. Mr. Mandlik says that it was not known to the West even long after it was translated into English under the auspices of the Government.

Dattaka Chandrika is not even the sincere opinion of a learned Hindu as Mr. Justice Knox believed it to be. It is an out and out forgery designed for the purpose of helping a rich litigant, the adopted son of Raja Nobokisen. The Pandits, who are the repositories of Hindu Law and who are the persons that Hindus ordinarily consult, all regard it in this light—the most eminent Pandits, Vidyasagar, Bharat Siromoni, all favour this view. It is nowhere referred to in the carefully prepared Digest of Mr. Colebrooke (or Jagannath).

The *ekrar* executed by Radhamohan is invalid, being devoid of consideration; Radhamohan had at that time only a contingent, reversionary interest in the property. The general principle that *spes successionis* is not transferable, held good even before it was positively enacted in the Transfer of Property Act. Further, the *ekrar* could not be valid as a gift as it was not registered and there was no delivery of possession; nor could it be a testament for nobody took a Probate and regarded it as a testament.

Supposing that the *ekrar* was genuine and valid, it gives all the properties to the adopted son with a proviso. In this proviso, half of Radhamohan's properties are given to the adopted son in the event of the birth of a natural son; there is no mention of the *deva kirties*, *petri kirties*, etc., as in the earlier part. The reason is, in the presence of a legitimate son the adopted son becomes unable to perform any religious rite; hence he was excluded from any share in the *debutter* properties.

Babu *Mohendranath Roy* (with him Babus *Bepin Behary Ghose*, *Lalit Behary Ghose*, *Karunamoy Ghose* and *Jogesh Chandra Bose*), for the Respondents in Appeal No. 222 of 1912. Dattaka Chandrika is a treatise on the special subject of adoption. Section 5 (paragraphs 15—32) of Setlur's Translation deals with the subject exhaustively. The quotation that occurred in Chapter X, paragraph 7, of Dayabhaga from Devala is given in paragraph 15 of Dattaka Chandrika. Then there is an exhaustive reference to early texts on the subject. Katyayana, Vashista, Vrihaspati, etc., make the adopted son sharer of a third part, when an afterborn legitimate son is born. Paragraph 29 lays down a separate rule for Sudras, making the share of the adopted son equal to that of the legitimate son. A reason is given, namely, that as Manu and Yajnavalkya allow in the case of a Sudra, to the son by a female slave, a share equal to that of the legitimate son, the position of the adopted son must *a fortiori* be not inferior to the son by a female slave. In paragraph 32 a text is cited from Vriddha Gautama as supporting equal division amongst Sudras.

The provisions of Dattaka Chandrika do not differ from those of the Dayabhaga. Dayabhaga is a treatise on the general subject of inheritance. It deals with the subject of adoption in a cursory manner and has no space for every minute detail. The

(6) 14 A. 67; A. W. N. (1892) 161.
(7) 17 A. 294; A. W. N. (1895) 167.
(8) 26 I.A. 113; 21 A. 460; 22 M. 398; 3 C. W. N. 427; 1 Bom. L. R. 226; 9 M. L. J. 67; 7 Sar. P. C. J. 330.

Privy Council has repeatedly pronounced on the authoritative character of the two well-known books on inheritance. [*Rungama* v. *Atchama* (9), *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (5).] Dattaka Chandrika being a special treatise on adoption, its rules must be taken as acquiesced in by Dayabhaga unless expressly rejected. Dattaka Chandrika is supplementary to Dayabhaga and not in conflict with it, which is far from being exhaustive on the subject.

As the Privy Council points out, the rules of Dattaka Chandrika have become a part of the general law and attempts to find out whether it is a forgery or not may be of interest to the antiquarian or the historian, but not to the lawyer. As time will pass on, its authority will go on increasing on the principle of *stare decisis*.

In Bombay a similar attempt was made by Mr. Mandlik and a full Court refused to alter its usage.—*Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (10). The Privy Council has taken the same view in two recent decisions.

An adopted son is in all respects identical with the natural born sons, subject to exceptions clearly defined and specified by writers on adoption. There is a complete severance from the natural family and new birth in the adoptor's family.—*Birbhadra Rath* v. *Kalapataru Panda* (2).

One of these exceptions is that there will be unequal division in a certain proportion between the adopted son and the afterborn legitimate son, but this exception does not apply, according to Dattaka Chandrika, to Sudras.

Shyama Chandra Sircar in the 2nd edition of his Vyavastha Darpana, pages 913—15, maintains the view that the rule of Dattaka Chandrika does not apply to Bengal Kayasthas, whose practices are like those of the regenerate classes. In the 3rd edition, he retracts these remarks.

As to the *ekrar*, the father of the boy relying upon the representation in the *ekrar* that his son will have certain rights, altered his position in life. The person making the representation or any one claiming through him cannot resile from this representation: *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (11). In *Bhala Nahana* v. *Parbhu Hari* (12) the equity to make good such a representation was enforced against the heirs of the person making the representation. There are numerous English cases in White and Tudor to this effect, based on a principle which requires no explanation nor any authority to support it.

Babu *Mohendra Nath Roy* (with him Babus *Bepin Behary Ghose*, *Lalit Mohan Ghose* and *Jnan Ranjan Chatterjee*), for the Appellant in Appeal No. 266 of 1912.

Babu *Karunamoy Bose* (with him Babu *Bimal Chandra Roy*), for the Respondent in Appeal No. 266 of 1912.

JUDGMENT.—One Radha Mohan Ghose Moulik, a Bengali Kayastha *zemindar* of the District of Murshidabad governed by the Dayabhaga School of Hindu Law, died intestate on the 16th Vadro 1300=2nd September 1903. In the Collectorate Register he was recorded as the proprietor of certain *zemindari* properties and as *shebait* of certain *debutter* properties. Shortly after his death Sailendra Mohan Ghose Moulik applied for registration of his name under the Land Registration Act in respect of 8 annas of both the *zemindari* and *debutter* properties, alleging that he had been adopted by Radha Mohan as his son on the 26th *Joistha* 1283=7th June 1876 and that Asita Mohan Ghose Moulik, who was born on the 29th May 1289 as the afterborn natural son of Radha Mohan Ghose Moulik, was entitled to the other 8 annas. Asita Mohan objected to Sailendra's application denying his adoption and applied for registration of his name in respect of the entire 16 annas as the only son and heir of Radha Mohan. The Land Registration Officers held that Sailendra was the adopted son of Radha Mohan and registered his name in respect of 8 annas of the *zemindari* properties only and Asita's name in respect of other 8 annas and as *shebait* of the entire *debutter* properties. Sailendra died on the 22nd *Aswin* 1312=8th October 1905, leaving Nirode Mohan and Khirode Mohan, his sons. They instituted Suit No. 79 of 1909 in the Birbhum Court for a declaration that they were entitled as *shebaits* by descent from their father to 8 annas of such properties as were *debutter*. They asserted that the properties set out in Schedules *Kha* and *Ga* to their plaint were

(9) 4 M. I. A. 1; 7 W. R. 57 (P. C.); 1 Suth. P. C. J. 197; 1 Sar. P. C. J. 313; 18 E. R. 600.

(10) 14 B. 249.

(11) 19 C. 513 at p. 526 (P. C.); 19 I. A. 108.

(12) 2 B. 67.

not *debutter*, and prayed for declaration that they were entitled to one-half of these properties as proprietors, but submitted in the alternative that if the Court found that those properties were charged with *deva sheba* expenses, they should be declared entitled thereto and to possession thereof as proprietors, subject to such charge, or if the Court found them to be absolute *debutter*, they submitted that they were entitled thereto as co-*shebaits*, to the extent of 8 annas.

Asita Mohan, on the other hand, instituted Suit No. 134 of 1909 in the same Court for declaration of title to and possession of the whole of *mal* or *zemindari* properties as the sole heir of Radha Mohan and claimed that *Kismat* Binderpore (*Tauzi* No. 9552) recorded by the Land Registration Officers as *mal* property was really the *debutter* property of Radha Gobind Jiu. Both these suits were tried together (see Order No. 18, dated 31st January 1910, in Suit No. 79 of 1909 and Order No. 8 of same date in Suit No. 134 of 1909) and one judgment has been delivered in both.

The learned Subordinate Judge has held (*i*) as to adoption:—

(1) That Radha Mohan's family is a family of Bengal Kayasthas, who are Sudras, amongst whom the ceremony of "giving and taking" only is necessary for the validity of an adoption.

(2) That Sailendra Mohan was given by his natural father, Kumar Narendra Chandra Roy, to Radha Mohan Ghose Moulik, who took the boy in adoption on the 26th *Joistha* 1283=7th June 1876 and that the adoption was not contrary to law or custom in any respect.

That an *ekrar-patra* (Exhibit 13) was executed by Radha Mohan addressed to Kumar Narendra Chandra Roy, the natural father of Sailendra Mohan, and a deed of gift (Exhibit 64) was executed by Kumar Narendra Chandra Roy in favour of Radha Mohan at the time of the said adoption and that both the documents are genuine, valid and operative.

(3) That being Sudras, Sailendra as the adopted son of Radha Mohan was entitled to share equally with Asita Mohan, the after-born natural son, and that he was also so entitled according to the terms of the *ekrar-patra* (Exhibit 13).

(*ii*) As to the *debutter* properties:—

(1) That *Kismat* Binderpore mentioned in Suit No. 134 of 1909 was not *debutter* nor was it ever treated as *debutter*.

(2) That as to the properties in Schedules *Kha* and *Ga* annexed to the plaint in Suit No. 79 of 1909, Harishchandrapur, Taraf Mandar (appertaining to Huda Kutubpur and Fatehpur) were not *debutter*, but all the others were absolute *debutter* and not merely charged with *deva sheba* expenses.

(*iii*) That Sailendra Mohan had no right to be a *shebait* in respect of the *deva sheba* or the *debutter* properties in the presence of the natural born son Asita Mohan, and, therefore, Sailendra's sons had no such right.

He has thus decreed that the sons of Sailendra are entitled to one-half of all the secular properties including Binderpore, Harishchandrapur, Taraf Mandar (appertaining to Huda Kutubpur and Fatehpur).

It appears that Sailendra's sons have effected mortgages and granted *putni* leases in favour of defendants Nos. 3 to 6 in Suit No. 134 of 1909. The learned Subordinate Judge has held that they are not binding on Asita Mohan.

Asita Mohan and the sons of Sailendra have filed separate appeals against such portions of the judgment and decree as are adverse to their respective contentions. Defendants Nos. 3 to 6 have not appealed. Asita Mohan's appeal, being the earlier one in order of date, came up first, but both appeals have been heard together at the request of the parties.

We intend to deal with the findings of the Subordinate Judge in the order above set out.

(*i*) As to the adoption:—

(1) We agree with the learned Subordinate Judge that Kayasthas according to the law prevalent in Bengal are considered as Sudras. The question has frequently arisen in connection with cases of adoption and it is settled that as Sudras, no religious ceremony is in their case necessary, but that the mere giving and taking of a son is sufficient to give validity to adoption amongst them. See

Raj Coomar Lall v. *Bissessur Dyal* (13). As to Bengali Kayasthas being Sudras see the passage from Shayam Charan Sirkar's Vyavastha Darpana quoted in *Raj Coomar Lall* v. *Bissessur Dyal* (13). They have been treated as Sudras in our Court for a long series of years and their status as such cannot now be questioned. Asita Mohan did not submit anything to the contrary in his plaint or written statement. No issue was raised as to whether Kayasthas are Sudras or not, when issues were settled in the Trial Court. It appears, however, that during the examination of Banwari Lal Ghose, Asita Mohan's witness (No. 22), questions were sought to be put to him about some Kayasthas recently taking the sacred thread, which the learned Subordinate Judge disallowed. See Order No. 110 of the 2nd February 1912 in Suit No. 79 of 1909. We think that the learned Subordinate Judge rightly disallowed such questions. During the argument before us nothing was urged by Asita Mohan's learned Vakil on this point, but the concluding sentence of the learned junior Vakil's address in reply was, that his clients having raised the point although they as his Vakils had not argued it, it was not to be considered that the point was abandoned. We do not think the question ought now to be allowed to be raised. Bengali Kayasthas have been uniformly treated as Sudras in our Courts and the question does not appear capable of serious argument, although attempts may have recently been made by some members of the community to trace their descent from Kshatriyas, and some of them may have actually taken the sacred thread as belonging to the regenerate classes.

As to the factum of adoption:—

Sailendra Mohan was the second son of Kumar Narendra Chandra Roy of Sheoraphuli, the brother of Nagendra Bala, wife of Radha Mohan and mother of Asita Mohan. Narendra has been examined. He deposed to giving the boy in adoption to Rada Mohan on the 26th *Joistha* 1283=7th June 1876. On that very day the *ekrar-patra* (Exhibit 13) and deed of gift (Exhibit 64) were executed and registered and exchanged by and between the natural father and the adopter. The child was then seven or eight months old. Narendra made over the child at his own house at Sheoraphuli to Radha Mohan, who took him as his adopted son in the presence of a large number of people who had been invited to witness the ceremony. Within a month thereafter the boy was removed to Radha Mohan's house at Panchthopi, where the *namkaran* and *annaprasan* ceremonies of the boy and the *putresthi jag* were performed. At these subsequent ceremonies Narendra, the natural father, was not present. The boy was named Sailendra Mohan Ghose Moulik—Ghose Moulik being the caste name of Radha Mohan, and was brought up in Radha's family as his adopted son. Sailendra and Asita Mohan, who was subsequently born, were taken by Radha Mohan himself on the same date (3rd August 1891) to the same school, the Metropolitan Institution in Calcutta, and admitted there as students. All the members of the family of Radha Mohan, their relations and agnates, *amlas*, servants, tenants and others connected with them treated Sailendra as the adopted son up to his death. He was married at Radha Mohan's expense to the daughter of Raja Khetra Mohan Singh, member of a very respectable Kayastha family of Dinajpur, in 1298. He was known as the *Boro* Babu (eldest son) and Asita Mohan as the *Chota* Babu, the younger son. In the family account books their expenses are so headed. Sailendra called Radha Mohan "father" and Nagendra Bala "mother" and his natural father Narendra as "mama" (maternal uncle in his relationship as the brother of Nagendra Bala). Asita used to address Sailendra as "*dada*" (eldest brother). After Radha Mohan's death, which took place in *Vadro* 1310, invitation letters for the *shrad*, Exhibits 16 (1) and 16 (2), were issued in the name of Sailendra and this was done by Asita Mohan. At the *shrad*, gifts were dedicated by Sailendra. In fact the evidence that Sailendra was known as and treated and enjoyed the status of a son during Radha Mohan's lifetime and also right up to Sailendra's death is so overwhelming that both in the Trial Court and before us, the facts proved by his sons about such treatment were not seriously challenged. Learned Vakil for Asita Mohan conceded that these

(13) 10 C. 688 at p. 694.

facts undoubtedly raised a very strong presumption that Sailendra had been duly adopted. He went further and said that if no direct evidence of the giving and taking had been given, the Court would have been justified upon that presumption in upholding the validity of the adoption but he argued that inasmuch as some direct evidence was given, the question whether giving and taking of the child actually took place or not must rest upon that evidence and not upon any presumption. If that evidence is unsatisfactory the presumption raised by conduct, he argued, would be of no avail. He criticised the evidence of Kumar Narendra Chandra Roy and Jogendra Chandra Ghosh who deposed to the "giving and taking" as discrepant. Narendra could not "exactly recall if Jogendra was at the particular spot at the time of adoption", but "he was at Sheoraphuli participating in the matter of adoption." Jogendra said he was actually present at the time. According to Narendra "the baby was brought in the arms of a maid servant to the *baitakkhana* (the outer apartments) and made over to him and he from his arms made over the baby to Radha Mohan Babu's arms", who took it in his lap and went "inside," meaning the inner apartments, and he followed. "That was the giving and taking." Asked if anything was said on that occasion the witness answered: "I said I make over the baby to you at the free will and consent of myself and my wife (and he accepted it and said 'I have already taken the child, you bless him' and he went inside)": the portion within brackets the witness is said to have volunteered. It is so noted in the deposition.

Jogendra's version is—"From the inner apartments a maid servant brought the child. Kumar Narendra Chandra took the child from her and made over the child to Radha Mohan."

Q.—What did Narendra Chandra say when he made over the child ?

A.—Narendra said, "You have been requesting me for the child for a year. You may take him now."

Q. - What did he want the child for ?

A.—He wanted the child for *dattak grahan* adoption). Radha Mohan took the child in his arms and went to the inner apartments and Narendra also followed him. I have narrated the conversation as I heard it."

There is no discrepancy between these two versions of any value. It must be remembered that the witnesses were speaking in 1912 of what happened in 1876, 36 years ago. That Narendra failed to remember that Jogendra was present at the spot, indicates that they had not been comparing notes. Most of the other persons said to have been present on that occasion are dead. One Lalit Mohan Ghose is still alive, but it is in evidence that he was ill and bedridden when the case was being heard. As against the above evidence we have that of Nogendra Bala, the mother of Asita Mohan. Her denial is of no value. In fact she has so palpably told untruths even in respect of matters not seriously contested by Asita Mohan that the Trial Court was quite right in disregarding it. We are unable to attach any weight to her evidence.

It was at first argued that the recitals in the *ekrar-patra* and deed of gift showed that no giving and taking had taken place on the 26th *Joistha* 1283, but later on the learned Vakil modified his argument by saying that although the *ekrar-patra* (Exhibit 13) might be read as supporting the statement that the giving and taking had taken place, the deed of gift was so worded as to show the contrary, that is to say, it showed that "the giving and taking" was to take place on a future date.

Now Exhibit 13 is quite clear. It contains the following recitals:—

"You (Narendra) have of your own free will made a gift of your second son to me and executed a deed of gift. I (Radha Mohan) also of my own free will and in good faith adopt the aforesaid according to the Shastras."

This passage leaves no room for ambiguity. The argument was, however, based upon the opening sentence of the document which reads thus in the translation put before the Court, *viz.*—"Being without any issue I (Radha Mohan) *intend to adopt a son*," which was construed to mean that he had not yet adopted the boy, but only intended doing so. The passage has, however, been mistranslated. The words used are "*ami grahanechchhuk hawaya*", which mean "I having desired to take a son." This translation was accepted as correct by

the learned Vakil and he withdrew his argument so far as the *ekrar* was concerned.

The argument as to the deed of gift (Exhibit 64) executed by Narendra is based on the following passage:—

"By adopting him as a son according to the rites prescribed by the Shastras, by performing the *namkaran* and other ceremonies, by bringing him up as your son, by performing all the ceremonies at different stages of life, by making him a successor to your properties, etc., etc., you (Radha Mohan) shall live in the enjoyment of perfect felicity."

It is argued that this passage shows that the rites were to be performed later and that inasmuch as the *namkaran* as a matter of fact did take place later at Panchthopi, it was intended that everything in connection with the adoption was to take place later. This is plausible, but overlooks two passages in the earlier part of the document, namely:—

(*a*) "Accordingly, I give you my younger son for adoption by divesting myself of all rights in him." This is the translation in the paper-book, but the passage correctly translated should read thus—"I am giving you my younger son in adoption by divesting myself, etc." That this is the correct translation is accepted by the appellant's Vakil. The Bengali words used in the document are "*amar kanistha putrati apanake nisshatwa haiya dattak dan karitechi.*"

(*b*) "You have also on agreeing to the same and on accepting the gift executed an *ekrar*, I also execute this Deed of Gift and declare as follows: Whatever rights I had in the aforesaid son *have from this day vested in you.*"

If the giving and taking had not taken place on that day, how otherwise had the right to the son vested in Radha Mohan from that day? That is the essential element in an adoption between Sudras. No doubt the *putresthi jag* and *namkaran* took place afterwards, but they are not essential ceremonies. It is also significant that Narendra was not present at Panchthopi where these ceremonies took place afterwards. If the "giving and taking" was to have taken place later at Panchthopi, why did not Narendra go there? The only explanation is that the formal giving and taking had taken place before at Sheoraphuli.

The Bengali passage "*apani jatha shastranushare dattak dan grahan kariya*" has been translated as "*by adopting him* according to the rites prescribed by the Shastras." The verbal form *kariya*" in Bengali may be rendered either as "by adopting him," or "having adopted him." We are unable to draw the conclusion suggested by the learned Vakil having regard to the two passages from the same document above given. We must not also forget that Exhibit 13 and Exhibit 64 are contemporaneous documents.

It is quite true that at the time of the adoption Radha Mohan and his wife were not old and that the lady was not past child-bearing age, but they had been married many years and were without a child. Adoptions had before this taken place in the family. In fact both Radha Mohan and his father were adopted sons. There is nothing unnatural in Radha Mohan thinking of taking a son in adoption at that time. In fact there is evidence, which we see no reason to disbelieve, that his wife was anxious that he should adopt the second son of her own brother and thus prevent him from taking a second wife. She appears to have proposed this adoption through amongst others an English governess in her brother's family.

To account for Narendra swearing that he had given Sailendra in adoption to Radha Mohan, it has been suggested that Narendra was in very poor circumstances and was anxious to thrust the child on his brother-in-law, as too heavy a burden upon himself. Narendra was not, however, in straitened circumstances at that time. We do not see any reason why he should be disbelieved, because he has since suffered from misfortunes and has lost his properties. He belongs to a Kayastha family of rank which at that time enjoyed a high status. We see no reason to doubt his evidence and are of opinion that the giving and taking took place as deposed to by him and Jogendra.

It has also been suggested that the adoption was unlikely as on that date Radha Mohan was in *asouch*, owing to a birth in the family of one Mohendra Narain, an agnate of his. The Subordinate Judge

is right in holding that it is not proved that any message about such birth reached Radha Mohan on that date. Such *asouch* results from knowledge of the fact. It is not shown that Radha Mohan knew of such birth at that time. Besides, it has been held that pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious, but gift and acceptance are secular acts. See *Santappayya* v. *Rangappayya* (14).

It is argued that it is unlikely that the "giving and taking" took place in the *baithakkhana* in Narendra's house, when he had a *thakurbari*, but it is not a religious ceremony and only a secular act.

We have now dealt with all the points raised before us in connection with the adoption and hold that Sailendra Mohan was validly adopted.

We shall now deal with the decision of the learned Subordinate Judge that being Sudras, Sailendra the adopted son was entitled to share equally with Asita Mohan the afterborn natural son, and that he was so entitled also according to the terms of *eirar-patra* (Exhibit 13).

There has been considerable divergence of opinion between the different High Courts in India relating to the shares of an adopted son and an afterborn natural son amongst the three regenerate classes, but this is a case of Sudras, which has not been the subject of much judicial discussion.

Mayne thus deals with it in the second portion of section 168, Hindu Law, pages 224—225 (8th Edition):—

"According to a text of Vriddha Gautama, an adopted and an afterborn son share equally. This text is said in the Dattaka Chandrika to apply only to Sudras, and in the Dattaka Mimansa it is explained away altogether as referring to an afterborn son destitute of good qualities. The High Court of Madras, following Mr. W. MacNaghten and Sir Thomas Strange, say it is in force among all Sudras in Southern India, and M. Gibelin says it is the rule among all classes in Pondichery. It is the rule still in Northern Ceylon. Babu Shamachurn says that in Bengal this rule only applies to the lower class of Sudras."

Clear authority for the proposition that they share equally is to be found in the Dattaka Chandrika. See V, sections 29 to 32.

The Dattaka Chandrika is a work of undoubted authority in Bengal. It is a special treatise on the subject of adoption and "possesses at present", in the words of Mayne, "an authority over other works on the same subject." See section 30, Hindu Law, page 30 (8th Edition).

MacNaghten (W. H.) says—"In questions relative to the law of adoption the doctrine of the Dattaka Chandrika is adhered to in Bengal."

In *Rungama* v. *Atchama* (9) their Lordships in the Privy Council said, on page 97 referring to the Dattaka Chandrika and the Dattaka Mimansa, as follows:—"We think that these treatises are more distinct than the work of Jagannatha; they are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India."

In *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (5) their Lordships on page 437 said:—"Of the Dattaka Mimansa and Dattaka Chandrika the two treatises on the particular subject of adoption, Sir William MacNaghten says, that they are respected all over India: but that when they differ the doctrine of the latter is adhered to in Bengal."

In *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova* (10) a Full Bench of the Court said on page 259—"The Dattaka Mimansa and Dattaka Chandrika are regarded in this Court as the leading authority on the subject of adoption and although their title to such high authority has been disputed and such course may be fairly open to a critic of the decisions of the Court, the Court should, in the absence of a very cogent reason to the contrary, not depart from the standard it has uniformly applied in appreciating the value of the different text book writers."

In *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (8) Lord Hobhouse in delivering the judgment of the

(14) 18 M, 397 at p. 398; 5 M, L. J. 66.

Board said on page 131*:—"The date of the Dattaka Chandrika is not certain, but it is at all events very much later than the Smritis." After dealing with the observations of West and Buhler in their Hindu Law, 3rd Edition, page 11, his Lordship says on page 132*:—"Both work shave had a high place in the estimation of Hindu Lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses when they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

In *Bhagwan Singh* v. *Bhagwan Singh* (15) their Lordships on page 161* say—"Their authority (Dattaka Mimansa and Dattaka Chandrika's) has been affirmed as part of the general Hindu Law, founded on the Smritis as the source from whence all Schools of Hindu Law derive their precepts." They sum up by saying that "both works must be accepted as bearing high authority for so long a time *that they have become embodied in the general law.*"

Their Lordships in the Privy Council in the very recent case of *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (16) have referred to the Dattaka Chandrika as a work of authority and held that the position of the adopted son is accurately defined in the Dattaka Chandrika and Dattaka Mimansa.

Having regard to these series of decisions the Dattaka Chandrika must be considered as a work of great authority.

(15) 26 I. A. 153; 21 A. 412; 3 C. W. N. 454; 1 Bom L. R 311; 7 Sar. P. C. J. 474.

(16) 32 Ind. Cas 403; 23 C. L. J. 395; 20 C. W. N. 702, 30 M. L. J. 19 ; 14 A. L J. 185; 3 L. W. 259; 19 M. L. T. 193; 18 Bom. L. R. 172; (1916) 1 M. W. N. 258; 40 B. 270.

* Pages of 26 I. A.—*Ed.*

Strange in his Hindu Law, page 99 (Edition 1830), states:—"Amongst the Sudras the afterborn son and the adopted share equally the parental estate": but no authority is cited in support. Apparently the basis upon which it is based is the Dattaka Chandrika.

Although the high authority of the Dattaka Chandrika has been accepted by the Privy Council in a series of cases, some recent text-writers, among them Golap Chandra Shastri in his Hindu Law (4th Edition), have tried to question the authority of the Dattaka Chandrika, the work being said to be a literary forgery and "according to rumour" written in support of an adoption case which was then pending in the Calcutta High Court. The author speaks of the rule relating to Sudras as being a novel one enunciated for the first time in the Dattaka Chandrika.

From this and the observations of the Privy Council in the case of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (8) that caution is required in accepting its glosses where it deviates from or adds to the Smritis, it has been submitted that no weight ought to be attached to the passages in the Dattaka Chandrika above referred to, inasmuch as, it is contended that the learned author has, in laying down the above rule, deviated from the Smritis or added to them.

Before examining this contention, we should point out that the rule as laid down in the Dattaka Chandrika relating to the shares of the Sudra's adopted son and the afterborn natural son that they share equally, was accepted without question by the Madras High Court in *Raja* v. *Subbaraya* (17), one of the Judges in that case being Mr. Justice Muthusami Ayyar, who was a great Hindu lawyer. The correctness of that decision has never been questioned. It has been quoted by the Privy Council in the case of *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (16) above cited without disapprobation.

In *Baramanund Mahanti* v. *Krishna Charan Patnaik* (18) a Bench of this Court accepted the law as laid down in the Dattaka

(17) 7 M. 253.

(18) 12 Ind. Cas. 6; 14 C. L. J. '83 at p. 187.

Chandrika on this point. Their Lordships said:—"It is, however, unnecessary to decide this point in the present case, namely, as to whether the adopted son took the father's full share as the families are Sudras and by paragraph 29 of the Dattaka Chandrika, section V of the preceding paragraph 25 does not apply to families of that caste."

There are no other decided cases exactly on the point. We feel bound to attach great weight to the fact that these decisions have remained unchallenged for over thirty years.

It has been pointed out to us that in the Dattaka Mimansa, V. 40 to 44, Vyavastha Darpana, 1042 to 1046, Vyavastha Chandrika (Edition 1880), Volume 2, page 169, Dayacrama Sangraha, Chapter VII, clause 23, Dayatattwa by Raghunandan, Chapter II, Volume 37, Dayabhaga, Chapter X, section 9, V. 13, Vyavahara Mayukha, Mandalik's Edition, page 60, and Mitakshara, Chapter I, section XII, V. 24 to 25, no special rule as to Sudras has been laid down.

In order to examine the contention that the rule laid down in the Dattaka Chandrika has added to or deviated from the Smritis, it is necessary to quote the following passages from the work which give the authorities in support of the rule :

V. Section 29.—"The mode, however, of partition between the son of the wife, the son given and the rest and the legitimate son which has been propounded in what proceeded does not apply to the Sudra class."

V. Section 30.—"Since in the following texts of Manu and Yajnavalkya, respectively, a share equally to that of the real legitimate son is prescribed for the son even by the female slave of a man of the class in question and the heirship with the daughter's son of such son only when having no brother is intimated; the equal partition of the son of the wife, the son given and the rest with the real legitimate son whilst the father lives and their succession to the moiety of the share of such son, where the father may be dead at the time of partition, follow *a fortiori*. And otherwise there would be a great inconsistency, if where the son of the wife, the son given, and the rest took the fourth of the share of the legitimate son, the son by a female slave, whose title is infinitely inferior in respect to these, were to take an equal share with the legitimate son. Manu—'But a son begotten by a man of the servile class on his female slave or on the female slave of his male slave may, by permission, take a share of the heritage. This is the law established.' Yajnavalkya : 'Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brothers should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons.'"

V. Section 31.—"If according to this authority, where there may be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share (with the son by a female slave): the rule for the succession of the daughter (or other proper heir) would be infringed; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate; but only shares equally with such heirs."

V. Section 32.—"Accordingly the text subjoined must be construed as referring merely to Sudras, 'A son given being thus adopted, if by any chance a legitimate should be born, let them be equal partakers of the father's estate.' So also in the following text the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares, of the other sons likewise, is subsequently declared by the sentence, ('If there be an hundred sons') occurring therein, 'For a Sudra is ordained a wife of his own class and no other. Those begotten on her shall have equal share; if there be an hundred sons (the same mode of partition shall obtain).' If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning."

The Dattaka Chandrika cites Manu and

Yajnavalkya as authority for the proposition laid down by him about the Sudras.

The passage in Manu runs thus :

* * * * *

Manu, IX, 179.

Translated by Grady and Haughton thus :—

"But a son, begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, *if permitted by the other sons* : thus is the law established," * * * (*anugnatah*) has been rendered as if permitted by the other sons, which is wrong—it means, *if permitted or directed by the father.* See Kallukbhatta's note on the above passage. He reads "*iti dharmo vyavasthita,*" as "*iti shastra vyavastha niyata,*" that is to say, this is the established *vyavastha* of the Shastras.

The Dattaka Chandrika also supports itself by Manu IX, 157, which runs thus :—

"For a Sudra is ordained a wife of his own class, and no other; all, produced by her, shall have equal shares though she have a hundred sons."

The Dattaka Chandrika says that the "hundred sons" must refer to different classes of sons, otherwise it would be merely a repetition of the earlier general rule laid down in Manu, and unmeaning.

The Dattaka Chandrika also supports itself by the following from Yajnavalkya :—

133.—A son begotten by a Sudra, even though upon a female slave, may take a share by choice.

134.—But after the death of the father, the brothers should make him a half sharer; if he have no brothers, he may take the whole property, unless there are sons of daughters.

The Mitakshara note on the above is:—"A son begotten by a Sudra on a female slave, obtains a share by choice (*kamatah*) that is, by the option of the father. But after (the death of) the father, if there be sons of a wedded wife, then these brothers should make that son of the female slave a half sharer. That is, they should give him a half from their own allotment. However, should there be no sons of a wedded wife, the son of the female slave shall take the whole estate, provided there be no daughters of a wedded wife, nor their sons. But if there be such, the son of the female slave participates for half a share only. From the mention of a Sudra in this place, moreover, (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor even a half, much remote (is the chance of his claiming) the whole. But, if he be docile, he receives a bare maintenance." (Collection of Hindu Law Texts edited by Gharpure, published by Nirnaya Sagar Press, Bombay, 1910).

The translation of these passages by MacNaghten and Colebrooke (Tarkalankar's Edition, 1870, page 331) is practically the same, but we have quoted the above passage from Gharpure, as he follows the text more closely.

It appears from the above that the law does not give the illegitimate son of a Sudra a right to a share in his father's lifetime. The father may, if he chooses, (*kamatah*) give him an equal share with his legitimate sons, and it is only upon the father's death that he becomes entitled to a moiety of the share of the legitimate son.

The law does not require even a Sudra father to recognise such a son, probably with a view to discourage alliances with female slaves. Instead of creating a moral obligation for the maintenance of such a son out of the father's estate upon the taker of the inheritance, the law gives the illegitimate son of a Sudra the right to an equal share. The Dattaka Chandrika argues that if the illegitimate son of a Sudra gets an equal share, the adopted son, who is superior, *a fortiori* gets such a share. This, it is said, proceeds upon an assumption that the adopted son is superior to the son by a female slave. The right of the son by a female slave, it is argued, is based upon consanguinity, whereas an adopted son has no such claim. How then, it is asked, is he superior ? That amongst the regenerate classes the adopted son is superior to the illegitimate son, is not questioned. He has a legal status, the illegitimate son has none. Even amongst Sudras the son by a female slave is not legitimate, and has no status as

a son unless his father chooses to give it to him. The superiority of the adopted son in their case also follows by analogy. The adopted son is voluntarily brought into the family and given the position of a son. It does not, therefore, appear to us that the Dattaka Chandrika has made an incorrect assumption in asserting that amongst Sudras the adopted son is superior to the son by a female slave.

The first text referred to in the Dattaka Chandrika in V, 32, is evidently that in Vriddha Gautama which is quoted in the Dattaka Mimansa thus (see section V, 43): As for the text of Vriddha Gautama, "A given son abounding in good qualities (*yatha jate*) existing should a legitimate son be born at any time; let both be equal sharers of the father's whole estate."

It will be noticed that the Dattaka Chandrika uses the words *tatha jate* meaning (subsequently born) instead of *yatha jate*. A slight typographical variation would make *yatha jate* into *tatha jate*, and it is difficult to say which really is the correct expression. *Tatha jate* gives a natural meaning and is an ordinary expression, but *yatha jate* is not. It has severely taxed the ingenuity of commentators. The way it has been construed to mean "one possessed of good qualities" is not very convincing. This is how the Dattaka Mimansa reads it: "That (passage) must be construed as supposing the former possessed of good qualities, and the legitimate son, destitute of same: on account of the epithet '*yatha jate*' (abounding in good qualities). He, in whom there is a *jate*, that is, an assemblage (*samuha*) of good qualities, (implied by *yatha*), is *yatha jate*—one abounding in good qualities. This is the meaning; for, the term, '*yatha*' is significant of similitude, depending on quality."

The meaning given in Dattaka Mimansa is said to receive support from Manu IX—141, which runs thus:

"Of the man, to whom a son has been given, according to a subsequent law *adorned with every virtue* (* * * * * '*Upapannagunai*'): that son shall take a fifth or sixth part of the heritage, though brought from a different family."

The Dattaka Chandrika says that the above passage from Vriddha Gautama, really refers to Sudras only, which seems to me to be a natural and logical conclusion. His argument is that it refers to a separate class not to the regenerate classes, as otherwise the unequal shares mentioned for the regenerate classes in the Smriti cannot be reconciled. To reconcile Vriddha Gautama's text with those texts a forced interpretation has to be given after adopting such an unusual expression as *yatha jate* for a natural and easily intelligible expression as *tatha jate*.

The Mitakshara says in the passage above quoted that the sons of a wedded wife should give the son of the female slave half from their own allotment. This is made clear by Balambhatta, page 182, II, 22-23, also Subodhini, page 61, I, 26 (same edition) which runs thus: "From the entire estate, a half of what would be regarded as his share, *i.e.*, one-half of the amount allotted to a legitimate issue."

This question about the Sudra adopted son and an afterborn legitimate son's share has been dealt with in Dattaka Siromoni compiled by Professor Bharat Chandra Siromoni of the Sanskrit College at Calcutta, an eminent Sanskrit scholar held in high respect in Bengal. It is a very valuable treatise on the law of adoption, which was published in 1867.

It comprises the following treatises on the law of adoption:—1. Dattaka Mimansa: 2. Dattaka Chandrika: 3. Dattaka Nirnaya, (a compilation by Srinath Bhatta, a celebrated Pandit referred to in MacNaghten's Considerations on Hindu Law, Preface, page xiii): 4. Dattaka Tilaka (referred to as a fragment of valuable commentary on Hindu Jurisprudence by Bhavadeva, an old writer on Hindu rituals also mentioned in Colebrooke's Digest): 5. Dattaka Darpana (a modern digest): 6. Dattaka Kaumudi (referred to in MacNaghten's Principles and Precedents of Hindu Law, Vol. II, page 200): 7. Dattaka Didhiti [referred to as a work of authority in the evidence of Ramcoomar Siromoni in *Srimutty Degumberry Daby* v. *Srimutty Taramoney Daby* quoted in MacNaghten's Hindu Law, edition 1824, Appendix xiii]; 8 Dattaka Siddhanta Munjuri (also a modern digest).

After discussing the various authorities

in Chapter X the learned author of Dattaka Siromoni concludes thus (see page 194/2):—

" * * * * * * *

The meaning of the Shastras is that amongst Sudras the adopted son takes equal share with the *aurasa* son.

In Dattaka Kaumdi, page 25, we have the following:—

" * * * * * * * *

The proof of this is set out in Vidhanamala. If after the adoption an *aurasa* son be born (*yada jate*) they become equal sharers of the whole of the father's estate."

It will be noticed that in the above the reading is again different. It is neither *yatha jate* nor *tatha jate* but *yada jate* which means, when born, which is practically the same as *tatha jate*.

Vidhanamala is undoubtedly an ancient work of authority. Dattaka Didhiti also supports the same view. Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis and inasmuch as the rule laid down in the Dattaka Chandrika in the case of Sudras has been accepted as correct by both the Madras and Calcutta High Courts, we think the matter must rest there.

In this case the adopted son also takes an equal share according to the *ekrar-patra* (Exhibit 13) which runs thus:

"If by the blessing of God, a son of my loins is born, both of them shall be equally entitled to all the aforesaid moveable and immoveable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected."

We hold that the *ekrar* is valid and operative.

In the Andul case, namely, that of *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (11), the *ekrar* was held binding as between the Ranis, the adoptive mothers, and it was further held that the adopted sons could insist upon the performance of the contract by which each Rani bound herself to the other to deal with the estate in their favour. In *Bhala Nahana* v. *Parbhu Hari* (12) it was held that, where a person by an express promise to settle his property upon the boy induced his parents to give him in adoption, but died without having executed a settlement, the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract survived, and that the property in the hands of the widow, the heir-in-law in that case, was bound by that contract.

Asita Mohan, the afterborn son, also relies upon the *ekrar* (Exhibit 13) in support of his contention that according to its terms the *debutter* properties do not go to the adopted son or his heirs.

We hold that in law and according to the *ekrar* Sailendra was entitled to one half of the secular properties and his sons are now entitled thereto.

Debutter :—

The appeals so far as they relate to the *debutter* properties fall under the following heads:—

1. That the properties alleged to be *debutter* are not so.

2. That in law the adopted son has no right to be treated as a *shebait* in respect of the *debutter* properties in the presence of the natural-born son.

3. That in this case the adopted son cannot make any such claim having regard to the *ekrar*.

Before dealing with these contentions it is necessary to give a short account of the family to follow the history of the creation of the *debutter* properties and the dealings therewith. It is necessary to begin from the time of Nrisingha Deb Ghose Moulik who died about 1200, B.S. (1793-94). He left him surviving his brother named Gobind Deb, his widow Lakshiswari, a son named Badan Chandra Ghose Moulik and Brojomoni, a daughter. Badan Chandra died on the 6th *Sravan* 1213. He executed two documents on the day of his death, namely, a *mukti-patra* (Exhibit 14) in favour of his mother Lakshiswari by which he appointed her manager of his estate and an *anumati-patra* (Exhibit 46) in favour of his wives Khudumoni and Bhubaneswari. Shortly after his death, namely, on the 17th of *Sravan* 1213, his two wives executed an *ekrar-patra* (Exhibit 47) in favour of their mother-in-law Lakshiswari, by which they acknowledged and confirmed her appointment as manager and *karta* of the

estate left by their husband, and agreed that she was to get her name registered in the Collectorate, and also stipulated that in the event of their adopting a son, he would in his turn be registered as proprietor. Lakshiswari thus took possession of the estate and got her name registered in the Collectorate Records. It appears that Lakshiswari had some litigation with Gobind Deb, but they settled their dispute by a deed of compromise dated the 18th *Assar* 1220 (Exhibit 15), which recited amongst other things that Gobind Deb had separated from Lakshiswari and Badan in 1204. Lakshiswari continued in possession of the estate until the 26th *Joistha* 1230, when she withdrew from the management and executed a deed of relinquishment (Exhibit 48) in favour of her surviving daughter-in-law Bhubaneswari, empowering her to get her name registered and to manage the estate until she adopted a son, and pending his minority. Lakshiswari also executed about this time two *debutter patras*, V1 and V2, in favour of her widowed daughter Brojomoni as *shebait*, namely, on the 26th *Joistha* 1230 and 30th *Joistha* 1320, respectively. She died on the 11th *Assar* 1230. Bhubaneswari adopted a son named Krishna Kinkar, who married three wives, Kristapriya, Monmohini and Kristamoni, by whom he had three daughters but no son. He accordingly executed an *anumati-patra*, dated the 14th *Kartik* 1351 (29th October 1844), in favour of two of his surviving wives, namely, Kristapriya and Kristamoni, giving them permission to adopt, but provided that his mother Bhubaneswari was to continue as the manger of the estate during her lifetime and after her death the widows were to be the managers, until the adopted son came of age. They adopted a son named Radha Mohan and on the 29th *Sravan* 1272 (12th August 1865) executed an *ekrar-patra* (Exhibit 45) in favour of Bhubaneswari and Radha Mohan, leaving the management in Bhubaneswari's hands, and giving up their rights in the estate in consideration of some properties given to them by way of maintenance. This deed also provided that the estate was to vest in Bhubaneswari after their death and in Radha Mohan after Bhubaneswari's death. On the 6th *Pous* 1286 (20th December 1879) Bhubaneswari executed a "deed of gift and relinquishment" (Exhibit T) in favour of Radha Mohan "as he was at that time fit to manage the estate and to take it out of the hands of the Court of Wards," which had in the meantime taken possession, owing to the incompetency of the proprietor. Radha Mohan thereafter took possession of the estate from the Court of Wards and the contest is now between the sons of his adopted son Sailendra, and Asita Mohan his afterborn natural son.

The *debutter* properties in suit are said to belong to two deities, namely, Radhakant Jiu and Jiu Shiva Durga. So far as the latter is concerned, there is no physical image, but *poojas* of both have been carried on in the family for a considerable time, the *poojas* of the latter being held annually at Durga *poojah* time.

Of the *debutter* properties Taraf Harishpur alone is said to have been dedicated to Joy Shiva Durga and the rest are claimed on behalf of Radhakant Jiu. We intend to deal with individual items of the property in the order in which we have summarised the findings of the learned Subordinate Judge.

(1) *Kismat Binderpore.*—The learned Subordinate Judge had held that this property is not *debutter* and was never treated as such.

It is said to have been endowed by Lakshiswari by a deed of gift, Exhibit M, dated the 8th *Bysakh* 1226, in favour of Radhakant Jiu.

Asita Mohan is the only witness who speaks of the production of Exhibit M from proper custody. He did not search for it, he had never seen it before he got it from one Gobind Adhikari who was in charge of the estate *daftarkhana*. Gobind Adhikari did not tell him where he had got it from. Gobind is still in his service but has not been called. We hold with the learned Subordinate Judge that the production of Exhibit M from proper custody has not been proved.

It is a document written on plain paper and is not registered. A large number of other documents executed during the time of Lakshiswari's management, both before and after the date of Exhibit M, appears, all of them, to have been registered. Its non-registration is a circumstance which has to be remembered in considering the question of its genuineness.

Exhibit 36 (2), which is a certified copy of the Decennial Settlement, shows that Kismat Binderpore was settled by the Govern-

ment with Gobind Deb for the years 1197 to 1206, B.S.

Exhibit 40 (2), dated 28th *Chaitra* 1212= (9th April 1806, is Badan's application for registration of his name as proprietor, in which he alleged that Gobind Deb was the *benamidar*.

Lakshiswari is said to have dedicated this property by Exhibit M in 1226. She was at that time managing the estate of Badan under the *mukti-patra*. She had no right to dedicate any property either as *mukhtear*, or as executor if the *mukti-patra* be held to operate as Badan's Will. She gave up her management in favour of Bhubaneswari in 1233 by Exhibit 48. In that document Binderpur is one of the properties mentioned by name as belonging to the estate. There is a clause in that document which runs thus—"That you (Bhubaneswari) shall maintain the service and worship of the deities established by your husband according to custom, preside over your husband's house, etc." This is a general direction to the lady to manage the estate and keep up the *shevas*. It does not support the contention that Binderpur was treated as *debutter* property at that time. The document taken as a whole rather goes against such a contention, as Binderpur appears in the schedule of properties therein set out as belonging to the estate of Badan. It directs Bhubaneswari to get her name registered in respect of such properties in her place.

Exhibit 42 (2), dated *Aswin* 1230=17th September 1823, shows that Bhubaneswari got her name so registered.

Exhibit 12, dated 18th *Sravan* 1275=1st August 1868), is an *ijara* lease granted by Bhubaneswari of the *mal* and *kharidji* lands of five *mauzas* including Binderpur. It is not clear from it what property is referred to as "dedicated to the service of the deities," but it is clearly not a lease granted as *shebait* and the bulk of the lands leased seems to be *mal* lands.

Bhubaneswari relinquished her management in favour of Radha Mohan by Exhibit T, dated 6th *Pous* 1286=20th December 1879. This deed recites that "Radha Mohan is the sole reversionary heir to the properties," that he is "entitled to exercise the right of sale and gift in those properties and to remain in possession of them from generation to generation in succession in any way he pleased." In the list of properties Binderpur is not specifically mentioned as *debutter*. This document purports to transfer the *zemindaris*, *mal*, *debutter*, etc., to Radha Mohan and contains a general direction that he should perform the service of the deities, etc.

We have from the mutation decree, Exhibit 50 (11), date illegible, that Nabin Krishna Banerjee as manager for Bhubaneswari was registered for Binderpur and from Exhibit 50 (10), dated 15th January 1881, that Radha Mohan was registered as proprietor of that *mauza*, neither of them as *shebaits* for the *thakur*. From 1201, as shown from Exhibit 51 (2), up to 1881 in the Collectorate Records the *zemindars* are recorded as proprietors, not as *shebaits*.

In Exhibit 24, dated 3rd *Vadra* 1308=19th August 1901) which is a *kabuliyat* by a tenant in favour of Radha Mohan in respect of certain *chowkidari chakran* lands. *Kismat* Binderpur is referred to as appertaining to his *zemindari*. From Exhibit 58, a *hastabad* and *terij* prepared in 1288, Binderpur appears to have been treated as part of the *zemindari* estate. *Dakhilas* for a great number of years, Exhibit 25 series and Exhibit 26, are in the name of the *zemindars* as owners.

The receipts from the property and payments of its Government revenue are entered in the *mal* accounts of the family. Although payments for land revenue of the other *debutter* properties are shown in the *debutter* accounts, such payment for Binderpur is not there shown.

The above facts show that the learned Subordinate Judge was quite right in holding that Binderpur was not *debutter* property and has not been treated as such.

The mere reference to the properties in Exhibit 12 "dedicated to the service of the deities", even taking that reference as relating to Binderpur, cannot lead one to conclude that Binderpur was really *debutter* property.

Exhibits V1 and V2 both of June 1823 and which are registered *debutter* deeds executed by Lakshiswari in favour of the deity Radha Gobind Jiu, appointing her widowed daughter Brojomoni as *shebait*,

make no reference to Exhibit M, or to Binderpur as having been previously dedicated. Exhibit M has, however, been sought to be supported by another unregistered document (Exhibit C) which is an *arpannama*, said to have been executed by Bhubaneswari on the 4th *Bysakh* 1253. The date on this document appears to have been altered and some other documents, such as the Collector's *rubokari* (Exhibit A2) for registration of Bhubaneswari's name as *shebait*, dated 18th *Baisakh* 1273, which makes no mention of Exhibit C, throw doubt on its genuineness.

It is pointed out that both Exhibit M and Exhibit C bear a note that they were filed in a case before the Deputy Collector. There is no evidence, however, that they were actually so filed.

To sum up, having regard to the registration of the names of the *zemindars* as proprietors, not as *shebaits*, to the *dakhilas* in their names as *zemindars*, to the absence of entries relating to the properties in the *debutter* accounts as above mentioned, to the payment of Government revenue from the *mal* accounts, and the non-registration of the deed of endowment, Exhibit M, when the bulk of the documents of transfer executed by members of the family are found to have been registered, and the want of proof that Exhibit M was produced from proper custody, support the finding of the Subordinate Judge, which we uphold.

The Trial Court has also found that Harishchandrapur is not *debutter* property and we agree with that finding, and as there is no appeal from it by Asita Mohan, we need not deal with it any further.

As to the properties found to be *debutter* by the Trial Court we shall deal with them in the order in which they appear in his judgment.

Harishpur.

This property is shown to have been purchased in 1192 B. S. by Nrishingha Deb Ghosh Moulik as *shebait* in the name of the deity Joy Shiva Durga. See Exhibits S3 and S2 (where his name appears as Nursing Ghose), dated 1st *Chait* 1192 B. S. and 21st *Chait* 1192 respectively. The *kabuliyat* for the Decennial Settlement for this estate from 1197 to 1206 B. S. was executed by Nrisingha Deb as such *shebait*. See Exhibit S1. We find from Exhibit W2, dated 13th July 1807, that Government revenue was paid for it by Lakshiswari as *shebait* and Exhibit E4, dated 1st *Aghran* 1287, that Radha Mohan applied for registration of his name as *shebait*. This exhibit also shows that before him Bhubaneswari was recorded in the register as *shebait*, although the *rubokari* Exhibit 42 (2), dated 17th September 1823, in respect of Bhubaneswari's application for registration does not specifically show that she applied to have her name registered as such *shebait*.

It is clear from the evidence that there has been an annual *puja* held in the family in the name of Joy Shiva Durga. No doubt the mere purchase of an estate in the name of a *thakur* does not prove a dedication [see *Rajmohun Gossain* v. *Gourmohun Gossain* (19) and *Maharanee Brojosoondery Debea* v. *Ranee Luchmee Koonwaree* (20)], but we think that the documents above referred to and the way in which the proprietors of the estate dealt with the property, show that Harishpur was validly endowed to the deity. No adverse inference can legitimately be drawn against the *debutter* character of the property from the fact that its income is entered in a separate account, nor in the books of account of the deity Radha Gobind Jiu. That her *puja* expenses appear in the secular account is probably due to the fact that the income of the dedicated property was insufficient and had to be supplemented from the income of the secular estate. It is a small property and is shown to have been treated as *debutter* by successive holders of the estate and held by them as *shebaits*.

We have been asked to hold by the sons of Sailendra Mohan on the strength of Exhibit 15, which is a deed of compromise executed in *Assar* 1220 by Gobind Deb in favour of Lakshiswari settling the litigation above referred to, that inasmuch as *Mauza* Harishpur is there recited as belonging to Lakshiswari in her own right as her *nij taluk*, there

(19) 4 W. R. 46 (P. C.); 8 M. I. A. 91; 1 Suth. P. C. J. 378; 1 Sar. P. C. J. 723; 19 E. R. 464.

(20) 20 W. R. 95; 15 B. L. R. (P. C.) 176 *note*; 4 Sar. P. C. J. 810.

is ample ground for holding that Nrisingha Deb Ghose Moulik acquired it in the *benami* name of the *thakur* to deprive his brother Gobind Deb, that it was put in the name of the *thakur* although it was really secular property. In support of this contention reference has also been made to the *mukti-patra* (Exhibit 14) in favour of Lakshiswari and the *ekrar* of Lakshiswari (Exhibit 48) in favour of Bhubaneswari, where there is no specific mention of this property being *debutter*. We are unable to accede to this contention. The absence of a permanent image has also been commented upon. Such an image is not absolutely essential for dedication to a *thakur*. The Durga Puja is a periodical festival in Bengal and clay images of the *thakur* are built every year and thrown into a river after the *puja* is over. Such *puja* of Shiva Durga has been held every year for a long period in this family. We agree with the Trial Court that Harishpur is *debutter* property.

Huda Kutubpur (Fatehpur), Dayanagar and Hasnabad. Exhibits V1 and V2 and Exhibit 104 govern the above.

V-1 deals with Kutubpur and portion of Dayanagar, Exhibit 104 with Dayanagar and V2 with Hasnabad.

V1 and V2 are taken together, as Lakshiswari purported to create these endowments appointing Brojomoni *shebait*. They were executed about the same time, namely, V1 on the 26th *Joistha* 1230 and V2 on the 30th *Joistha* 1230. The endowment is in favour of the deity Radha Gobind which also appears to have been established about the same time. The *thakur* is in existence and has been located in a large *thakurbari* and its daily and periodical festivals have been conducted ever since. Separate accounts are kept in the name of the *thakur* and the *sheva* has been carried on by successive holders of the estate. Brojomoni got her name registered as *shebait*, see Exhibits E, E2 and U8. Brojomoni acquired other properties out of the income of the endowed properties in the name of the *thakur* and got her name registered in respect of them as *shebait*. She paid revenue as *shebait* and remained in possession as such up to her death, which occurred in 1285 B. S. After her death Badan's heirs kept those properties separate and treated them as validly endowed, as also the properties acquired out of their income.

The originals of V1 and V2 have not been produced. Asita Mohan was called upon to produce the original of one of them, but did not, and certified copies produced by him were admitted. The sons of Sailendra Mohan had in fact called upon Asita Mohan to produce V1 and V2 and were ready to file certified copies upon non-production of the originals. We hold that V1 and V2 have been properly admitted and that they are genuine documents.

It is to be noticed that Lakshiswari relinquished her management in favour of Bhubaneswari by Exhibit 48 on the 26th *Joistha* 1230, the same day she executed V1 in favour of Brojomoni, and four days later, namely, on the 30th *Joistha* 1230, she dedicated further properties by V2 in Brojomoni's favour as *shebait*. It is quite clear she, as manager or executor, had no authority to create such *debutters*. It has been argued that these dedications were apparent and that in substance they were by way of provision for Brojomoni, specially as the deeds provided that after Brojomoni's death Bhubaneswari was to succeed as *shebait* and after her the adopted son of Badan. It is no doubt capable of that inference, but it is quite possible also that Brojomoni was pious minded and Lakshiswari thought her a fit and proper person to act as *shebait*. Nothing has been placed before us to show that any fraud was contemplated. This has not even been suggested.

It is quite correct that Lakshiswari had no legal power to create such endowments, but the subsequent successors to the inheritance did not question their validity prior to this suit. No doubt in the list of properties made by the Court of Wards during its management, these properties were included in a general list of properties belonging to the estate, as also in the schedule to Exhibit T, but we find from Exhibits BB1 and EE3, Radha Mohan applied as *shebait* in 1881 to have the name of the *thakur* registered in respect of Dayanagar, Kutubpur and Fatehpur and it was so ordered.

Having regard to all the circumstances we hold that the above properties were

debutter. We do not think we ought to, after this lapse of time, hold the endowments void.

Sreedhurpur, Paharpur and portion of Kutubpur.—These were purchased from the income of the other three.

Exhibit N1 is the conveyance of Sreedhurpur in favour of the idol represented by Brojomoni as *shebait*, dated 6th *Falgoon* 1237.

Exhibits O and P (dated 3rd *Joistha* 1238 and 28th *Joistha* 1239) are similar conveyances of Paharpur and Exhibit Q, dated 27th *Choitra* 1237, is a similar conveyance in respect of $7\frac{1}{2}$ annas of Kutubpur.

It is conceded by the appellants that our decision in respect of the other three will also govern these properties. We hold that they are *debutter*.

The last one of the properties we have to deal with is

Mohonpur.—Lakshiswari obtained this property as a gift from her father. See Exhibit Y, dated 25th *Agran* 1298. Exhibit R, dated 14th *Kartik* 1251, is the *anumati-patra* in favour of his widows executed by Kristo Kinkar. It also purports to assign Mohonpur as additional estate for the *thakur* Radha Gobind. The *ekrar*, Exhibit 45, of 1272 executed by the widows in favour of Bhubaneswari and Radha Mohan contains a recital that Mohonpur is dedicated to the *thakur* and we find from Exhibit AA4 that in 1287 Radha Mohan got the *thakur* registered in the Collectorate as proprietor represented by him as *shebait*.

We hold that Mohonpur is *debutter*. In fact it has not been seriously contested that it is not.

The sons of Sailendra Mohan have, however, submitted that as the income of the *debutter* properties exceeds the expenditure for *deva sheva* and inasmuch as large sums of money from the *deva sheva* fund have been shown to have been spent in Radha Mohan's time in payment of his personal debts and expenses, as also for the maintenance of the daughters of Kristo Kinkar, we should hold that the above properties were only charged to the extent of the amount necessary for the *sheva* and the balance of the income should be declared divisible as secular property. The learned Subordinate Judge has found that the income of the *debutter* properties is roughly between Rs. 6,000 and Rs. 8,000 and the expenses have been variously estimated between Rs. 3,000 and Rs. 5,000. It may be that there is a small margin left over, but as we find that there was a clear intention of creating the properties *debutter* and they were treated as such by the subsequent holders of the estate, although Radha Mohan appears to have spent some of the income on his personal account and also to have mortgaged Paharpur without mentioning that it was *debutter* property, we do not think it would be right to hold on the materials before us that the properties were not absolutely dedicated, but are merely charged with *deva sheva* expenses. All the documents show that these were genuine endowments, and intended to be absolute.

The next question is as to the right of Asita Mohan and Sailendra's sons to be treated as co-sharers. The learned Subordinate Judge has held against the latter, basing his judgment mainly on the *ekrar* executed by Radha Mohan, Exhibit 13. He rightly holds that *shebaitship* can be held in shares and separate *palas* may be directed. Ordinarily the right to *shebaitship* of family deities goes by inheritance unless otherwise provided by the deed of endowment. The learned Subordinate Judge, however, seems to think that inasmuch as in the presence of the natural-born son, the adopted son is not competent to perform the *krityadis* and no specific mention is made in the *ekrar* in this case relating to the adopted son's right to the *shebaitship*, Sailendra had no right to it, and so Sailendra's sons have no such right. When he is speaking of *krityadis*, he is referring collectively to *deva krityas* and *pitri krityas*, namely, the *shevas* and *shrads*. It is now settled law that as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son, except in some special matters. Let us see if there are any specific rules excluding him from *shebaitship* in the presence of the *aurasa* son. We find that in the presence of the *aurasa* son, the adopted son's right to perform certain

shrads is cut down. If after adoption a natural son is born to the adopter, then the adopted son cannot perform the *adya* or first *shrad*, the twelve monthly *shrads* which follow, the six-monthly and the anniversary *shrad* and the *sapindi-karan* (see Sarkar on Adoption—Tagore Law Lectures, 2nd Edition, page 388). Subject to this restriction, however, he can perform all the other *shrads* like the *aurasa* son, with this variation that the anniversary *shrads* have to be performed by him in the *ekoddista* form in honour of the deceased only and by the *aurasa* son in the *parvana* mode, in which a double set of three oblations are presented. So the *aurasa* son has a superior right in respect of *pitri-matri krityas*, but there is no such preference in respect of *shevas* or *deva krityas*.

The learned Subordinate Judge has drawn an adverse inference against the adopted son inasmuch as no reference is made in the *ekrar*, Exhibit 13, to his having equal rights in the *debutter* properties, while there is such a reference to his succeeding to the secular properties.

The passage in the *ekrar* runs thus:—

"From this day the aforesaid adopted son has become entitled to all my properties, moveable and immoveable, and to perform the services of the idols and all rites and ceremonies in connection with maternal and paternal ancestors. After my death, he shall perform the services of the deities and live in my ancestral residence at Punchthopi, and being vested in all my rights, and entitled to the ownership of these properties, he shall protect, enjoy and possess them by exercising the rights of sale and gift, and shall maintain all my rites and ceremonies. If by the blessing of God a son of my loins is born, both of them shall be equally entitled to all the aforesaid moveable and immoveable properties which may be left by me, and the son born of my loins shall not be entitled to claim a larger share in them, and if he does so, it shall be rejected."

In the second portion there is no reference to the right to perform the service of the idols, but we are unable to agree with him in construing the silence into a denial of the right. The right has not been expressly taken away, nor can it be said to have been taken away by implication. It is difficult to draw such an inference on the supposition that the adoptive father must be taken to have known that the natural son has some superiority over the adopted son in respect of *shrads*, and his intention was accordingly to disqualify him from sharing the *shevas*. Such a conclusion is far-fetched. The learned Subordinate Judge also supports his decision on the ground that it appears from Narendra's evidence that the question of *debutter* properties was discussed at the time of the adoption, and he says that because nothing is mentioned in the *ekrar* about them, it must be taken that Radha Mohan intended to exclude the adoption in case of the birth of an *aurasa* son. This is based on the following passages in Narendra's evidence which appears in his cross-examination:—

"*Q.*—Was there any talk about the *debutter* properties at the time of the *ekrar*?

A.—Not at the time of the *ekrar*, but when the draft was being made.

Q.—What was it?

A.—Radha Mohan Babu proposed that in case he gets a natural-born son, he would have the right to perform the *deva kirti* and *pitra kirti*, that is, he did propose but not accepted, neither inserted in the deeds.

Q.—Again I ask, was there any talk regarding *debutter* properties? (Objected to).

A.—Radha Mohan Babu said he got the *debutter* properties and in case he gets a natural-born child, he would have control over the *debutter* properties, but it was not accepted, but as it tantamounted to carving of the property, for good or bad reasons, I did not agree, and hence it was not inserted in the deed."

It is quite possible that if there was a discussion at the time, and Narendra did not agree to Radha Mohan's suggestion about the *debutter* properties, the matter was dropped and the law was left to take its own course. If it was settled that the adopted son was not to get it at all, Radha Mohan could have easily inserted in the deed that the adopted son would have no such

right in the presence of the *aurasa* son. Neither of them has any interest in the *debutter* properties except as *shebait*, and it is quite conceivable that the adopter did not think it necessary expressly to provide for the contingency.

We hold, therefore, that Sailendra's sons are entitled to take eight annas in the properties found by the Subordinate Judge and ourselves not to be *debutter* and that they are jointly entitled to rank as *shebaits* equally with Asita Mohan in respect of the properties found by both Courts as *debutter*. For convenience of the *shevas* the properties are to be held under joint management, but the periods of the *sheva* may be divided into six-monthly *palas* or annual *palas* or in alternate years, as they may arrange between themselves, failing which liberty is given to them to take the direction of the Court.

During the progress of the appeal we were informed that the parties had settled their disputes amicably and the matter was allowed to stand over for recording the settlement, subject to our sanction, as infants were involved. We regret that in spite of the advice of the learned Vakils the settlement has fallen through. The estate is not a large one and may be lost in this somewhat expensive litigation.

Asita Mohan's appeal fails in every respect and is dismissed with costs.

The appeal of Nirode Mohan and others succeeds as regards their right to *shebaitship* and we allow their appeal with half costs.

Appeal No. 222 *dismissed*; *Appeal No.* 266 *partly allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 239 OF 1914.

April 14, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

SELAMBAYI—PLAINTIFF—APPELLANT

versus

SANGU PANDITHAN AND OTHERS—DEFENDANTS Nos. 1 to 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 1—Joinder of plaintiffs—Suit by co-owner in possession for injunction against trespasser, maintainability of.

Per *Curiam*.—One of several co-owners who is in possession of property can maintain an action for injunction against an intending trespasser without joining the other co-owners as plaintiffs. [p. 147, col. 2; p. 148, col. 1.]

Per *Sadasiva Aiyar, J.*—Distinctions between 'real' and 'personal' actions known to English Law should not be introduced into Indian Courts. [p. 148, col. 1.]

The rule as to several 'heirs' of a deceased owner taking as 'one heir' known to English Law is not followed in either the Muhammadan or Hindu systems of Law. [p. 148, col. 1.]

Ahmad Sahib Shutari v. *Magnesite Syndicate Ltd.*, 29 Ind. Cas 60; 28 M. L. J. 598; 2 L. W. 460; 17 M. L. T. 387; *Pateswari Pratap Narain Singh* v. *Rudra Narain Singh*, 1 A. L. J. 543; A. W. N. (1904) 119; 26 A. 528, followed.

Second appeal against the decree of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 64 of 1913, preferred against that of the Court of the District Munsif, Paramakudi, in Original Suit No. 710 of 1911.

FACTS.—A woman belonging to the dancing girl caste died, leaving behind her two daughters as her heirs and some property. One of the daughters took possession of one item of property. Another person interfered with her possession. The present suit for an injunction was brought by her against the trespasser without making the other daughter, her sister, a party to the suit. The District Munsif decreed her suit, but on appeal the Subordinate Judge reversed the decree and set it aside on the ground that the other daughter was a necessary party to the suit and dismissed the suit altogether. The present appeal is against that decree.

Mr. *K. S. Narayana Ayangar* for Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *M. A. Thirunarayanachariar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Following *Ahmad Sahib Shutari* v. *Magnesite Syndicate, Ltd.* (1), I would hold that even if the plaintiff is not the sole owner of the plaint property, she is entitled to maintain her suit for an injunction against intending trespassers without joining her alleged co-owner or co-owners as parties, especially if she has been in sole actual possession, as found by the District Munsif, and was in such sole actual possession when the trespass was threatened and when the suit was brought. Mr. Thirunarayanachariar

(1) 29 Ind. Cas. 60; 28 M. L. J. 598; 2 L. W. 460; 17 M. L. T. 387.

for the defendants drew our attention to certain authorities laying down that one of several co-parceners who inherited the plaint property as co-heir cannot maintain what is known as a "real" action in English Law even against trespassers without joining his co-owners. In the *first* place, the present action for injunction is not a "real" action. In the *second* place, I am not prepared to bring unnecessary distinctions between the rules of procedure in "real" and "personal" actions from the English Law into Indian Courts. *Lastly*, the rule as to several "heirs" of a deceased owner taking as one "heir" known to English Law is not, in my opinion, followed in either the Muhammadan or the Hindu systems of Law.

I might also refer to the case of *Pateswari Pratap Narain Singh* v. *Rudra Narain Singh* (2), where it was held that one member of a joint Hindu family can maintain a suit in ejectment (a "real" action) against trespassers though he did not sue as manager of the family.

I would, therefore, set aside the judgment of the lower Appellate Court which dismissed the suit on the preliminary ground of non-joinder of parties, and direct that Court to re-hear the appeal presented to it and pass fresh decision; costs to abide.

BAKEWELL, J.—The findings of the District Munsif are that plaintiff was in possession of certain property and defendants were trespassers thereon. On these findings, I think that plaintiff's possession was sufficient to sustain her suit, and that the trespassers should not have been allowed to raise any plea as to her title.

I agree with the order proposed by my learned brother.

Appeal allowed; Suit remanded.

V. R. P.

(2) 1 A. L. J. 543; A. W N. (1904) 119; 26 A. 528.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 346 OF 1914.

February 25, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

HIMMAT BAHADUR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DHANPAT RAI—DEFENDANT—RESPONDENT.

Hindu Law—Family settlement, when valid.

A "family settlement" is valid in law if at the time it was arrived at there was a *bona fide* dispute, *bona fide* settled by the members of the family. There is a great difference between a settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the members of the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it. [p. 150, col. 1.]

Where a baseless claim was put forward to the property of a widow and the lady, in order to avoid being forced to litigation, consented to give the property to the claimant:

Held, that under the circumstances the settlement was not a "family settlement" and the reversioners, who were not parties to the settlement, were not bound by it. [p. 150, col. 1.]

First appeal from a decree of the Subordinate Judge, Budaun.

Dr. *Sundar Lal* and Mr. *G. W. Dillon*, for the Appellants.

Mr. *B. E. O'Conor* and Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit for possession of landed property consisting of a 20-*biswas zemindari* share in *Mauza* Barsua, *Mahal* Dhanpat Rai. One Duli Chand left two sons, Munshi Nitya Nand and Munshi Bechei Lal. We are not concerned with the branch of Munshi Bechei Lal. Munshi Nitya Nand died in the year 1878 leaving him surviving a widow *Musammat* Mullo and two daughters *Musammat* Saraswati and *Musammat* Naraini. *Musammat* Naraini was married to the defendant Dhanpat Rai. She died in the year 1889 in the lifetime of her mother. *Musammat* Saraswati died on the 25th of November 1902 leaving her surviving two sons who are the plaintiffs in the present suit. *Musammat* Mullo after the death of her husband executed a deed on the 15th of December 1880 by which she gave a

2 ½-*biswas zemindari* share in this *mauza* to her two daughters in equal shares. It is said (and probably correctly said) that she gave in a similar way other property to each of her daughters, worth about two lakhs, by other deeds. On the death of *Musammat* Naraini in the year 1889 *Musammat* Mullo and her daughter attempted to get back the property which had been given to *Musammat* Naraini. They were opposed by the defendant Dhanpat Rai, who made claim to all the property which had been in the possession of his wife. The result was that a submission to arbitration was entered into, a Pleader of the name of Munshi Baldeo Prasad was called in, he gave certain advice, and the end was that Dhanpat Rai executed a relinquishment of all claim to the major portion of the property whilst *Musammat* Mullo and her surviving daughter admitted his claim to the property now in dispute. Subsequently the property was formed into a new *mahal* under the name of *Mahal* Dhanpat Rai. The plaintiffs have now instituted the present suit in which they allege that they became entitled to the property upon the death of their mother on the 25th of March 1902, and that neither she nor their grandmother *Musammat* Mullo had any power to alienate the property. These allegations are met with the allegation, *first*, that Nitya Nand had made an oral Will in favour of his wife *Musammat* Mullo which authorised her to dispose of the property as she pleased, *secondly*, that the suit was barred by limitation, and *thirdly*, that the arrangement on the death of *Musammat* Naraini was a family settlement which ought to be given effect to.

As to the first point about the Will, the Court below has entirely disbelieved the allegation. There cannot be the least doubt that the Court was right. This Will was alleged for the first time in the present litigation. As to the question of limitation false evidence was given as to the date of the death of *Musammat* Saraswati. We entirely agree with the finding of the Court below that the lady died on the 25th of March 1902. There only remains for consideration the question of the alleged family settlement. The learned Subordinate Judge thought that the transaction should be treated as a family settlement, and dismissed the plaintiffs' suit. No doubt their Lordships of the Privy Council and this Court have always been ready to give effect to what is in reality a "family settlement." The case of *Behari Lal* v. *Daud Husain* (1) has been quoted, also the decision of their Lordships of the Privy Council in the case of *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (2). A careful perusal of both these cases will show that there was in each case a *bona fide* family dispute. We have to look into the facts of this case to see whether there was anything of the kind. Reading the deed of gift of the 15th of December 1880, which is a specimen of the manner in which *Musammat* Mullo gave over the property to her daughters, we think that the document, read as a whole, clearly shows that what the mother did was to accelerate the succession of her two daughters. There is, however, nothing in the document which would lead us to think that she had any intention of doing anything more. On the death of Naraini, Dhanpat Rai made claim to everything that his wife had been in possession of. It seems to us almost impossible to believe that Dhanpat Rai really considered that he had any title to this property. In his evidence in the present case he makes a feeble attempt to suggest that he thought that his wife was possessed of two classes of property, namely, some that she had got from her mother as *stridhan* and some which she had got as part of her father's estate and that this was the dispute. We have only the bare word of Dhanpat Rai for the suggestion that his wife had two classes of property, unsupported by any kind of documentary evidence. The defendant was not even born at the time of Nitya Nand's death and could know nothing personally of the property he left. Not one of the witnesses who speak of the dispute allege that this was the dispute. It seems to us that the very highest at which the defendant's case can be put is that he in the year 1889 put forward a baseless claim and the ladies, in order to avoid being forced to litigation,

(1) 18 Ind Cas. 721; 11 A. L. J. 352; 35 A. 249.
(2) 24 Ind. Cas. 307; 14 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648.

consented to give him the property in suit. It is said that this settlement was carried out at the suggestion of a respectable Pleader. No doubt it may have been very wise to advise the ladies to yield up property of small value sooner than have to incur the expenses and suffer the horrors of litigation, but it does not follow from that that there was a *bona fide* dispute, *bona fide* settled by the members of the family. There is a great difference between a settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the members of the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it. The defendant has enjoyed the property ever since the year 1889. He has certainly got full consideration for all that he gave up on the death of his wife. There has no doubt been some delay on the part of the plaintiffs in instituting the present suit. But it appears from certain matters on the record that they have been engaged in other litigation since the death of their mother. We think that the decision of the Court below was wrong and that it would be very dangerous to hold that the parties could evade the law by a pretended dispute and family settlement.

We allow the appeal, set aside the decree of the Court below and decree the plaintiffs' claim with costs in all Courts.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 324 OF 1914.

March 15, 1916.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

KUDAPA VENKAYAMMA, MINOR, BY HER FATHER AND GUARDIAN MALLINA KRISTNAMMA—PLAINTIFF—APPELLANT

versus

KAKARLA NARASAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law – Will, construction of—General canons of construction of Hindu Wills—Life-estate, creation of, with residue to persons unborn at testator's death—Legatees born before death of legatee for life, vesting of estate in—Hindu Bequests Validation Act (Mad. Act I of 1914), *s.* 2 (2), *effect of, on antecedent Wills.*

The question of the construction of a Hindu Will has to be determined with reference to the terms of the document in each case, though, in arriving at the true meaning of the document, one must have regard to any general rules of construction that bear on this matter. [p. 151, col. 1.]

One of the elements to be taken into consideration in construing a Hindu Will is that bequests to persons not born at the date of the testator's death are void and that the testator must be presumed to have intended that only persons born at the date of his death should take. [p. 151, col. 1.]

Bhagabati Barmanya v. *Kali Charan Singh*, 10 Ind. Cas. 641; 38 C. 468; 15 C. W. N. 393; 9 M. L. T. 411; 21 M. L. J. 387; 8 A. L. J. 433; 13 C. L. J. 434; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295 (P. C.), referred to.

The intervention of a life-estate before legacies to unborn persons are to take effect prevents the application of the general rule that only persons born at the death of the testator were intended to take. [p. 151, col. 2.]

A residuary legatee born after the testator's death, but before the termination of the life-estate, has a vested interest in the property bequeathed, and his heirs are entitled to his share on his death occuring during the continuance of the life-interest. [p. 152, col. 1.]

The language of clause 2 of section 2 of Madras Act I of 1914 is general and has the effect of validating dispositions which are to come into operations at a future date in accordance with the intention of the testator. [p. 151, col. 2.]

The section means that if a testator intended that his disposition should take effect at a future date, and that date happened to be subsequent to the passing of the Act, then by virtue of the Act the disposition would be valid and effective. [p. 151, col. 2.]

Appeal against the decree of the Subordinate Judge, Kistna at Ellore, in Original Suit No. 3 of 1913.

Messrs. *V. Ramesam* and *P. Narayanamurthi*, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate-General, and Mr. *B. Somayya*, for the Respondents.

This appeal coming on for hearing on the 3rd, 6th and 7th March 1916, the Court delivered the following

JUDGMENT.—There are two questions arising in this appeal. The *first* relates to the construction of the Will Exhibit A. There can be no doubt that Subbanna, one of the sons of a daughter of the testator, acquired a vested interest under the terms of the Will on the death of the testator. He lived for some time after the testator's death, and then died leaving the plaintiff his

widow. It is argued on behalf of the plaintiff that upon a proper construction of the Will, only such of the sons of the testator's daughter would take as were born and living at the time of the testator's death: and Mr. Ramesam relies for this construction upon a ruling of the Privy Council reported as *Bhagabati Barmanya* v. *Kali Charan Singh* (1). The question being one of construction, it has to be determined with reference to the terms of the document in each case, though, in arriving at the true meaning of the document, one must have regard to any general rule of construction that bears on the matter.

It is said that, because under the Hindu Law which governed Wills of the Hindus at the date of the Will in question, unborn persons would take no interest, therefore the testator must be presumed to have intended that only persons that were born at the date of his death should take. No doubt that is an element to be taken into consideration, and we do not think that their Lordships of the Privy Council, in alluding to that factor in the construction of a Will, meant to lay down anything further than that this fact is to be borne in mind in arriving at the true intention of the testator. The terms of the Will seem to be quite clear to show that not only the sons of the daughter of the testator born and living at the date of the testator's death, but also others who may be born thereafter and existing at the period of distribution, were intended to take. Here a life-estate in favour of the testator's widow has been intervened, so that the property would not come into the possession and enjoyment of the residuary legatees until her death. The material passage in the Will is to this effect: "The whole of the remaining property consisting of immoveable property, etc., should be enjoyed with right by the son already born to my second daughter, Kudapa Chinna Gopanna, *viz.*, Subbanna and by the male issues who may be born hereafter to the said Chinna Gopanna." The Will then goes on to provide for certain payments to be made by the testator's wife and it is only the residue that is left that is to go to the sons of the testator's daughter. No good reason can be suggested why the testator should have intended to benefit only those sons of his daughter who might be born at the time of his death and not those who might be born thereafter and as I have said, the terms of the Will indicate the contrary. If there was no intervening life-estate, the argument of the appellant no doubt would have force, but the fact that the life-estate intervened prevents the application of the general rule that only the persons born at the death of the testator were intended to take.

The *next* question arises upon the construction of the Madras Act I of 1914. The Act came into operation only in March 1914, and the respondents were born after the Act came into force. The Will itself was made long before the Act was passed. The question then is whether clause 2 of section 2 of that Act operates upon the dispositions of this Will. That clause says: "In the case of transfers *inter vivos* or Wills executed before the date of the Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date: Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property had vested prior to the date of the Act." The language is general and has the effect of validating dispositions which are to come into operation at a future date in accordance with the intention of the testator. What is argued on behalf of the appellant is that the testator cannot be said to have intended that his dispositions would be valid in favour of persons who were not in existence at his death. That is the very question we have already disposed of. Clause 2 of section 2 of the Madras Act I of 1914 means that if the testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of the Act, then by virtue of this Act the disposition would be valid and effective. The gift, therefore, to the respondents is valid. The result will be, that the plaintiff as widow of Subbanna is entitled to the widow's interest in shares as Subbanna would, if living, have taken along with persons who might

(1) 10 Ind. Cas. 641; 38 C. 468 (P. C.); 15 C. W. N. 393; 9 M. L. T. 411; 21 M. L. J. 387; 8 A. L. J. 433; 13 C. L. J. 434; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295.

be born to his mother at the time the distribution takes place. That is to say, the plaintiff as representative of Subbanna will be entitled to share equally with other sons of Subbanna's mother (including the 6th defendant), who may be born before the death of 1st defendant. The Subordinate Judge has dismissed the plaintiff's suit altogether, on the ground that what was intended by the testator was that Subbanna and the other sons of the testator's daughter who might be born at any time would take as members of a joint family, and as Subbanna died before his mother, he did not take anything or rather his interests survived to other sons. It is difficult to understand how such a construction could be arrived at, and no attempt has been made to support it before us.

Appeal partly allowed.

NOTE.—The rest of the judgment is not material for the purpose of the report.—*Ed.*

V.R.P.

ALLAHABAD HIGH COURT.

EXECCTION SECOND APPEAL No. 1186 OF 1915.

February 14, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SAHEBZAD SINGH—PLAINTIFF—APPELLANT

versus

LALSA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution—Decree, mortgage—Rights of prior mortgagee reserved—Decree, if capable of execution.

A decree directed the sale of the right, title and interest of the judgment-debtor in certain specified immoveable property, with the further direction that the rights of the prior mortgagees of the specified property were reserved and exempted from the operation of the decree. On an objection being taken to the execution of the decree on the ground that it was vague and incapable of execution:

Held, that the decree was not vague and was capable of execution. [p. 152, col. 2; p. 153, col. 1.]

Execution second appeal from a decree of the Officiating District Judge, Azamgarh.

Mr. *Peary Lal Banerji*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is an appeal by a decree-holder whose application for execution has been dismissed by both the Courts below, on a finding that the terms of the decree are so vague and uncertain as to make it incapable of execution. The decree directed the sale of the right, title and interest of one defendant, Naik Singh, in certain specified immoveable property. It dismissed the suit as against certain other defendants and contained a further direction that the rights of these other defendants in the property specified were reserved and exempted from the operation of the decree. When execution was sought, certain of these additional defendants took objections to the execution. One objection was that a certain grove specified in the petition of objections was not within the operation of the decree, because it had been sold by Naik Singh prior to the passing of the decree and was not in his possession at the date of the decree. To this the decree-holder replied that the objection was well founded, and that he did not desire to execute his decree as against this particular plot of land.

Another objection taken was that a considerable portion of the property sought to be sold was in the possession of the objectors as mortgagees. To this the decree-holder replied that the rights and interests of the mortgagees were expressly reserved under the decree, and that he only desired to execute his decree subject to those rights. It does not seem that there was any question as to the extent of the rights of these mortgagees; but even if there had been, it was a matter which the Court could ascertain and determine with precision in the course of its enquiry under Order XXI, rule 66, of the Code of Civil Procedure prior to the drawing up of the proclamation of sale. The Courts below have fortified their decision by a reference to the case of *Muhammad Hasan Askari* v. *Niaz Husain* (1). The reference seems only to illustrate the danger of interpreting one document (the decree in the present case) on the strength of an interpretation put by the Court in another case on a document quite differently worded, that is to say, upon the decree in the case reported. The decree in the present case might have been more happily worded, but it does not seem to be open to the objection taken to it. It is not too

(1) 29 Ind. Cas. 213; 13 A. L. J. 428.

vaguely worded to be incapable of execution. On the contrary the decree-holder himself was asking the Court to execute it after making due allowance for the objections taken by the opposite party. We, therefore, accept this appeal and, setting aside the orders of both the Courts below, direct the case to be sent down, through the lower Appellate Court, to the Court of first instance, in order that it may be re-admitted to the file of pending execution cases and proceeded with according to law. The decree-holder is entitled to his costs in all the three Courts.

Appeal accepted; Case remanded.

COURT OF THE BOARD OF REVENUE, MADRAS.

REVENUE REVISION PETITION No. 4 OF 1916.

March 17, 1916.

Present:—Mr. Clegg, 1st Member.

PENTACOTA GAREEBU—PETITIONER

versus

PENTAKOTA PEDDARAYUDU —COUNTER-PETITIONER.

Madras Estates Land Act (I of 1908), ss. 131, 205 —Application to set aside sale—Deposit of smaller amount than required—Mistake—Information as to precise amount not available—Defect, whether fatal.

Where a deposit of a sum approaching to but not being the exact amount required to set aside a sale was made under section 131 (1) of the Estates Land Act, and under circumstances that the depositor could not ascertain the precise amount:

Held, that the depositor was entitled to an order that the sale be set aside, and an order to that effect should have been passed under section 131 (2) of the Estates Land Act. [p. 153, col. 2.]

Revenue revision petition against the order of the Collector, Vizagapatam, in R. P. C. No. 475 of 1915, dated the 20th July 1915,

Mr. *A. Visvanatha Iyer*, for the Petitioner.

Mr. *N. Patanjali Sastry*, for the Counter-Petitioner.

JUDGMENT.—This is a petition to revise the order of the District Collector passed on revision under section 205 of the Estates Land Act. It is admitted that there was an irregularity in the District Collector's proceedings, inasmuch as the parties concerned were not heard before the order was passed cancelling the sale as required by section 205 of the Act.

The sale was held on 25th February 1915. On the 1st March 1915 the counter-petitioner applied to the Sub-Collector to cancel the sale under section 131 of the Act and deposited with that officer Rs. 160, the amount which he was told by the Sub-Collector to deposit, but at that time the counter-petitioner had no means of knowing the exact amount required under section 131 (1), and in fact the Sub-Collector himself had no exact information as the sale records had not been received by him from the *Taluq* office. On receipt of the letter the Sub-Collector issued a notice to the counter-petitioner to deposit the difference Rs.7-7-3, but this notice was not personally served. Counter-petitioner alleges no knowledge of it until later when he again applied to the Sub-Collector, but it was then too late as sale certificate had been issued and possession transferred to the petitioner, the auction-purchaser. It is hardly likely he would have failed to pay this small balance if he was aware of the notice. The District Collector in his order says that he is not disposed to take advantage of a formal service of notice. It may be said that the counter-petitioner ought himself to have taken care to ascertain if anything further was still due, before the period of 30 days from the date of sale expired, but under the circumstances, I do not think he can be much blamed, for it was only from the Sub-Collector that he could ascertain the exact sum and he would naturally expect information. I consider that the District Collector's order was equitable and confirm it.

Under section 131 (2) of the Estates Land Act the District Collector should have passed an order as required by section 315 of the old Civil Procedure Code (Order XXI, rule 93, of the present Code). He should now supplement his order by an order under that

provision. With this modification the petition is dismissed. No order as to costs will be made.

Petition dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 898 TO 900 OF 1913.

March 22, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

CHUNDURY KRISHNAYYA,

HAVING DIED, HIS WIFE AND LEGAL REPRESENTATIVE CHUNDURY SITHAMMA —PLAINTIFFS—APPELLANT IN ALL

versus

IN S. A. NO. 898 OF 1913

KORIPALLI RAJU AND OTHERS—DEFENDANTS NOS. 2, 17 AND 18—RESPONDENTS.

IN S. A. NO. 899 OF 1913

GADI SOMANNA AND OTHERS—DEFENDANTS NOS. 1 AND 3 TO 5 AND LEGAL REPRESENTATIVE OF THE 4TH DEFENDANT—RESPONDENTS.

IN S. A. NO. 900 OF 1913

KORIPALLI KOTAYYA AND ANOTHER—DEFENDANT NO. 1 AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 1, 2, 19—Appeal—Death of guardian ad litem *of minor appellant pending appeal—Fresh guardian not appointed—Decree against minor, validity of—Execution proceedings, appointment of guardian in—Sale in execution without objection, whether valid—Jurisdiction.*

The provisions of Order XXXII, rule 19, Civil Procedure Code, are imperative. [p. 156, col. 1.]

A decree passed against a minor appellant who was not at the time represented by a guardian *ad litem* is void and all proceedings had thereafter are also void. The position is the same as if the minor was not party to the appeal. [p. 155, col. 2; p. 156, col. 2.]

The subsequent appointment of a guardian *ad litem* in execution proceedings neither validates the decree, nor renders a sale held in the course of the execution legal, and the sale conveys no title to the purchaser. [p. 155, col. 2; p. 156, col. 2.]

The fact that a minor appellant's interests were safeguarded by some of the defendants, whose defence was common with that of the minor, will not cure the defect of want of jurisdiction in the Court to sell the properties of the minor who was not properly represented on the record and as against whom the decree was a nullity. [p. 156, col. 1.]

Kamalakshi v. *Ramasami Chetti*, 19 M. 127; *Shapurji Hormasji* v. *Manosseh Jacob*, 4 Ind. Cas. 107; 34 B. 374; 11 Bom. L. R. 1011; *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani*, 22 M. 187; *Khiarajmal* v. *Daim*, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23, *Rashid-un-nisa* v. *Muhammad Ismail Khan*, 3 Ind. Cas. 864: 31 A. 572; 19 M. L. J. 631; 6 M. L. T. 279 (P. C.); 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 36 I. A. 168; *Posumarti Payidanna* v. *Ganti Lakshminarasamma*, 29 Ind. Cas. 314; 28 M. L. J. 525; 38 M. 1076; *Dakeshur Pershad Narain Singh* v. *Rewat Mehton*, 24 C. 25; *Daji Himat* v. *Dhirajram Sadaram*, 12 B. 18; *Hanuman Prasad* v. *Muhammad Ishaq*, 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229, referred to.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822, distinguished.

Bhagwan Dayal v. *Param Sukh Das*, 27 Ind. Cas. 623; 13 A. L. J. 179; 37 A. 179; *Moothetuth Kanari* v. *Hari Shenoy*, 34 Ind. Cas. 428; 3 L. W. 301; (1916) 1 M. W. N. 273; 19 M. L. T. 245, referred to.

Purno Chandra Kumar v. *Bejoy Chand Mahatap*, 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549, followed.

Second appeals against the decrees of the Court of the Temporary Subordinate Judge, Masulipatam, respectively, dated the 11th November 1912, in Appeal Suits Nos. 279, 250 and 489 of 1911, preferred against the decrees of the Court of the Principal District Munsif, Tanuku, in Original Suits Nos. 270 of 1909, 265 of 1910 and 270 of 1909, respectively.

Mr. *G. Venkataramiah*, for the Appellant.

Messrs. *P. Narayanamurthi* and *V. Ramesam*, for the Respondents.

JUDGMENT.

MOORE, J.—The facts which have given rise to these appeals are as follows:—In execution of the decree in Original Suit No. 759 of 1905 in the District Munsif's Court of Tanuku obtained by one Gade Somanna against two minors, named Venkamma and Nagamma, and one Kotayya, the husband of the minor Nagamma, on a pro-note executed by Kotayya, the first defendant in the suit and the guardian of the minors, certain properties were sold and purchased in Court auction by the appellant. The decree in Original Suit No. 759 of 1905 was passed on 20th April 1906. On 30th August 1906 the defendants preferred a joint appeal, Appeal Suit No. 291 of 1906, to the Sub-Court, Ellore. At the time of the presentation of the appeal the minors were represented by their maternal grandmother Salemma as guardian *ad litem*. Salemma, it appears, died on 24th September 1906, but this fact was not brought to the notice of the Court. On 6th March 1907 the Subordinate Judge of Ellore directed that the evidence of a

witness named Sitaramayya, who had been summoned by the defendants but had not been examined, should be taken by the District Munsif of Tanuku. On 19th June 1907 the District Munsif returned the record to the Sub-Court, stating that no summons had been taken out to the witness and that the defendants' Vakil said that he had no instructions. The appeal was dismissed on 9th July 1907. On 12th September 1907 the decree-holder transferred his rights under the appellate decree to one Sithayya. During the execution poceedings, Mangamma, the mother of the defendant Kotayya and the mother-in-law of one of the minors, was appointed as guardian *ad litem* of the minors. The properties were sold in Court auction in February 1908 and the auction-purchaser took delivery on 20th August 1908. The appellant brought a suit, Original Suit No. 270 of 1909, in the Tanuku Munsif's Court for the recovery of the lands which he had purchased in Court auction, alleging that the defendants had trespassed upon them and removed the crops, and obtained a decree. The minors Venkamma and Nagamma also filed a suit, Original Suit No. 865 of 1910, for a declaration that the decree obtained in Original Suit No. 769 of 1905 and the execution proceedings taken thereunder were not binding on them as they were not properly represented in the appeal, the guardian *ad litem* having died during the pendency of the appeal and that the decree in Appeal Suit No. 291 of 1906 was obtained by fraud. The District Munsif held that the appellate decree was binding on the plaintiffs and dismissed the suit. On appeal the Subordinate Judge held that the decree which had been obtained against the minors who were not duly represented by a guardian was a nullity and that the sale and other proceedings taken in execution of the decree were void, and allowed the appeals against the decree in Original Suit No. 270 of 1909 and Original Suit No. 759 of 1905.

The learned Vakil for the appellant contends that the omission to get a next friend appointed for the minors was a mere irregularity and did not nullify the decree, as the minors were effectually represented and their interests safeguarded by the first defendant, and that the minors were duly represented by a guardian *ad litem* during the execution proceedings and that not having questioned the validity of the decree in Appeal Suit No. 291 of 1906 during the execution proceedings, the minors were estopped from questioning its validity as against a *bona fide* purchaser for value.

I think that the decision of the Subordinate Judge is right, and that no guardian *ad litem* having been appointed for the minors, the decree in Appeal Suit No. 291 of 1906 is not binding on them, and the sale which was held in execution of the decree must be regarded as void.

The question is, I think, really concluded by the decisions of the Privy Council in *Khiarajmal* v. *Daim* (1) and *Rashid-un-nisa* v. *Muhammad Ismail Khan* (2). In the former case it was held that where a minor was sued without a guardian *ad litem* being appointed, the decree and Court sale which took place in execution of the decree were null and void, because in the absence of the proper representation of the minor, the Court has no jurisdiction at all. In *Rashid-un-nisa* v. *Muhammad Ismail Khan* (2) the suit was brought to declare the nullity as against plaintiff of a sale in execution of a decree against a deceased person in which the minor plaintiff had been brought as the legal representative of the deceased judgment-debtor. In two instances, he had been represented by a woman who as such was not qualified to act as guardian *ad litem*, and in the third by another person whose interests were adverse. Their Lordships held that the plaintiff had never been a party to any of those suits in the proper sense of the term. The latest case of this Court, *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (3), is to the same effect. Reference may also be made to *Dakeshur Pershad Narain Singh* v. *Rewat Mehton* (4), *Hanuman Prasad* v. *Muhammad Ishaq* (5) and *Dayi Himat* v. *Dhirajram Sadaram* (6). Order XXXII, rule 19, Civil Procedure Code provides that on the retirement, removal or death of a next friend, further

(1) 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23.
(2) 3 Ind. Cas. 864; 31 A. 572; 19 M. L. J. 631; 6 M. L. T. 279 (P. C.) 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 36 I. A. 168.
(3) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.
(4) 24 C. 25.
(5) 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229.
(6) 12 B. 18.

proceedings shall be stayed until the appointment of a next friend has taken place. The provisions of the rule are imperative. The learned Vakil for the appellant relies on certain observations of their Lordships of the Privy Council in *Vulian* v. *Banke Behari Pershad Singh* (7). In that case the mother of certain defendants appeared throughout the proceedings in the suit as their guardian; the Court admitted the plaint in which she was described as guardian and in the decree and execution proceedings, the Court so described her. Their Lordships held that the Court was bound to appoint a proper person to act on behalf of a minor in the suit, and that this rule should be strictly followed, but where the Court has by its action given sanction to the appearance of a person as such guardian, the absence of a formal appointment order is not necessarily fatal to the proceedings. This case is plainly distinguishable from the present case. It is pointed out that the minors and 1st defendant Kottayya, the husband of one of the minors, raised a common defence to the suit that the promissory note was not genuine: that they were represented by the same Vakil at the hearing of the appeal, and it is argued that their interests were duly protected, and that there is no sufficient reason for disturbing a judicial sale which was properly conducted. We cannot assent to this contention. No guardian for the minors having been appointed, they were to all intents and purposes not parties to the appeal at all. That being so, the Court has no jurisdiction to sell the properties of persons who were not properly represented on the record, and as against them the decree and sale were a nullity. No explanation is offered as to why Kottaya omitted to intimate the death of the minor's guardian to the Court and get a new guardian appointed. It is significant also that the minors' properties alone were sold in execution, and there is evidence that they fetched a very inadequate price.

In the result the appeals fail and are dismissed with costs.

(7) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822 (P. C.).

SADASIVA AIYAR, J.—I agree. Mr. G. Venkataramiah for the appellant is, no doubt, right in his contention that the case of an unrepresented minor plaintiff differs in some respects from that of an unrepresented minor defendant [see *Kamalakshi* v. *Ramasami Chetti* (8) and Order XXXII, rule 2]. The death of the next friend of a minor plaintiff does also not impose any *duty* on the defendant to apply to have a new next friend appointed though he has a *right* to do so [Order XXXII, rules (1) and (2)], whereas the death of a guardian *ad litem* imposes a duty on the Court itself to appoint a new guardian [Order XXXII, rule 11 (2)]. It might also be conceded that minor defendants who are appellants stand in some respects in the position of plaintiffs and the guardian *ad litem* of minor defendants-appellants is, in some respects, in the position of the next friend of minor plaintiffs [*Shapurji Hormasji* v. *Monosseh Jacob* (9)]. But this is not so in all respects and for all purposes; see *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani* (10), where it was held that the guardian *ad litem* for the defendant in the lower Court is alone entitled to appeal and nobody else could, on the analogy of the next friend of a plaintiff, prefer the appeal without a proper appointment of himself as guardian by the Court after the removal of the original guardian *ad litem*]. On the question we have now to consider, namely, whether a decree passed in appeal against minor appellants (who were defendants) is valid without their having been legally represented, the above argument based on the difference in procedure in some respects between the cases of minor plaintiffs and minor defendants seems to me to be of no help [see also *Bhaghwan Dayal* v. *Param Sukh Dass* (11) and *Moothetuth Kanari* v. *Hari Shenoy* (12)]. That execution proceedings took place under the decree (which is a nullity) without objection by the guardian appointed in such proceedings cannot validate those proceedings or the sale held under them, as the appointment of a guardian in execution proceedings held without jurisdiction in respect of minors who were not parties to the

(8) 19 M. 127.
(9) 4 Ind. Cas. 107; 34 B. 374; 11 Bom. L. R. 1014.
(10) 22 M. 187.
(11) 27 Ind. Cas. 623; 13 A. L. J. 179; 37 A. 179
(12) 34 Ind. Cas. 428; 3 L. W. 301; (1916) 1 M. W. N. 273; 19 M. L. T. 245.

decree is itself a nullity. The fact relied on by Mr. Venkataramiah (if it is a fact) that the Court and the decree-holder were ignorant of the minor appellants' guardian's death when the appeal was argued and decided, has also no legal bearing on the question of the validity or nullity of the decree [see *Purna Chandra Kumar* v. *Bejoy Chand Mahatap* (13)].

Appeal dismissed.

(13) 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 32 AND 33 OF 1915.

April 11, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

IN A. A. O. No. 32 OF 1915

MAHOMED SILAR SAHIB & Co., BY MAHOMED SILAR SAHIB —2ND DECREE-HOLDER—PETITIONER—APPELLANT

versus

NABI KHAN SAHIB—JUDGMENT-DEBTOR—COUNTER-PETITIONER—RESPONDENT.

IN A. A. O. No. 33 OF 1915

MAHOMED SILAR SAHIB—2ND DECREE-HOLDER—2ND COUNTER-PETITIONER—APPELLANT

versus

NABI KHAN SAHIB AND OTHERS—JUDGMENT-DEBTOR AND 1ST AND 3RD DECREE-HOLDERS—PETITIONER AND COUNTER-PETITIONERS NOS. 1 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 1 (b), 2—Joint decree—Partners holding joint decree—Satisfaction of decree—Payment out of Court to some of decree-holders, whether amounts to satisfaction of decree.

A payment of the amount of a decree to two out of three joint decree-holders cannot be treated as a satisfaction of the decree even in part, unless it is admitted by the third decree-holder or unless it is proved that he and the other two decree-holders to whom the money was paid, own separate and definite shares in the joint decree-debt. [p. 157, col. 2; p. 158, col. 1.]

Periasami v. *Krishna Ayyan*, 12 M. L. J. 166; 25 M. 431; *Sultan Moideen* v. *Savalayammal*, 15 M. 343; 11 M. L. J. 50, followed.

Lachman Das v. *Chaturbhuj Das*, 28 A. 252; A. W. N. (1906) 16; 3 A. L. J. 49; *Tamman Singh* v. *Lachhmin Kunwari*, A. W. N. (1904) 22; 26 A. 318, distinguished.

Per *Sadasiva Aiyar, J.*—It is very doubtful whether two out of three partners can, in their individual capacities, legally claim definite shares in a particular decree-debt belonging to themselves and the other partners jointly. [p 158, col. 1.]

The right of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree has no bearing on the decision of the question whether, when the partners have become decree-holders, two of them can receive the joint decree-debt. [p. 158, cols. 1 & 2.]

Payment to one or more of joint decree-holders will bind the rest if they were constituted as agents by the latter, but the status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree, and cannot merely be inferred from the position of the payee as managing member of the joint Hindu family of the decree-holders or as one of several partners decree-holders. [p. 158, col. 2.]

Appeals against the orders of the District Court, Guntur, in Execution Petition No. 7 of 1914 and Execution Appeal No. 358 of 1914 (in Civil Suit No. 282 of 1912 on the file of the High Court of Madras).

Messrs. *L. A. Govindaraghava Aiyar* and *L. S. Veera Raghava Aiyar*, for the Appellant.

Messrs. *C. Madhavan Nair*, *K. Naraina Rau*, *H. Balakrishna Rau* and *S. Duraisaumi Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—Reason has not been shown for dissent from the statement of the law by Bhashyam Ayyangar, J., in *Periasami* v. *Krishna Ayyan* (1) that "a payment made out of Court to one only of several joint decree-holders cannot bind the others, unless he was also constituted by them an agent for the purpose;" and, as explained by the learned Judge with reference to the case before him, the mere fact that one of the joint decree-holders is the managing member of the family consisting of the joint decree-holders will not empower him to give a discharge of the decree-debt without the concurrence of the remaining members. It has not been shown how any relevant distinction can be drawn between the position of a manager and that of a member of a partnership in this respect. The conclusion must, therefore, be against the validity of the payment to two out of the three partners pleaded by the judgment-debtor in this case.

As the payment pleaded would not in any event be valid, it is useless to consider

(1) 25 M. 431; 12 M. L. J. 166.

whether the lower Court should have enquired whether it was made.

The appeals must, therefore, be allowed and the lower Court's order be set aside, Execution Appeal No. 358 of 1914 being dismissed and Execution Petition No. 7 of 1914 being remanded for re-admission and disposal according to law. The judgment-debtor and 1st and 3rd decree-holders will pay the costs of the 2nd decree-holder in this Court and in Execution Petition No. 7 in the lower Court.

SADASIVA AIYAR, J.—I think that payment of the decree amount to two out of three joint decree-holders cannot be treated as satisfaction of the decree even in part, unless it is admitted by the third decree-holder or proved that he and the other two decree-holders to whom the money was paid own separate and definite shares in the joint decree-debt. In *Tamman Singh* v. *Lachhmin Kunwari* (2) there was no dispute as to the shares and in *Sultan Moideen* v. *Savalayammal* (3) the distinct share due to the payee was proved and in both cases there was no dispute as to the right of the payee to receive his separate share. The present is a case where the right of the payees to receive their alleged shares is neither admitted nor proved. I am very doubtful whether two out of three partners can in their individual capacities legally claim definite shares in a particular decree-debt belonging to themselves and the other partners jointly, such a decree-debt being only an asset out of the numerous partnership assets. I think that they cannot make such a claim to own separate shares in a particular asset any more than a member of a joint Hindu family can claim to receive in his individual capacity (or give a valid discharge for) his share of a particular debt due by one of the debtors of the joint Hindu family which possesses numerous other assets. Neither a partner nor a member of a joint Hindu family can claim and receive a definite share in a particular partnership debt or family debt, as the case may be. The right of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree, so as to bind the third partner, has no bearing on the decision of the question whether, when the three partners have become joint decree-holders (and are not merely joint private creditors), two of them as such decree-holders can receive the joint decree-debt so as to release the judgment-debtor from liability in execution for even a portion of the decree-debt. Sir Bashyam Aiyangar's judgment in *Periasami* v. *Krishna Ayyan* (1), in my opinion, establishes that one of the several joint decree-holders cannot receive his alleged share of the decree-debt, so as to enable the judgment-debtor to put forward a claim to enter satisfaction of that portion of the decree unless the payee had been appointed by all other decree-holders as their agent. The status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree, and cannot merely be inferred from the position of the payee as managing member of the joint Hindu family of the decree-holders or as one of several partners decree-holders. See also *Lachman Das* v. *Chaturbhuj Das* (4). I would, therefore, hold that even if the alleged payment to the two partners of the appellant was proved and was a real payment, it cannot have the legal effect of satisfying or adjusting the decree even in part and I would, therefore, reverse the order of the District Judge, dismiss the judgment-debtor's application to enter satisfaction and direct the District Judge to pass fresh orders on the appellant's execution petition according to law in the light of the above remarks. I also agree in the order proposed by my learned brother in respect of costs.

Appeals allowed; *Cases sent back.*

(2) 26 A. 318; A. W. N. (1904) 22.
(3) 15 M. 343; 11 M. L. J. 50.
(4) 28 A. 252; A. W. N. (1906) 16; 3 A. L. J. 49.

ALLAHABAD HIGH COURT.

STAMP REFERENCE.

January 22, 1913.

Present:—Mr. Justice Tudball.

TAJAMMUL HUSAIN KHAN—
DEFENDANT—APPELLANT

versus

MUHAMMAD HUSAIN KHAN—
PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908,) *s.* 2 (2), *O. XXXIV, r.* 6 —*Decree—Appeal*—Ad valorem *Court-fee.*

A decree passed under Order XXXIV, rule 6, of the Civil Procedure Code, 1908, is a decree within the meaning of section 2 (2) of the Code and a memorandum of appeal against such a decree should be stamped *ad valorem* on the amount decreed. [p. 159, col. 2.]

Mr. *S. A. Haidar*, for the Appellant.

JUDGMENT.—This is a reference by the Taxing Officer. The facts are simple. A suit for sale was brought on the basis of a mortgage. The suit was decreed. One of the mortgagors paid off the amount of the decree. He then brought a suit for contribution against his co-mortgagors in respect of the excess amount paid by him and future interest. He sought to enforce his lien against the defendant's share in the property and obtained a decree for sale. In execution of such decree the property was put to sale, but the debt remained unsatisfied. The plaintiff accordingly applied to the Court under Order XXXIV, rule 6, of the Code of Civil Procedure on the ground that the balance was legally recoverable from the defendant otherwise than out of the property sold. The defendant contested the matter and finally the Court granted the decree mentioned in Order XXXIV, rule 6. The defendant appealed to the District Judge from that decree, affixing an 8-annas stamp as Court-fee. His appeal was dismissed and he has come to this Court affixing a stamp of Rs. 2 as Court-fee on the memorandum of appeal. The office has reported that in the case of both the appeals, *i.e.*, in the Court below and in this Court the memorandum of appeal is insufficiently stamped, as Article 11 of the Second Schedule of the Court Fees Act does not apply. This Article refers to a memorandum of appeal when the appeal is not from a decree or an order which has the force of a decree. This Article clearly does not apply in the present case, because the appeals both to this Court and in the Court below are from the decree passed under Order XXXIV, rule 6, of the Code of Civil Procedure. A reference to that rule makes the matter perfectly clear. It runs as follows:—"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a *decree* for such amount." The appeal in the present case is from a *decree* passed under this rule. The Code clearly and distinctly distinguishes between orders and decrees and where the Code uses the word 'decree,' it does not mean an 'order.' It is quite clear that the order passed by the Court below, using the word in its loose sense, clearly falls within the definition of a decree in section 2 (2). It has conclusively determined the rights of the plaintiff to recover the balance of the sum from the person and other property of the defendant. It seems to me that the matter is not open to question. In the present case the appellant has to make good a sum of Rs. 194-8 for the Court below as well as Rs. 193 for this Court, the said amount being calculated *ad valorem* on the amount decreed. I allow one month to the appellant to make good the deficiency.

Time allowed to pay deficient Court-fee.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 180 OF 1915.

February 29, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

JAGANNATH PRASAD—OBJECTOR—APPELLANT

versus

U. P. FLOUR AND OIL MILLS CO., LTD.—OPPOSITE PARTY.

Companies Act (VI of 1882), ss. 81, 125, 151—Contributory, liability of—Calls, unpaid, barred by time, if recoverable by liquidator—Limitation Act (IX of 1908), Sch. I, Art. 112.

Once a member of a company, which is being wound up, is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound up, that is to say, to the extent of his original share held in the company which remains unpaid, he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of winding up under section 61 of the Indian Companies Act, VI of 1882. [p. 160, col. 1.]

When a Court makes calls from persons on the list of contributories for the amount for which they are shown as liable in the list prepared by the liquidator, it is not the right of a company which is being enforced by the liquidator but a statutory right of the creditors of a company to enforce against the contributories of an insolvent company through the Court the obligation which the shareholders took upon themselves when they originally subscribed in

the event of insolvency subsequently overtaking the company, and the calls are recoverable although they have become statute-barred under Article 112 of the Limitation Act and ceased to be recoverable debts by the company. [p. 160, col. 2.]

First appeal from an order of the Officiating District Judge, Cawnpore.

Mr. *Kailas Nath Katju*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.

WALSH, J.—In our opinion this appeal must be dismissed. A question of principle has been raised apparently for the first time in this Court, namely as to whether an unpaid call, due from a share-holder of a company, which has become statute-barred under Article 112 of the Limitation Act and has, therefore, ceased to be a recoverable debt by the company, may yet be recovered if at any date subsequent to its having become time-barred the company is wound up. That question really depends upon the nature of the liability of a contributory and the provisions of the Indian Companies Act relating to winding up. We entirely agree with the contention put forward by the appellant's Counsel that so far as the recovery of the original debt based upon calls made by the company which has become time-barred is concerned, the liquidator has no higher right than the company. The company could not sue for these calls, no more can the liquidator. But the proceeding before us, as has been pointed out by the learned Counsel for the respondent is not a suit at all. What has happened is that in the performance of his duty the liquidator has put the appellant on the list of contributories. Once a member of the company is upon the list of contributories—unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories,—he is liable for all those matters in respect of which he may be charged in the event of a company being wound up, that is to say, to the extent of his original share held in the company which remains unpaid, he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of the winding up under section 61 of the Indian Companies Act No. VI of 1882. Now it is necessary to refer to section 125 of that Act in order to ascertain the nature of that liability. Section 125 provides as follows:—"The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." Now it is quite clear that the contribution dealt with under section 61, which is in itself a sort of correlative duty to the right which a shareholder has to have his liability, for any debt or expense of the winding up which the company may have incurred, limited to the amount of his original subscription, is not in itself a debt. But the Act says that for the purpose of recovery the amount shall be deemed to be a debt payable at the time or respective times when calls are made, and section 151 gives a Court power to make calls from persons on the list of contributories for the amount for which they are shown as liable in the list prepared by the liquidator; so that really it is not even the right of a company which is being enforced by the liquidator. It is a statutory right of the creditors of a company to enforce against the contributories of an insolvent company through the Court the obligation which the shareholders took upon themselves when they originally subscribed in the event of insolvency subsequently overtaking the company. In our opinion the two decisions in *Sorabji Jamsetji* v. *Ishwardas Jugjiwandas* (1) and *Vaidiswara Ayyar* v. *Siva Subramania Mudaliar* (2), referred to in the judgment appealed against, were right, and were in accordance with the principles on which this question has always been considered under the English Law and ought to be followed by us. We dismiss this appeal with costs.

Appeal dismissed.

(1) 20 B. 654.
(2) 31 M. 66; 3 M. L. T. 250.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 813 OF 1915.
December 10, 1915.
Present:—Mr. Justice Tudball and
Mr. Justice Piggott.
BHAWANI DAS—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (c)—"Offence committed by a party", interpretation of—Abetment of forgery—Party to proceeding—Prosecution without sanction, legality of.

The expression "offence committed by a party" in section 195 (1) (c) of the Criminal Procedure Code is loosely used for "offence alleged to have been committed by a party," and the provisions of the sub-section apply to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described as "a party to any proceeding in any Court" in which the document in question has been produced or given in evidence, that is to say, who is or has been a party to such proceeding. [p. 164, col. 1.]

A person alleged to have abetted the forgery of a document cannot be prosecuted for the offence without the sanction of the Civil Court, if he was a party to the proceeding with respect to the document in that Court. [p. 163, col. 2.]

Semble.—Once a Magistrate has taken cognizance of an alleged forgery, the person accused cannot be permitted to obstruct his proceedings by filing a civil suit on the basis of the document impeached, inasmuch as section 195 (1) (c) of the Criminal Procedure Code prohibits only the cognizance of an offence alleged to have been committed by a party to a suit after he became such party. [p. 163, col. 2.]

Criminal revision from an order of the Magistrate, First Class, Agra.

Mr. *C. Dillon*, Maulvi *Shafi-uz-zaman*, Pandit *Shiam Krishna Dar* and Munshi *Benode Behari*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.

PIGGOTT, J.—This is an application in revision against the order of a Magistrate taking cognizance of a complaint filed by one Cheda Lal against the applicant Bhawani Das. The offence alleged against the latter is abetment of the forgery of a sale-deed, dated 27th June 1913, whereby Cheda Lal purported to convey certain property to one Het Ram. On the same date Het Ram executed a mortgage-deed, whereby he purported to borrow money from Bhawani Das on the security of this very property. Cheda Lal's case is that he knew nothing about the sale-deed, and that his signature to the same was forged by one Babu Lal. The question was raised in two separate suits filed in the Court of the Subordinate Judge, one by Cheda Lal and one by Bhawani Das. The latter did not affirm the disputed sale-deed to be genuine, but on the contrary claimed damages from Babu Lal and Het Ram for having defrauded him. The Subordinate Judge held that the deed was a forgery and that Bhawani Das had been defrauded. He gave appropriate relief to the latter as well as to Cheda Lal, and he took proceedings under section 476 of the Criminal Procedure Code against Babu Lal and Het Ram. At the Sessions trial which followed Bhawani Das appeared as a witness for the prosecution. Babu Lal and Het Ram were convicted; but the Sessions Judge cannot have been satisfied with the evidence given by Bhawani Das, for he issued a notice calling on the latter to show cause why he should not be prosecuted for abetment, on charges framed under sections 467/471 read with sections 109/114 of the Indian Penal Code. In the meantime, however, Cheda Lal had filed a complaint before a Magistrate charging Bhawani Das simply with abetment of forgery under sections 463/109 of the Indian Penal Code. The Magistrate has taken cognizance of this complaint, and his competence to do so is challenged by the present application.

The question depends on the construction to be put on certain words in section 195 of the Code of Criminal Procedure. The essential words to be considered are: "No Court shall take cognizance.....of any offence described in section 463 or punishable under sections 471, 475 or 476 of the same Code (*i. e.*, of the Indian Penal Code) when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction or on the complaint, of such Court, or of some other Court to which such Court is subordinate."

The case for the applicant is that the offence alleged against him in the complaint of Cheda Lal is an offence of the kind described in section 463 of the Indian Penal Code; that it was committed in respect of a document produced and given in evidence in the

Court of the Subordinate Judge in two suits to each of which Bhawani Das was a party, and that no sanction has been granted or complaint made by the Subordinate Judge or by the presiding officer of any Court to which that of the Subordinate Judge is subordinate. As for the proceedings initiated by the Sessions Judge, they have not yet resulted in any definite order respecting the prosecution of Bhawani Das; moreover, the Court of the Subordinate Judge is not subordinate to that of the Sessions Judge.

On behalf of the prosecution it is pointed out that the complaint against Bhawani Das is for abetment of forgery, and that this offence was completed before Bhawani Das became a party to any proceeding in the Court of the Subordinate Judge; hence it is contended that it cannot with propriety be described as an offence "committed by a party" to such proceeding. It may be noted further that Bhawani Das is nowhere alleged to have committed any offence punishable under section 471 of the Indian Penal Code in connection with the litigation in the Court of the Subordinate Judge. He did not set up the forged sale-deed as genuine in that Court; on the contrary, he denounced it as a forgery by which he had himself been defrauded.

With regard to the actual wording of the sub-section under consideration, it does seem to me somewhat lacking in precision. To forbid a Court to "take cognizance" of an "offence committed by a party" is open to the criticism that no Court can decide whether an offence was committed or not, until after it has taken cognizance. It seems necessary, therefore, to read the word "committed" as equivalent to the expression "alleged to have been committed." It then remains to be decided whether the words "by a party to any proceeding" refer to the date of the commission of the alleged offence, or to the date on which the allegation is brought to the notice of the Criminal Court invited to take cognizance of such commission.

I am not satisfied that this precise point is covered by any reported decision. The greater part of the case-law which has grown up around section 195 of the Code of Criminal Procedure is devoted to the elucidation of sub-clause (*b*) of clause (1) of the aforesaid section. This relates to certain offences "committed in, or in relation to, any proceeding in any Court," but in sub-clause (*c*), which is now under consideration, there are no words equivalent to the expression "or in relation to" in sub-clause (*b*). It would, I think, be easy to refer to a number of cases in which the point now in question has been assumed, or decided by implication, in a sense favourable to the present applicant. I may refer to the case of *Giridhari Marwari* v. *Emperor* (1), where it was obviously conceded, on behalf of the prosecution, that a person who first gets a document forged and then institutes a suit upon it, cannot be prosecuted for any offence in respect of the said document without the sanction of the Court in which the suit was instituted. I note also the case of *Emperor* v. *Raja Mustafa Ali Khan* (2), because this case would seem to have been put forward in the Court below on behalf of the prosecution. It seems to me by implication strongly in favour of the applicant's contention, that sanction is required in the present case. The complaint before the Oudh Court was one of forgery in respect of a document which a Civil Court had declared to be a forgery in a suit instituted by the complainant. The person accused had made no use of the document in the Civil Court; he had in fact declined to defend the civil suit or to produce the document. The plaintiff had obtained his declaration on the basis of a certified copy produced as secondary evidence. The learned Judges held that no sanction was necessary because the document itself had never been produced or given in evidence in the Civil Court; they obviously never thought of holding that sanction was not required because the complaint was in respect of an offence of forgery which had been completed before the accused person became a "party" to the civil suit. There is a Bombay case which is some authority on the other side, namely, that of *Noor Mahomad Cassum* v. *Kaikhosru Maneckjee* (3). There a certain cheque had been forged and used as genuine in a sale transaction. It was subsequently produced and

(1) 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51.
(2) 8 O. C. 313; 2 Cr. L. J. 653.
(3) 4 Bom. L. R. 268.

relied upon as genuine on behalf of the defendant in a civil suit. The successful plaintiff in this suit then filed a complaint against the defendant, not in respect of the forgery of the cheque, nor yet in respect of the use made of it in the Civil Court, but simply in respect of the use made of it in the sale transaction which preceded the institution of the civil suit. Objection was taken that the Chief Presidency Magistrate could not take cognizance of this complaint without the sanction of the Civil Court. The Magistrate clearly thought that his cognizance ought not to be barred, but doubted whether the words of section 195 (1) (*c*) of the Code of Criminal Procedure were not wide enough to cover the case. He referred to the Bombay High Court the question "whether in the event of an offence punishable under section 471 of the Indian Penal Code being made out in a complaint, the use complained of being prior in date to the use of the document in question in evidence in a Civil Court, the sanction of such Court is necessary under section 195 (1) (*c*), Criminal Procedure Code, before a Criminal Court can take cognizance of such offence." The learned Judges who sat to determine this reference did not discuss the wording of the sub-section, or refer to any authorities. They intimated their opinion that the question referred to them must be answered in the negative, and laid down the general principle that sanction to prosecute for an offence under section 471 of the Indian Penal Code is not necessary in respect of a use made outside the Court.

There is one case of this Court which is strongly relied on by the prosecution and has been accepted by the Magistrate as sufficient authority for his action in taking cognizance of Cheda Lal's complaint. This is the case of *Lalta Prosad* v. *Emperor* (4). The facts of that case are not fully apparent from the report or from the record filed in this Court. I am inclined to think that the Magistrate had actually taken cognizance of the alleged offence before the person accused brought the matter into the Civil Court. This is the sense in which the ruling has been understood by Mr. G. P. Boys in his commentary on the Code of Criminal Procedure. I should not feel the slightest hesitation in holding that once a Magistrate had taken cognizance of an alleged forgery, the person accused could not be permitted to obstruct his proceedings by filing a civil suit on the basis of the document impeached. Cognizance having been validly taken, the Magistrate's jurisdiction could not be ousted by subsequent proceedings before a Civil Court. I think, however that the learned Judge who decided this case was obviously inclined to hold, and did in substance hold that section 195 (1) (*c*) of the Code of Criminal Procedure must be understood as prohibiting only the cognizance of an offence alleged to have been committed by a party to a suit after he became such party.

The present application has in fact been referred to a Bench of two Judges in order that the point may be further considered. The interpretation sought to be put on section 195 (1) (*c*), on behalf of the prosecution in the present case, does not seem to me to follow inevitably from the wording of the section or to be consistent with its apparent purpose. Sub-sections (*a*) and (*b*) of section 195 (1) are intended to restrain private individuals from coming forward to demand the punishment of certain offences against the lawful authority of public servants, or the administration of public justice, except under the authority of the public servant or the Court of justice concerned. The Legislature has seen fit, in sub-clause (*c*), to extend this prohibition to a certain limited class of offences not exactly *ejusdem generis* with either of the above. Yet it is clear that when a party to a civil suit forges a document for the purpose of that suit and then produces it in support of his claim, he has committed an offence punishable under section 193 of the Indian Penal Code, and for these offences he cannot be prosecuted without the sanction of the Court. It would be something of an anomaly to maintain this prohibition, and yet to permit a prosecution without any sanction for the graver offences of forgery and of using as genuine a forged document. Mereover, the Legislature doubtless intended to prevent the possibility of any such scandal to the administration of justice as is generally understood to have occurred in the historical case of the prosecution for forgery of the Maharaja Nand Kumar

(4) 17 Ind. Cas. 799; 34 A. 654; 10 A. L. J. 294; 13 Cr. L. J. 863.

(Nuncomar). It was not considered proper to leave it open to the defendant in a civil suit to carry the question of the genuineness of the plaintiff's document of title before a different tribunal by instituting a prosecution against the plaintiff, alleging him to have forged the same, or to have made use of it knowing it to be forged. If the Legislature had seen fit to limit the prohibition to the prosecution without sanction of "a party to any proceeding *pending* in any Court in respect of a document," etc., there could have been no serious doubt as to the meaning of the words; but the prohibition would have ceased to be effective as soon as the suit was decided. It may well be that this was considered practically inconvenient, in view of the possible filing of an appeal after prosecution had been instituted. Or it may have been thought advisable, as already suggested, to make the prohibition, as against parties to a proceeding in a Civil Court, co-extensive with the prohibition in respect of the offence of fabricating false evidence already embodied in section 195 (1) (*b*). At any rate, I am decidedly of opinion that the Legislature employed the words "offence committed by a party to any proceeding" with reference, not to the date of the commission of the alleged offence, but with reference to the date on which the cognizance of the Criminal Court was invited. The argument that an offence cannot with propriety be said to have been committed by a party to a proceeding on a date anterior to the institution of such proceeding, seems to me to lose much of its force when the point is clearly grasped that the expression "offence committed by a party" is loosely used for "offence alleged to have been committed by a party." To my mind the provisions of the sub-section under consideration require to be interpreted as applying to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described as "party to any proceeding in any Court" in which the document in question has been produced or given in evidence, that is to say, who is or has been a party to such proceeding. It does not appear to me that this interpretation does any real violence to the language of the sub-section and I am confident that it is in accordance with the general practice of the Courts.

The only case about which I have felt any difficulty is the Bombay case of *Noor Mahomad Cassum* v. *Kaikhosru Maneckjee* (3), to which I have already referred. The decision in that case is unsupported by reasoning, and it is impossible to say with certainty what view the learned Judges intended to take of the provisions of section 195 (1) (*c*), Criminal Procedure Code, as a whole. I feel the strongest possible doubts as to whether they would have accepted the general proposition contended for on behalf of the prosecution in the present case. Had they taken this view they might well have informed the Chief Presidency Magistrate that no offence anterior in date to the institution of a certain proceeding could with propriety be said to have been committed by a party to that proceeding. I incline to the opinion that they had present to the minds some such analogy, as I have myself suggested, between the prohibition with regard to the manufacture or use of false evidence in sub-section (1) (*b*) and the extension of that prohibition to major offences in sub-section (1) (*c*). They were trying to distinguish between offences committed by "a party to any proceeding" in respect to the said proceeding and any offence which he may have committed in the course of a transaction wholly independent of that proceeding. Personally I doubt if this case was rightly decided, and I incline to the opinion suggested by the Chief Presidency Magistrate, that the wording of section 195 (1) (*c*) was "wide enough" to cover even the case which was then before the Court. If it were attempted to apply any such a distinction to the facts of the present case, then the necessity or otherwise for sanction would have to depend on whether or not the prosecution was in a position to prove that Bhawani Das, at the time when he abetted this forgery, intended that the document should be produced or given in evidence in the subsequent civil suits. The distinction seems to me too fine for practical application and to involve reading into the provisions of the sub-section words which are not there.

I would, therefore, allow this application and set aside the order of the Magistrate

In re BOB DORE.

taking cognizance of the complaint filed by Cheda Lal.

TUDBALL, J.—I concur.

BY THE COURT.—The application is allowed and the proceedings against Bhawani Das in the Magistrate's Court are quashed.

Application allowed; Proceedings quashed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 788 OF 1915.
(CASE REFERRED NO. 36 OF 1915.)
April 5, 1916

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

In re BOB DORE—ACCUSED.

Indian (Foreign Jurisdiction) Order in Council, 1902 —*Government of India Notifications No.* 680 *I-B, dated* 19*th March* 1912, *and No.* 732 *D, dated March* 1913 —*Criminal Procedure Code* (*Act V of* 1898), *ss.* 36, 443, 446, *Sch III, cls.* (iii) *and* (v) – *District Magistrate of Civil and Military Station of Bangalore, powers of, with reference to European British subjects—'Ordinary powers,' meaning of.*

The combined effect of Notifications No. 680 I-B, dated 19th March 1912, and No. 732 D, dated March 1913, of the Government of India under the Foreign Jurisdiction Order in Council is to invest the District Magistrate of the Civil and Military Station of Bangalore, with reference to European British subjects, with all the powers exercisable under the Criminal Procedure Code by a District Magistrate not limited by the special provisions applicable to European British subjects. He, therefore, has power to try a European British subject and sentence him to a term not exceeding two years. [p. 166, col. 2.]

In re W. B. Lawrence, 9 Ind. Cas. 255; 9 M. L. T. 322; (1911) 2 M. W. N. 199; 12 Cr. L. J. 42; 24 M. 346, applied.

The expression 'ordinary powers' in Notification No. 680 I-B has reference to section 36, Criminal Procedure Code, and does not mean the general powers of a Magistrate under the Code. [p. 165, col. 2.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate and Justice of the Peace of the Civil and Military Station of Bangalore, in his letter No. 4714, dated the 29th October 1915.

Mr. *J. C. Adam*, for the Government.

ORDER.—The question referred to us by the District Magistrate of Bangalore is whether he has exceeded his powers in awarding a sentence of six months' rigorous imprisonment to a European British subject in Criminal Case No. 7 of 1915, his view being that as a Justice of the Peace, he can only pass a sentence of imprisonment for three months, in which case the sentence passed by him for six months would be illegal.

This view is evidently founded on the language of section 446 of the Criminal Procedure Code, which limits the powers of a Justice of the Peace to passing a sentence on a European British subject to a term of three months. We have had considerable difficulty in ascertaining the powers of the District Magistrate of Bangalore in respect of a European British subject. The Public Prosecutor has invited our attention to the history of the various Notifications and we are satisfied that there are only two Notifications at present in force, namely Notification No. 680 I-B of the 19th March 1912 and Notification No. 732 D of March 1913. Notification No. 680 directs "that any Justice of the Peace in or for any country or place beyond the limits of British India shall have, in regard to a European British subject, all the ordinary powers which may be conferred on a Magistrate of the first class under the Code of Criminal Procedure, and, in addition, all the powers which may be conferred on a Magistrate under sections 186 and 190 of the said Code". The term "ordinary powers which may be conferred" has reference to section 36 of the Code [*vide Loghan* v. *Romer* (1)] and does not mean the general powers of a Magistrate under the Code. The "ordinary powers" are specified in the Third Schedule and are to be found in clauses I, II and III of that Schedule. They do not include powers to try European British subjects, that power being reserved under clause V, sub-clause 15, to the District Magistrates. It is true that Mr. Cox is a District Magistrate but these ordinary powers conferred by the Notification are only incorporated by reference from the Code and it is not open to us to look at any part of the Schedule other than that containing the ordinary

(1) 12 Ind. Cas. 303; 34 M. 343; (1911) 2 M. W. N. 196; 12 Cr. L. J. 535.

In re BOB DORE.

powers specially made applicable. The powers which may be conferred on a Magistrate under section 186 are powers with reference to offences committed outside the local limits of his jurisdiction and those under section 190 are powers to take cognizance of offences *for which he may try or commit for trial.* But these powers do not enable him to try or commit for trial any European British subject, such power being given by sections 443 and 446 which are not included in the Notification. The other Notification No. 732 is a *quasi-statutory* Notification in exercise of the powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, applying a large body of enactments in force in British India to the Civil and Military Station of Bangalore, over which, although outside the limits of British India, the British Government has, by treaty, jurisdiction exclusive of that of the Government of Mysore. No Indian statute applies to the Civil and Military Station, the legislative power being exercised under the Indian (Foreign Jurisdiction) Order in Council above referred to. This Notification applies the Code of Criminal Procedure of 1898 to the Station subject to four exceptions, the fourth being "nothing in this Code as applied shall be deemed to apply to proceedings against European British subjects," etc. If this matter were *res integra*, we should be unable to find any power to apply the Code or any portion of it to a European British subject, for that seems to us to be the plain meaning of the words; and that being so, there would be, in the District Magistrate, no power to try a European British subject at all, the earlier Notification quoted having, as already pointed out, not given the power. We are, however, relieved from the necessity of holding this, as the matter has been considered by a Full Bench of this Court which has arrived at a conclusion which we think binds us, although on a different Notification. The decision is *In re W. B. Lawrance* (2). The District Magistrate of Bangalore had refused to take cognizance of an offence against a European British subject on the ground that Notification No. 2668, which applied the Criminal Procedure Code to the station, exempted European British subjects from its operation and the Full Bench had to consider the proviso, which is in exactly the same terms as that in the present Notification No. 732 D. They held that although in terms it did not apply the Code, still it must be read as reproducing the effect of an earlier Notification of the 1st March 1883, which applied the whole Code with the exception of so much of the Code as applies to European British subjects. It is obvious from the language used by the Full Bench that they thought the difference in language of the later Notification was due to inadvertance. The earlier Notification made a European British subject subject to the general powers of the District Magistrate over all British subjects and the Full Bench decided to read the latter Notification as having the same effect. The Notification we have now to construe is in the same terms and we are bound to apply the same reasoning. We, therefore, hold that the District Magistrate has with reference to European British subjects all the powers under the Code of a District Magistrate not limited by the special provisions applicable to European British subjects. He, therefore, has power to try a European British subject and sentence him to a term not exceeding two years. We think it right to express our surprise that after the decision of this Court in January 1911 pointing out the difficulty created by the language used in Notification No. 2668 a fresh Notification should have been issued in exactly the same terms. The papers will be returned to the District Magistrate.

Reference answered in the affirmative.

V.R.P.

(2) 9 Ind. Cas. 255; 9 M. L. T. 322; (1911) 2 M. W. N. 199; 12 Cr. L. J. 42; 34 M. 346.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 23 OF 1916.
March 11, 1916.
Present:—Sir Henry Richards, KT., Chief Justice.
BHAGWAT SARAN MISIR AND OTHERS—APPLICANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 378—Theft—Defence—Legal right—Dishonest action.

It is not a sufficient defence to a charge of theft for the accused merely to assert that he thought that he was acting within his legal rights. But if a Court finds that a person charged with theft was *bona fide* acting on what he supposed to be his legal rights, and was not acting dishonestly, the Court should not convict him

Criminal revision from an order of the Magistrate, First Class, Gorakhpur.

Mr. *W. Wallach*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case the four accused have been convicted of theft and sentenced to pay fines. The accused come to this Court in revision, contending that their conviction was wrong in law. The principal accused is a *zemindar* and the complainant was or had been a tenant of his. There had been disputes between them, which had been settled by the signing of an agreement by which the complainant undertook to build a house and to go and reside there within a certain time; whilst, on the other hand, the *zemindar* agreed to leave him certain fields. The agreement also provided that if the house was not built, then the *zemindar* should be at liberty to eject the complainant under the Tenancy Act or in any other way he thought fit. The complainant never built the house, and there were further disputes between them in consequence. The allegation is that the accused (*i. e.*, the *zemindar* and his servants) cut and took away the crops of the complainant. A perusal of the record clearly shows that there was a good deal to be said for both sides. The District Magistrate says in his judgment (confirming the conviction): "It seems certain *that the tenant sowed the crops of some of the fields at least* which the appellants cut and took away." A perusal of the record shows that the learned Magistrate tried the case as a civil case. He has carefully gone through the evidence and finds that some of the crops belonged to the complainant, but a perusal of the judgment also shows that the learned Magistrate had not very clearly before his mind the great importance of seeing whether or not the *zemindar* acted *dishonestly*. This is not altogether surprising, because it would seem that when the complaint was first made another Magistrate had dismissed the complaint upon the ground that the matter was of a civil nature. The case was taken up a second time in consequence of an order of the Sessions Judge. In my opinion it would have been better if the order of the first Magistrate had been left undisturbed and the complainant had gone to the Civil Court, where he could have got redress if he was entitled to it. This would have been best for all parties. The *zemindar* seems to have acted on what he supposed to be his rights. It is possible that he was mistaken as to the nature of the latter, but nevertheless he was acting in accordance with what he supposed to be his legal rights. The other accused seem merely to have acted under the orders of their master. I do not wish to be taken as laying down that it is a sufficient defence to a charge of theft for the accused merely to assert that he thought that he was acting within his legal rights. But if the Court finds that a person charged with theft was *bona fide* acting on what he supposed to be his legal rights, and was not acting dishonestly, the Court should not convict him. A conviction for theft against a man may have very serious consequences beyond the sentence imposed. I allow the application, set aside the convictions and sentences and direct that the fines, if paid, shall be refunded.

Application allowed.

SECRETARY OF STATE *v.* RANGASAMY AIYANGAR.

MADRAS HIGH COURT.
FULL BENCH.
SECOND APPEAL No. 203 OF 1914.
January 3, 1916.
Present:—Sir John Wallis, KT., Chief Justice,
Mr. Justice Kumaraswami Sastri and
Mr. Justice Phillips.
April 19, 1916.
Present:—Mr. Justice Seshagiri and
Mr. Justice Srinivasa Aiyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
REPRESENTED BY THE COLLECTOR OF TANJORE—DEFENDANT—APPELLANT
versus
RANGASAMY AIYANGAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 88, 89—Joint Hindu family—Absconding accused, attachment of interest of, effect of—Receiver, appointment of, after attachment—Rights of other co-parceners—Attachment of father's share—Rights of afterborn sons.

By the Full Bench.—The undivided interest of an absconding member of a joint Hindu family in the family property is liable to attachment under section 88 of the Code of Criminal Procedure. [p. 169, col. 1]

Musammat Golab Koonwur v. *Collector of Benares*, 4 M. I. A. 246; 7 W. R. 47 (P. C.); 1 Suth. P. C. J. 186; 1 Sar. P. C. J. 343; 18 E. R. 693 and *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry*, 11 M. I. A. 223 at p. 239; 7 W. R. 18 (P. C.); 1 Suth. P. C. J. 673; 2 Sar. P. C. J. 246; 20 E. R. 85, referred to

What has to be attached under the section is the share of the defaulting member of the family, which is subject to the rights of the other members of the family and may be realised by a Receiver in a suit for partition or otherwise. [p. 169, cols. 1 & 2.]

Criminal Revision case No. 536 of 1903, not approved.

Criminal Revision Case No. 560 of 1893, approved.

By the Division Bench.—The effect of an attachment under section 88, clauses (3) and (4), of the Criminal Procedure Code, read with clause (7), is only to secure to the Government the enjoyment of the income during the continuance of the attachment, and not to vest the property or the share of the absconder in the Government as confiscated. [p 170, col. 1.]

Bishonath Sircar's case, 3 W. R. 63 Cr., referred to.

Quod the property attached the rights of the Government are governed by the ordinary Hindu Law. [p. 170, col. 1.]

The language of sections 87 to 89 does not warrant the construction that the attachment effects a severance of a joint family or precludes the afterborn sons of the absconder from claiming their shares in the property on partition. [p. 170, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam, in Appeal Suit No. 260 of 1911, preferred against that of the District Munsif, Tiruturaipundi, in Original Suit No. 47 of 1910.

FACTS.—This suit was brought in 1910 to recover immoveable property with mesne profits from the Government by three plaintiffs, a Hindu father and his two minor sons. In a criminal case of 1898 wherein the father had been an accused and reported to be absconding, his property was attached by the Magistrate under sections 87 and 88, Criminal Procedure Code. The 2nd plaintiff was in his mother's womb on the dateof the attachment and the third plaintiff was born some years thereafter. The father was apprehended, convicted and ultimately released from jail in 1907. The present suit was brought by the three plaintiffs in 1910 in the Court of the District Munsif of Tiruturaipundi. The District Munsif held that the proceedings taken by the Government for the arrest of the first plaintiff and the subsequent attachment of his property were illegal as it had not been proved that the provisions of the Statute had been complied with, and in that view he decreed the plaintiffs' claim in full.

The Government appealed. The Subordinate Judge of Negapatam held that the proceedings in respect of the attachment must be presumed to be regular. He agreed with the District Munsif that the 2nd plaintiff was the legitimate son of the first and in his mother's womb on the date of the attachment. In view of the case of *Bishonath Sircar's* case (1), that the undivided interests of a co-parcener cannot be attached under the Criminal Procedure Code, he confirmed the decree of the District Munsif but directed the parties to bear their own costs in both the Courts.

Government filed a second appeal and the plaintiffs filed a memorandum of objections as regards costs.

This second appeal coming on for hearing on the 29th March 1915, the Court (Sankaran Nair and Spencer, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH.

On account of the importance of the question and the conflicting decisions on the point in Criminal Revision Case No. 560 of 1893 and Criminal Revision Case No. 536 of 1903 [*Chinniyan's* case (2)], we refer to a Full Bench for decision the question:—

(1) 3 W. R. 63 Cr.
(2) 2 Weir 43.

"Can the undivided interest of an absconding person, who is a member of an undivided Hindu family, in the family property or any portion thereof be attached under section 88 of the Code of Criminal Procedure?"

This second appeal coming on for hearing on January 3, 1916, in pursuance of the above order, upon perusing the order of reference, and upon hearing the arguments of Mr. *T. Narasimha Aiyangar* for the Government Pleader, for the Appellant, and of Mr. *S. T. Srinivasagopalachariar*, Counsel, and Mr. *N. Srinivasachari*, Vakil, for the Respondents, the Full Bench expressed the following

OPINION.—We think the question must be answered in the affirmative. Mr. Narasimha Aiyangar has called our attention to two decisions of the Privy Council under Bengal Regulation XI of 1796, which apparently were not brought to the notice of the learned Judges who decided the cases mentioned in the reference. Under Regulation XI of 1796, section 4, the Magistrate was to order the attachment of any land or other real property held by the absentee, and under section 6 on failure of the absentee to attend within six months after the attachment the lands were to be at the disposal of the Governor-General in Council. It was held by the Privy Council in *Musammat Golab Koonwur* v. *Collector of Benares*(3), under the Regulation in a case from Benares governed by the Mitakshara Law, that the undivided interest of the defaulting member of the joint family passed to the alienee from Government, and in *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry* (4) their Lordships again took the view that the share of the defaulting member of the joint family was liable to confiscation.

The provisions of section 88 of the present Code of Criminal Procedure are wider than the Regulation in so far as they include moveable as well as immoveable property, but as regards procedure they deal with the matter in greater detail specifying the manner in which each description of property is to be attached. What has to be attached under the section in a case such as this is the share of the defaulting member of the joint family, which is, of course, subject to the rights of the other members of the family and may be realised by a Receiver in a suit for partition or otherwise. We are unable to agree with the observations of Subramania Aiyar, J., in Criminal Revision Case No. 536 of 1903 that a Receiver cannot be appointed under the section to realise the share of the defaulting member, or that such an appointment would necessarily take the property out of the hands of the managing member. On the other hand we agree with Collins, C.J., and Shephard, J., in Criminal Revision Case No. 560 of 1893 that there is nothing in the language of section 88 to restrict the meaning of the word "property" and that it must include the rights and interests of persons who as members of an undivided family are jointly entitled to the property of the family.

This second appeal and the memorandum of cross-objections filed by the respondents coming on for hearing on the 13th March 1916, after the expression of the opinion of the Full Bench, and the case having stood over for consideration till the 23rd March 1916 and having been posted to be spoken to this day, the Court delivered the following

JUDGMENT.—It was sought to be argued before us that the finding as to the publication of the proclamation is not warranted by the evidence. We see no force in this contention.

In the view taken by the Full Bench, the further question arises whether the attachment by the Government takes away the right of the 3rd plaintiff to claim a share in the property. The property is found to have been ancestral. It is also found that at the time of the attachment, namely, July, 1898, the 2nd plaintiff was in the womb. The 3rd plaintiff was born some years after. On these facts, the point for decision is whether the Government obtained an absolute right to the share of the 1st plaintiff on the date of the attachment, so as to deprive the 3rd plaintiff of his share on partition. The answer to this question is not free from difficulty. It is well settled that an attachment by a Civil Court in execution of a decree does not confer a lien on the attaching creditor. Is the attachment under the Code of Criminal Procedure different in its nature and effect from a civil attachment? The mode of attachment prescribed in clauses (3) and (4) of section 88

(3) 4 M. I. A. 246; 7 W. R. 47 (P. C.); 1 Suth. P. C. J. 186; 1 Sar. P. C. J. 343; 18 E. R. 693.

(4) 11 M. I. A. 223 at p. 239; 7 W. R. 18 (P. C.); 1 Suth. P. C. J. 673; 2 Sar. P. C. J. 246; 20 E. R. 85.

of the Code of Criminal Procedure is practically identical with the procedure to be observed under the Code of Civil Procedure. The difference arises from the language employed in clause (7) of section 88. Under that clause the property after the period prescribed is declared "to be at the disposal of the Government." If this clause is read with 3 (*d*) and 4 (*h*), it seems to us that the right accruing to Government by the property being at their disposal is only to secure, to the Government, the enjoyment of the income during the continuance of the attachment. See also *Bishonath Sircar's* case (1). There are no words in section 88 or 89 vesting the property or the share of the absconder in the Government. Form V in Schedule V of the Code directs the Magistrate "to hold the same (property) under attachment pending the further order of this Court." It is not said that any further order was passed by the Magistrate. The intention apparently is to give the Government a hold on the property till the absconder surrenders himself. There is no indication in the section that by the process of attachment, a confiscation of the property was to be effected. It seems to us that the Government cannot be in a better position than the absconder so far as the property under attachment is concerned.

In the opinion delivered by the Full Bench, it is pointed out that the share attached is "of course subject to the rights of the other members of the family" and that an appointment of a Receiver to realise the share of the absconder would not "necessarily take the property out of the hands of the managing member." These observations indicate that *quod* the property attached, the rights of the Government are governed by the ordinary Hindu Law. The contrary view that the attachment effects a severance of the co-parcenary would render these observations in the judgment of the Full Bench meaningless.

Musammat Golab Koonwur v. *Collector of Benares* (3) was a case under Regulation XI of 1796 which, as regards attachment, substantially lays down the same procedure as the Code. In that case, the Governor-General in Council passed an order of confiscation subsequently. In the present case, no such order was passed, nor was our attention drawn to any provision by which a confiscation can be made. Notwithstanding the order of confiscation, the Judicial Committee held that the widow of a member of the family was entitled to maintenance out of the ancestral estate. This is what they say: "The only other question is the right of *Musammat* Golab Koonwar to maintenance out of the whole of the property held to be ancestral. Nothing was urged at the Bar against this right; and it appears to us that, on the principle of the decree, it ought to have been recognised." If the confiscation did not deprive the widow of her right to maintenance, it can only be on the ground that the property continued to be joint family property subject to the liabilities which rested on it in the hands of the owner.

In *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry* (4) the Judicial Committee held that a confiscation under the Regulation had not the effect of affecting encumbrances, and pointed out that the Regulation being a penal one should be construed strictly. These observations apply with equal force to sections 87 to 89 of the Code of Criminal Procedure. The language of these sections does not warrant the construction that from the date of attachment, the interest of the absconder is severed and vests in the Government. We must, therefore, hold that plaintiffs Nos. 2 and 3 are entitled to their 2/3rd share in the properties in suit. We pass a preliminary decree for possession of the 2/3rd share to plaintiffs Nos. 2 and 3 and direct the District Munsif to pass a final decree as to past and future mesne profits. Parties to pay and receive proportionate costs throughout. Plaintiffs will pay the Court-fee in the first instance and will get 2/3rd of it from Government within three months from the date of the final decree.

Appeal partly allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 983 OF 1915.

November 20, 1915.

Present:—Mr. Justice Rattigan.

AHMAD KHAN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 30, 408 (b)—Sentences by a Magistrate with powers under s. 30—Accused sentenced to two years' imprisonment, appeal by—Appeal, forum of, where co-accused sentenced to five years.

A Magistrate of the first class invested with special powers under section 30, Criminal Procedure Code, sentenced one of the accused to two years' rigorous imprisonment and the other accused to five years' rigorous imprisonment. The former appealed to the Sessions Judge, who declined jurisdiction:

Held, that the appeal lay to the Chief Court under section 408 (*b*), Criminal Procedure Code. [p. 171, col. 1.]

Palani Koravan v. *Emperor*, 17 M. L. J. 248; 5 Cr. L. J. 496 referred to.

Appeal from the order of the Magistrate, 1st Class, Gujranwala, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 15th September 1915, convicting the appellant.

Mr. *Raghunath Rai*, for the Appellant.

JUDGMENT.—The appellant, Ahmad Khan, and one Ahman have been convicted by a Magistrate of the 1st class, exercising enhanced powers under section 30 of the Criminal Procedure Code, of an offence under section 420, Indian Penal Code, and have been sentenced, Ahmad Khan to two years' rigorous imprisonment and a fine of Rs. 200, and Ahman (who has two previous convictions under sections 379 and 457, Indian Penal Code respectively, as well as a very recent conviction under section 420, Indian Penal Code, standing against him) to five years' rigorous imprisonment and a fine of Rs. 200, and to police surveillance for a period of two years. Ahman has not appealed, but Ahmad Khan has preferred this appeal [which was originally presented to the Sessions Judge, who declined jurisdiction upon the strength of the ruling of the Madras High Court reported as *Palani Koravan* v. *Emperor* (1)] through his Counsel, Mr. Raghunath Rai.

I have heard the latter gentleman at length in support of the appeal and have also carefully considered the evidence on the record, but I can find no ground for differing from the conclusions arrived at by the Magistrate.

The facts are stated in detail in the Magistrate's judgment and need not be repeated. The appellant admits that he took ornaments to Guranditta for the purpose of raising money on them; that Guranditta lent Rs. 175 thereon; that the witness Kaka was present on the occasion; and that there was an allegation that Rs. 5 had been paid in excess by Guranditta. He asserts, however, that the transaction was perfectly *bona fide* and that the ornaments were actually left in pawn with Guranditta, and he explains that the present charge has been preferred by the complainant with a view to misappropriating the ornaments.

On the other hand we have the evidence of Guranditta, an old man 72 years of age against whose respectability there is nothing on the record, who swears that a trick was played on him and that while he was away from the shop room, getting the money, the tin-box with a lock upon it, which he imagined contained the ornaments but really contained only mud and stones, was substituted for the similar box which contained the ornaments. The complainant's story is corroborated in material points by the evidence of the witness Kaka Ram (P. W. No. 2), in whose presence complainant opened the box left with him by Ahmad Khan. Complainant explains that the reason why he opened the box was that he found he had paid Rs. 5 too much to Jamu (Ahmad Khan's friend); that Jamu had told him to add this amount to the sum lent to Ahmad Khan (on whose behalf Jamu had acted, he being previously known to complainant); and that consequently he (complainant) thought it advisable to correct the amount of the loan in the *ruqqa* which had been handed over to Ahmad Khan in order to be locked up in the box with the ornaments. He accordingly opened the box and found that so far from containing the ornaments, it had within it only mud and stones.

In further corroboration of complainant's story we have it proved by the evidence of the Sub-Inspector Jafir Hussain and the *sarbrah zaildar* Fazal Ilahi, that on appel-

(1) 17 M. L. J. 248; 5 Cr. L. J. 496.

lant's house being searched, the *ruqqa* (Exhibit P.A) which should have been in the tin-box left with complainant and an empty tin-box (Exhibit P.I) which was to all intents and purposes the duplicate of the one in complainant's possession, were found on the premises, and that later on, certain female relations of appellants, on being questioned by the Police, delivered up certain ornaments. These latter have been identified by the witnesses, Shiv Lal (who weighed and valued the ornaments for complainant) and Devi Das, another *sahukar* to whom the ornaments were the same day offered as security, as the ornaments which they saw on the date in question. Both these witnesses had good reason to remember the ornaments and I believe their evidence to be true.

Finally we have the evidence of Hukam Singh (P. W. No. 6) who states that Ahmad Khan about the same time endeavoured, but unsuccessfully, to play a similar trick upon him.

In my opinion, all this evidence proves the guilt of the appellant beyond possibility of doubt and no serious attempt was made to shake that evidence in cross-examination.

It is alleged in the grounds of appeal that Ahmad Khan is a youth of about 17 or 18 years of age and it is urged that he should have been given the benefit of the provisions of section 562, Criminal Procedure Code. This point was not urged before me at the hearing, and in any event I could not accede to it. Ahmad Khan may be a young man but he has apparently chosen as an associate and friend a person (Ahman) who is a more or less confirmed criminal, and the fact that he had previously endeavoured to cheat Hukam Singh by a similar fraud shows that he has criminal propensities which, unless checked, are likely to prove dangerous to society. I cannot regard the sentence in these circumstances as excessive, and I, therefore, reject the appeal.

Appeal rejected.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 378 OF 1916.

July 1, 1916.

Present:—Mr. Justice Lindsay.

NOOR MAHOMMED AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 325, 323—Riot, serious—Revision—Sentence, reduction of.

The accused convicted in a very serious riot case are not entitled to reduction of their sentences in revision on the ground that men on their side sustained a certain number of injuries.

Messrs. *G. W. Dillon* and *Satya Charan*, for the Applicants.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—The only question raised in this application for revision is one of sentence. The applicants have been convicted of offences under sections 147, 325 and 323, Indian Penal Code, and have with one exception been sentenced to two years' rigorous imprisonment. The first applicant, Noor Mahommed, has been sentenced to six months' rigorous imprisonment and a fine of Rs. 500. I have heard Counsel and have examined the record. The medical evidence shows that a very serious riot took place in which these accused were concerned. It is true that men on their side sustained a certain number of injuries; but it is also proved that their opponents received a number of serious injuries amounting to grievous hurt. Having regard to these facts, it appears to me that I should not be justified in interfering with the sentences. The riot was a very serious one. I think the sentences were properly passed. I dismiss the application.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1073 OF 1915.

March 16, 1916.

Present:—Mr. Justice Knox.

CHUNNI LAL AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Security to keep peace—Order, legality of.

Where in a proceeding under section 107 of the Criminal Procedure Code, 1898, it was found that acts done by each of the accused persons were of such a provocative nature that the only probable result was the disturbance of the public tranquillity:

Held, that, although the order drawn up in writing in accordance with the police report might have been expanded, the order of the Magistrate to the accused to furnish security to keep the peace was justified and proper. [p. 173, col. 2; p. 175, col. 1.]

Criminal revision from an order of the District Magistrate of Cawnpore.

Mr. *Uman Shankar Bajpai*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government-Advocate), for the Crown.

JUDGMENT.—The District Magistrate of Cawnpore on the 28th of September 1915 refused to interfere with an order of the Deputy Magistrate of Cawnpore. That Deputy Magistrate on the 16th of August 1915 had passed an order whereby five persons, Chunni Lal, Raja Ram, Gajadhar, Sidhan Lal, and Manu Lal, residents of *Mauza* Deoha were bound over to keep the peace under the authority conferred on the Deputy Magistrate by section 107 of the Criminal Procedure Code These same five persons have come to this Court and ask this Court to interfere in revision on the ground:—(1) Because there is no finding by the Court below that each of the persons ordered to furnish security is likely to commit a breach of the peace or disturb public tranquillity or is likely to do some wrongful act which may occasion such a disturbance, and the order complained of is, therefore, bad in law. (2) Because the occasion on which there was any apprehension having passed off quietly before the order was passed, the said order is not warranted in law. (3) Because the mere fact that there is a marked tension between the Hindus and Muhammadans is not enough to justify an order under section 107. (4) Because the Police report was vague and indefinite and consequently no proceedings under section 107 could be legally started. (5) Because there is nothing to show that the applicants were doing any wrongful act or anything which they had not a legal right to do. (6) Because the Muhammadans were the aggressors and they ought to have been bound over and not the Hindus. There is a seventh ground which is a general ground and need not be considered.

The learned Vakil who has appeared for the applicants has done the very best he could under the circumstances and has put forward every point likely to tell in favour of his clients, but while throwing his whole force into pleas such as Nos. 2, 3, 4, 5 and 6 of the application I did not, in the arguments, notice equal energy bestowed on his part in confronting the evidence which is on the record and which is in reality that on which the Deputy Magistrate had to arrive at his finding. Granting that the order drawn up in writing under section 112 might have been expanded with advantage and granting further that the Police report, upon which the learned Vakil says that order was founded, proceeded upon matters which his clients have done their best to meet, there is no doubt that the persons who heard that order read under section 113 of the Code could not have failed to have an accurate apprehension of what was the information they had to meet. Both in that order and in the evidence which followed, these five persons must have known that the grievance against them was that they were likely to commit a breach of the peace and to disturb the public tranquillity, and I deemed it necessary under the circumstances to look into the evidence and see whether that evidence disclosed reliable statements that the applicants were men who had shown by their acts and general behaviour that the object of their lives for the time was to disturb the Muhammadans of Deoha. With this view I read through the evidence, not the Police evidence only but the evidence of both Hindus and Muhammadans who appear to be people of standing in Deoha. The evidence shews that up to recent time public tranquillity in Deoha was on a secure footing. Neither the Hindus set themselves

against the Muhammadans nor the Muhammadans set themselves against the Hindus. It is only in recent time that a state of tension has been created in this village and the persons who are responsible for this have a great deal to answer for. Public security and public tranquillity are two of the greatest blessings that can be enjoyed and when at the same time the freedom of individuals to do lawful acts is interfered with, the responsibility of those who disturb the public tranquillity is still greater. There are many acts which a person is entitled to do and has a right to do, but that right is subject to the limitation that it is not used in such a way as to offend others. In the evidence before me, if it is reliable and I see no reason to doubt it is, there was no real attempt made to break it down by cross-examination and it is evidence which is not prompted by malice or prejudice, the case is remarkably free from these unfortunate incidents. With one or two exceptions the evidence shews internally that it was given by persons of even and moderate temper. At the same time it discloses that acts were done by each of the persons before me, man by man, which were of such a provocative nature that the only probable result was the disturbance of the public tranquillity. My brother Piggott has dealt with a similar case, *Emperor* v *Murli Singh* (1), and in the remarks made by him at page 777*, I fully concur and I, therefore, see no reason to repeat them. The learned Vakil for the applicants cited several cases before me, among them *In the matter of the petition of Basdeo* (2), *In the matter of the petition of Gauri Sahai* (3), *Queen-Empress* v. *Abdul Kadir* (4), *Jagat Narain* v. *Emperor* (5), *Dindayal Mozumdar* v. *Emperor* (6), *Narindra Bahadur Pal* v. *King-Emperor* (7). I do not think it necessary to comment on these: they do not seem to me to meet the facts of the present case. But there were others which were brought to my notice. There was the case of *Queen-Empress* v. *Nathu* (8). In that case the learned Judge of this Court held that the order prepared under section 112 did not properly or adequately disclose the substance of the information upon which the summonses were issued. The order under section 112 is set out at page 215. It certainly was a most vague and loose order and it purported to refer to the commission of the breach of the peace at the "Rathjatra" *mela* which was to be held at Kasi. That was a definite place and occasion on which the breach of the peace was apprehended and it appears that there was nothing in the evidence which justified wholesale order for security which was passed in that case. The case, moreover, was one referring to events of the year 1884, when the law ran differently from what it runs now. Section 107 of Act No. X of 1882 did not make one of the objects of the section the mere disturbance of public tranquillity. These words were added in the present Code and they are very important words. A person bound over may be a person who is not likely to commit a breach of the peace and still is likely to disturb the public tranquillity and if there is reasonable apprehension that he will so act, the Code authorises the Magistrate to bind him over so that he will not disturb the public tranquillity. The same remaks apply to the case of *Queen-Empress* v. *Abdul Kadir* (4). That was a case decided under the former Code and the main blot found in the procedure of the Court below was that a joint inquiry had been held and the learned Judge of this Court, though he could not say that a joint inquiry was *ipso facto* illegal, considered it necessary that overt acts should be proved before an order under section 107 could be made and substantial grounds for the apprehension of the breach of the peace were established by proof of facts against each person implicated which would lead to the conclusion that an order for furnishing security was necessary. I hold that in this case this was done in the case of each of the persons who are now applying for revision. Another case cited before me was *Jagat Narain* v. *Emperor* (5). The persons bound down in that case appear from the judgment of this Court to have been

(1) 13 Ind. Cas. 922; 33 A. 775; 13 Cr. L. J. 170.
(2) 26 A. 190; A. W. N. (1902) 229.
(3) 6 A. 114; A. W. N. (1883) 240.
(4) 9 A. 452; A. W. N. (1887) 111.
(5) 18 Ind. Cas. 818; 11 Cr. L. J. 719; 7 A. L. J. 1161.
(6) 34 C. 935; 11 C. W. N. 1002; 6 Cr. L. J. 230.
(7) 1 A. L. J. 419; 1 Cr. L. J. 696.

* Page of 33 A.—*Ed.*

(8) 6 A. 214; A. W. N. (1884) 51.

bound down merely because they were wealthy and influential members of a party. That cannot be said of the present case. There remains the case of *Brijnandan Prasad* v. *Emperor* (9). In that case the District Magistrate imported into the case certain facts which he had obtained from sources outside the record. No such mistake was committed in the present case. If the evidence before me had been confined to the constitution of a committee or the collection of funds for the Ram Naumi festival, I should have had to deal otherwise with the case; but the evidence before me, it is said and I see no reason for doubting it, is that the object of the persons concerned was not merely the restoration of the Ram Naumi festival but the bringing about what the persons hoped loss and disgrace to the Muhammadans. This was steadily put forward in the evidence. For all these reasons I do not think the order of the Deputy Magistrate can be disturbed and the order appears to be a very right and proper one. I dismiss the application.

Application dismissed.

(9) 26 Ind. Cas. 638; 16 Cr. L. J. 46; 37 A. 33; 12 A. L. J. 1246.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 25 OF 1916.

March 10, 1916.

Present:—Mr. Justice Rattigan.

RAM JAS—PETITIONER

versus

EMPEROR—RESPONDENT.

Practice—Prosecution evidence weak and biased—Benefit of doubt—Revision.

Where in a case of theft of grass, the Magistrate found that the evidence for the prosecution was weak and biased and that it was possible that the accused did get permission from the joint proprietors to cut the grass:

Held, that under the circumstances the accused could not be convicted of theft.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the District Magistrate, Lyallpur, dated the 25th October 1915, confirming that of the Magistrate, 2nd Class, Toba Tek Singh, dated the 30th September 1915, convicting the petitioner.

ORDER.

RATTIGAN, J.—(*January 13th*, 1916).—The case is a very petty one, but I confess I am at a loss to understand how a conviction was arrived at. The Magistrate finds that the evidence for the prosecution is weak and biased and he also states that *it is quite possible* that petitioner Ram Jas did actually get permission from the joint proprietors, Mehr-ud-Din and Bura, to cut the fodder or grass. In the alternative he thinks that it is *equally possible* that petitioner cut the grass without permission, but under the impression that he had the right to do so; upon this view of the case I fail to understand how petitioner could possibly be convicted of theft.

The District Magistrate's very brief judgment is equally difficult to follow. Petitioner urged before the Magistrate that he had received permission from Mehr-ud-Din and Bura to cut the grass and that was his defence, and I cannot find anything in the grounds of appeal which militates against this plea as his main defence. On the other hand petitioner was obviously justified in urging that upon the findings of the Magistrate no offence of theft had been committed.

The District Magistrate was not, I think, justified in saying that accused had not pleaded that he had no guilty intent.

Notice to District Magistrate.

Mr. *Nanak Chand*, for the Petitioner.

JUDGMENT.—For reasons stated in my order, dated 13th January 1916, I give the petitioner the benefit of the doubt and acquit him. The fine, if paid, will be refunded.

Revision allowed.

BUDHA *v.* EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 204 OF 1916.
May 4, 1916.
Present:—Mr. Justice Rattigan and
Mr. Justice Scott-Smith.
BUDHA—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 451, 457—Lurking house-trespass, essential element of—House trespass by night.

In order to constitute lurking house-trespass the offender must take some active means to conceal his presence from some one who has a right to exclude him.

Ghulam Jelani v. *Empress*, 16 P. R. 1889 Cr. followed.

The mere fact that a house-trespass was committed by night does not make the offence one of lurking house-trespass.

Where, therefore, the accused had entered the courtyard of a *haveli* through the *deorhi* but the *deorhi* itself had no door attached to it, and was caught red-handed in the act of stealing cattle:

Held, that he was guilty of the offence of house trespass.

Appeal from the order of the Sessions Judge, Lahore, dated the 18th February 1916, convicting the appellant.

R. S. Lala *Mul Chand* (for the Government Advocate), for the Respondent.

JUDGMENT.

SCOTT-SMITH, J.—Budha, a *kumhar* by caste, has been convicted by the Sessions Judge, Lahore, of lurking house-trespass by night under section 457, Indian Penal Code, and as he has been convicted four times previously of offences under Chapter XVII, Indian Penal Code, has been sentenced to transportation for life. He has appealed to this Court through the Superintendent of Jail and we have carefully considered the evidence against him.

In our opinion it is clearly proved that the appellant was caught at night in the courtyard of Jowand Singh's *haveli* under circumstances which showed that he had come there in order to commit theft of cattle. Jowand Singh and Baj Singh (P. Ws. Nos. 2 and 3) were sleeping in the *haveli* on the night in question and caught the appellant red-handed. We see no reason whatever to reject their evidence. The evidence of Tilok Singh (P. W. No. 5) is also important as shewing that appellant knew that there were cattle in the *haveli* in question. Appellant's allegation that he was Jowand Singh's servant and was falsely accused of the offence because he had demanded the pay which was due to him, is not supported by any evidence. On the contrary from the prosecution evidence it is clear that he was a stranger in Jowand Singh's village and had never been seen there before. The assessors were unanimously of opinion that he was guilty and we agree with them and the Sessions Judge.

At the same time we do not think that the offence committed was one of *lurking* house-trespass by night. It was certainly one of house-trespass, for the appellant had entered the courtyard of the *haveli* through the *deorhi* but the *deorhi* itself had no door attached to it and, therefore, there was no house-breaking. House-trespass becomes lurking house-trespass if the offender takes precautions to conceal such house-trespass from some person who has a right to exclude him. We do not think it can be said that the mere fact that a house-trespass was committed by night makes the offence one of *lurking* house-trespass. In order to constitute lurking house-trespass we are of opinion that the offender must take some active means to conceal his presence as in the case reported as *Ghulam Jelani* v. *Empress* (1), where it was held that hiding in a corner of the porch was within the definition. We, therefore, alter the conviction to one under section 451, Part II, Indian Penal Code, but having regard to appellant's previous record we see no reason to interfere with the sentence and we dismiss the appeal.

Appeal dismissed.

(1) 16 P. R. 1889 Cr.

CALCUTTA HIGH COURT.

REFERENCE No. 9 OF 1916.

June 5, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

HARENDRA CHANDRA BHATTACHARJEE—PLAINTIFF

versus

GAGAN CHANDRA DAS—DEFENDANT.

Limitation Act (IX of 1908), s. 20—Payment of a sum on decree for money not bearing interest, effect of—Application to certify payment under decree, if controls s. 20.

The provisions of section 20 of the Indian Limitation Act are in no way affected by the decree-holder making an application to certify payment under a decree. [p. 179, col. 1.]

A payment by the judgment-debtor of a certain sum on a decree for money which does not bear interest cannot operate to give a fresh start to the period of limitation under section 20 of the Limitation Act, even if the decree-holder in his application for execution certifies that payment as payment of interest, unless that payment appears in the handwriting of the judgment-debtor or his agent duly authorized in that behalf, so that it might be taken as having been made in part payment of the principal under that section. [p. 179, col. 1.]

Reference made by the 2nd Munsif of Nabinagar, Tipperah, in Small Cause Court Execution Case No. 58 of 1916.

FACTS of the case appear from the following reference made by the second Munsif of Nabinagar, Tipperah:—

"The original suit was decreed, on 19th December 1911. The decree was for Rs. 30 (principal Rs. 20 and interest Rs. 10) and costs Rs. 5-13-9. No interest was allowed on the decretal amount by the Court.

The 1st execution case, No. 41 of 1913, was filed on 7th January 1913, notice was served on 20th January 1913, and no further step was taken.

The 2nd (present) execution case was filed on 28th January 1916. In the petition for execution the decree-holder has credited Re. 1 as having been paid by the judgment-debtor on the 10th *Bhadra* 1322 B. S., corresponding to 27th August 1915. The payment is not in the handwriting of the judgment-debtor.

The judgment-debtor contends that he did not pay Re. 1 either as principal or interest, that the decretal amount did not carry any interest and the decree is barred by limitation.

The points for determination are:—

1 Did the judgment-debtor pay Re. 1 to the decree-holder on the 10th *Bhadra* 1322 B. S.?

2 Is the Execution Case No. 58 of 1916 barred by limitation?

DECISION.

Point 1. The decree-holder and his *karnachari* Srikanta Sil have deposed in this case. On a consideration of their evidence and the documentary evidence Exhibit 1 and Exhibit 2, I believe and find that the judgment-debtor paid Re. 1 on account of the decree in question on the 10th *Bhadra* 1322 B. S.

Point 2. The present execution case has not been brought within three years of the last step-in-aid of execution. So but for the payment of Re. 1 on the 10th *Bhadra* 1322 B. S. it would have been time-barred.

The learned Pleader for the judgment-debtor contends that even if there was any payment of Re. 1 on account of the decree on the 10th *Bhadra* 1322 B. S., the present execution case is time-barred according to section 20 of the Indian Limitation Act of 1908, as no interest was allowed on the decretal amount by the Court and as such the payment of Re. 1 must have been a part payment of the principal of the judgment-debt, and the fact of the said payment does not appear in the handwriting of the judgment-debtor.

The learned Pleader for the decree-holder argues that the judgment-debt includes interest also which was claimed in the suit, and as the judgment-debtor did not say on what account, whether as principal or as interest, he made the payment, the decree-holder may now in Court say that the payment of Re. 1 was a part payment, of the interest, which was a part of the judgment-debt. The Pleader for the decree-holder also argues that the decree-holder may at any time certify a payment made out of Court, and may prove such payment by evidence when a question whether an application for execution is barred by limitation arises, and the Pleader has cited the rulings

reported in *Tukaram* v. *Babaji* (1) and *Kishan Singh* v. *Aman Singh* (2).

In this connection the ruling of the Hon'ble High Court of Calcutta in the case of *Lakhi Narain Ganguli* v. *Felumani Dasi* (3) should be considered. That case is distinguishable from the present case, for in that case the payments were all endorsed on the back of the decree by the judgment-debtor himself, and, therefore, the question whether that case was barred according to section 20 of the Indian Limitation Act of 1908 did not arise at all. It has been only held in that case that no time has been fixed for decree-holders to certify payments under Order XXI, rule 2, of the Civil Procedure Code.

It is, no doubt, settled law that ninety days' limitation applies in the case of the judgment-debtor only for the purpose of Order XXI, rule 2, of the Civil Procedure Code.

As the word "debt" in section 20 of the Indian Limitation Act of 1908 includes money payable under a decree or order of Court, according to section 20 of the Indian Limitation Act all the words of the section should strictly apply to the case of judgment-debt. I think Order XXI, rule 2, of the Civil Procedure Code cannot override section 20 of the Indian Limitation Act, 1908. No authority has been cited to the contrary effect. I have already said that the case reported as *Lakhi Narain Ganguli* v. *Felumani Dasi* (3) is distinguishable.

Now a nice point of law has arisen as to what is meant by "interest on a judgment-debt." The Pleader for the judgment-debtor argues that the interest which was a part of the claim in the original suit has merged in the judgment-debt and that as no interest was allowed on the decretal amount by the Court in this case, there was no "interest on the judgment-debt" and the entire judgment-debt should be taken as principal. The Pleader for the decree-holder argues that interest which was a part of the claim is also interest payable under the decree just as principal and costs are payable under the decree, and so although the payment of Re. 1 is not in the handwriting of the judgment-debtor the present execution case is not time-barred.

On the said questions I entertain reasonable doubt and as the questions have arisen in execution of a Small Cause Court decree, I think it necessary to make a reference on the points for decision of the Hon'ble High Court under Order XLVI, rule 1, of the Civil Procedure Code.

I am of opinion that the interest which was a part of the claim in the original suit has merged in the judgment-debt, and the words "interest on a debt" in the first line of section 20 of the Indian Limitation Act of 1908 mean interest allowed by the Court on a judgment-debt, *i. e.*, entire decretal amount, so far as that section relates to the case of money payable under a decree or order of Court.

I, therefore, send this reference with the record concerned to the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Side, Calcutta, with a request that he will be pleased to place the reference with the papers concerned before the Hon'ble High Court for decision of the following points:—

1. Whether section 20 of the Indian Limitation Act of 1908 is in any way affected by the observations in *Tukaram* v. *Babaji* (1) and *Lakhi Narain Ganguli* v. *Felumani Dasi* (3) that the decree-holder may at any time certify a payment made out of Court?

2. Whether the words "interest on a debt" in the first line of section 20 of the Indian Limitation Act of 1908 do or do not mean interest allowed by the Court on an entire judgment-debt, so far as that section relates to the case of money payable under a decree or order of Court?

3. Whether in any case in which the decretal money does not carry any interest, the decree-holder can fall back upon the interest which was a part of the original claim and say that any money paid on account of the decree was paid on account of interest and, therefore, the decree was not barred although the payment was not in the handwriting of the judgment-debtor?"

Babu *Upendra Kumar Roy*, for the Decree-holder.

JUDGMENT.—This is a reference made in connection with an application for execution of a decree passed on the 19th December

(1) 21 B. 122.
(2) 17 A. 42; A. W. N. (1894) 198.
(3) 27 Ind. Cas. 11; 20 C. L. J. 131; 18 C. W. N. cxcvi (*Notes*).

1911. This application was the second application for the execution of the decree, and it was made on the 28th January 1916 — more than three years after the first application which was made on the 7th January 1913. The decree-holder, however, alleged that there was a payment of Re. 1 by the judgment-debtor on the 27th August 1915, that is, within three years of the first application for execution. It has been found by the Munsif that the payment of Re. 1 was, in fact, made by the judgment-debtor as alleged by the decree-holder. But there is nothing to show that it was paid by way of interest and the decree did not bear any interest. We are of opinion that, although the decree-holder may either apply to certify the payment before execution or may do so in his application for execution of the decree, the provisions of section 20 of the Indian Limitation Act are in no way affected by it. The claim in the original suit, no doubt, included interest; but that interest had been rightly held by the Munsif to have merged in the decree and, as the decree did not bear any interest, any payment made by the judgment-debtor must be taken to have been made in part payment of the principal, in which case it must appear in the handwriting of the judgment-debtor or by his agent duly authorized in this behalf, in order that a fresh period of limitation may run from the date of such payment under section 20 of the Limitation Act. Let the records be sent back.

Records sent back.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 74 OF 1914.

CIVIL REVISION PETITION No. 635 OF 1914.

March 14, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

K. ANAVARDA KHAN PANI SAHIB —4TH DEFENDANT—APPELLANT—PETITIONER

versus

MISIRI KHAN PANI SAHIB—7th DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Satisfaction of decree—Disputes inter se between judgment-debtors, order on—Appeal or second appeal, whether lies.

Disputes *inter se* between judgment-debtors after satisfaction of the decree and in which the decree-holder has no interest are not questions arising between the parties to the suit within the meaning of section 47, Civil Procedure Code, and no appeal lies against an order passed on such disputes. [p. 181, cols. 1 & 2.]

A decree passed in a suit against the deceased 1st defendant, who was the *hukdar* of a mosque, and his five sons directed that the decree should be gradually satisfied out of the surplus profits of suit lands to which the *hukdar* was entitled, after meeting the expenses of the mosque. For this purpose a Receiver was appointed by Court. After the larger portion of the decree amount had been paid, the 7th defendant, who was brought on the record as the legal representative of the deceased 2nd defendant, paid up the balance and applied to Court for discharge of the Receiver and the delivery of the lands to him. The 4th defendant applied separately for joint possession with 7th defendant. The Court dismissed the 4th defendant's petition and the lower Appellate Court dismissed his appeal against the order of dismissal. On appeal to the High Court:

Held, (1) that the matter was not one for decision under section 47, Civil Procedure Code; [p. 181, cols. 1 & 2.]

(2) that no appeal lay against the order of the Primary Court nor a second appeal from the appellate order dismissing the appeal. [p. 181, col. 1; p. 182, col. 2.]

Mahabir Prasad v. *Partab Chand*, 22 A. 450; A. W. N. (1900) 171; *Lingam Krishna Bhupati Devu Garu* v. *Jogani Venkataswamy*, 33 Ind. Cas. 235; (1916) 1 M. W. N. 109; 3 L. W. 105; *Ram Saran Pande* v. *Janki Pande*, 18 A. 106; A. W. N. (1895) 240; *Maganlal* v. *Doshi Mulji*, 25 B. 631; 3 Bom. L. R. 255, referred to.

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 C. 683; 19 I. A. 166; *Collector of Jaunpur* v. *Bithal Das*, 24 A. 291; A. W. N. (1902) 67, distinguished.

Appeal against the appellate order of the District Court of Tinnevelly, dated the 7th April 1914, in Appeal Suit No. 350 of 1913, preferred against that of the Subordinate Judge, Tinnevelly, in Miscellaneous Petition No. 1271 of 1913, in Original Suit No. 24 of 1896, and

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly, dated the 7th October 1913, in the said Miscellaneous Petition No. 1271 of 1913, in Original Suit No. 24 of 1896.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *S. T. Srinivasa Gopalachari*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The 4th defendant, one of the judgment-debtors, is the appellant before us. He was the petitioner in the lower Court. The respondent in this appeal is the 7th defendant, another

of the judgment-debtors. The respondent (7th defendant) has been styled in the judgment of the Subordinate Judge by mistake as the 5th defendant and 5th respondent. The decree had been passed so long ago as in 1896 against the 1st defendant, who was then the *hukdar* of the mosque, and his five sons. The first defendant as such *hukdar* was entitled to the surplus profits of certain lands after meeting the expenses in connection with the upkeep of the mosque charities. The decree directed the realisation of the decree amount from such surplus income. Three sons, namely, defendants Nos. 2, 3 and 4 were afterwards in actual possession of the lands as lessees from their father, the 1st defendant, under a registered lease-deed dated 26th October 1900. The other two sons, (the defendants Nos. 5 and 6) had died unmarried and issueless before the date of this lease of 1900. While the defendants Nos. 2, 3 and 4 were in possession as lessees, a Receiver was appointed by the Court in order that the decree-holder might obtain the surplus income from the Receiver in gradual satisfaction of the decree amount. Defendants Nos. 1, 2 and 3 died after the Receiver took possession of the properties from the lessees, the defendants Nos. 2, 3 and 4. The 7th defendant was brought on the record as the eldest son of the 2nd defendant, who was himself the eldest son of the 1st defendant. It appears from an order (in a claim petition, Miscellaneous Petition No. 1418 of 1906) passed in February 1907 by the Subordinate Judge that the eldest son of the 1st defendant (namely the 2nd defendant) became the *hukdar* on his father's death. After the larger portion of the decree amount had been paid up to the decree-holder through the Receiver, the 7th defendant paid up the balance of the decree amount into Court and prayed for the discharge of the Receiver and for the handing back of the lands to himself as the *hukdar* of the mosque, or rather, to a lessee to whom he had leased the lands. The 4th defendant, the only surviving son of the 1st defendant, thereupon filed a petition of his own (Miscellaneous Petition No. 1271 of 1913) in the Subordinate Judge's Court, praying that the lands might be put back into the joint possession of himself, the 7th defendant, the 7th defendant's younger brothers and the 3rd defendant's sons and not delivered to the 7th defendant's lessee, because he (the 4th defendant) and his nephews other than the 7th defendant were the joint owners of the lands along with the seventh defendant and the lease by the 7th defendant alone was invalid. The petition was filed under sections 47 and 151 of the Civil Procedure Code. The Subordinate Judge held that *prima facie* the 7th defendant was the *hukdar* or trustee of the mosque and he, therefore, dismissed the 4th defendant's petition for joint possession. The 4th defendant thereupon appealed to the District Judge, who held that no appeal lay to him as the order under appeal was not one passed under section 47, Civil Procedure Code, which (in the learned District Judge's opinion) did not apply to disputes between the judgment-debtors *inter se*. Against the District Judge's order refusing to entertain the appeal, the present Appeal against Appellate Order No. 74 of 1914 has been filed.

The first question, therefore, before us is the preliminary question whether the order passed by the Subordinate Judge was one under section 47, Civil Procedure Code, and whether an appeal and a second appeal lay from such an order. In *Mahabir Prasad* v. *Partab Chand* (1) it was held that where the question which has to be decided was one in which the judgment-debtor or his representative was no longer interested, it was not a question arising between the parties to the suit and section 244 of the old Civil Procedure Code, corresponding to section 47 of the present Civil Procedure Code, had no application. So in *Lingam Krishna Bhupati Devu Garu* v. *Jogani Venkataswamy* (2), this Bench held that a question relating to poundage fees between the Court auction-purchaser and the judgment-debtor which did not affect the rights and liabilities of the decree-holder and the judgment-debtor *inter se* was not a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree and the order deciding that question was not appealable. In *Ram Saran Pande* v. *Janki Pande* (3), section 244 of the

(1) 22 A. 450; A. W. N. (1900) 171.

(2) 33 Ind. Cas. 235; (1916) 1 M. W. N. 109; 3 L. W. 105.

(3) 18 A. 106; A. W. N. (1895) 240.

old Civil Procedure Code was held not to apply so as to bar a separate suit brought by one of two joint judgment-debtors against the other joint judgment-debtor for contribution towards the moneys paid in satisfaction of the decree-debt, as the decree had passed beyond the stage of execution. In *Magaulal* v. *Doshi Mulji* (4) it was held that section 244 of the old Civil Procedure Code did not apply to a question between a party and a person who claimed to be that party's representative-in-interest. The well-known Privy Council case in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (5), relied on by Mr. Devadoss, merely held that where there was a question to be considered after decree between the opposing parties *in the suit* and relating to the execution, discharge, or satisfaction of the decree, the fact that a third person was also interested in that question did not preclude section 244 (now section 47) from applying. I am, therefore, of opinion that in this case, in which the question in dispute relates to the rights *inter se* between the judgment-debtors and in the decision of which the decree-holder has absolutely no interest, in whatever way it might be decided, no question under section 47 of the present Civil Procedure Code is involved and hence the District Judge's decision that no appeal lay to him was correct. The decree had been satisfied and there is no further question remaining to be disposed of which relates to the decree or its execution, discharge or satisfaction. It follows that no second appeal also lies and I would, therefore dismiss this Civil Miscellaneous Second Appeal No. 74 of 1914 with costs.

I now come to the connected Civil Revision Petition No. 635 of 1914 filed by the same 4th defendant (out of abundant caution) under section 115, Civil Procedure Code, against the order of the Subordinate Judge. I have already stated that in 1907 itself the 7th defendant's father, the 2nd defendant, the eldest son of the 1st defendant, was recognised as the sole *hukdar* after his (2nd defendant's) father's death. The Subordinate Judge's order, therefore, directing the property after the decree had been entirely satisfied to be put in the possession of the 7th defendant and his lessee (who according to the 7th defendant paid up to the decree-holder the balance of the decree amount) does not seem to me to be an improper order and there seems to be no sufficient ground for our interference with the Subordinate Judge's order under the exceptional revisional powers granted to this Court by section 115 of the Civil Procedure Code. I would, therefore, dismiss this civil revision petition also, which has come on for admission and on which no notice has gone to the respondents.

MOORE, J.—I entirely agree. The dispute is between the two judgment-debtors (defendants Nos. 4 and 7) *inter se* as to whom the property is to be restored, now that the decree has been satisfied.

The prayer in 4th defendant's petition is that an order should be issued to the Receiver directing him to deliver possession of the attached properties jointly to defendants Nos. 4 and 7 after declaring that a lease for seven years granted by 7th defendant is invalid. 4th defendant's case further is that 7th defendant is not entitled to the exclusive management of the mosque and its properties. It is clear that the question, whether 4th defendant and 7th defendant are entitled to joint possession and to joint management of the properties, is not one arising between the parties to the suit or their representatives *i. e.*, the decree-holder or his representatives on the one hand, and the judgment-debtor or his representatives on the other, within the meaning of section 47 of the Civil Procedure Code and cannot be determined in execution proceedings, but only by separate suit. The balance of the decree amount having been paid by 7th defendant's lessee, the decree-holder had no longer any interest in the matter and it is immaterial to him which party is put in possession.

The case of *Collector of Jaunpur* v. *Bithal Das* (6), on which Mr. Devadoss relied, merely, decides that section 244 of the old Civil Procedure Code applies as well to a dispute arising between the parties after a decree had been executed as it does to a dispute arising between them previous to execution, and is inapplicable to the facts of the present case.

(4) 25 B. 631; 3 Bom. L. R. 253.
(5) 19 C. 823 (P. C.); 19 I. A. 166.
(6) 24 A. 191; A. W. N. (1902) 67.

The District Judge was right in holding that no appeal lay from the Subordinate Judge's order which did not decide any question arising under section 47 of the present Civil Procedure Code.

The Subordinate Judge's order directing that when the Receiver was discharged the 7th defendant would be put in possession does not, I think, call for any interference.

I agree that the appeal and the civil revision petition should be dismissed.

Appeal and petition dismissed.

V.R.P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 68 OF 1915.

May 17, 1916.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Chaudhuri.

ANANDA MOHON SAOA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANANDA CHANDRA SAHA—DEFENDANT—RESPONDENT.

Material alteration—Alteration to carry out original intention of parties, effect of.

An alteration in an instrument made in good faith by one of the parties to it, without knowledge of the other, to carry out the original intention of the parties does not vitiate the instrument. [p. 184, col. 2.]

Therefore, an alteration made by a mortgagee in a registered mortgage-bond by inserting the words "per cent." at the place where the rate of interest was stated to be "Re. 1 per mensem," does not make the mortgage unenforcible, if the original intention of the parties was that interest was to be paid at the rate of Re. 1 per cent. per mensem. [p. 184, col. 1.]

Appeal against the decree of Mr. Justice Walmsley, dated the 12th of April 1915, in Appeal from Appellate Decree No. 4037 of 1913.

FACTS material to the report will appear from the following judgment of Walmsley, J., against which the Letters Patent Appeal was preferred :—

"The defendant borrowed Rs. 200 from the plaintiff on mortgage, and executed a bond in which the interest was set out as Re. 1 per mensem. After execution and registration the plaintiff added the words "per centum," and in his plaint he asked for interest at Re. 1 per centum per mensem. The lower Courts gave him a decree for the principal with interest at Re. 1 per mensem, that is, they overruled the defendant's contention that the alteration completely vitiated the document, but they would not give interest according to the alteration.

The defendant has preferred this appeal and it is contended on his behalf that the alteration rendered the bond absolutely void.

The learned Subordinate Judge appears to have held that the English rule about alterations in documents should not be applied in this case because it would be harsh to apply it; and it is not applicable because the alteration was of a venial character, and because it was made to bring the document into agreement with the intention of the parties, and because it was made after the bond had been registered.

The learned Vakil for the respondent supports the judgment of the lower Appellate Court on the ground that the alteration is not of a material nature, that it was made to bring the bond into agreement with the intention of the parties, and that in spite of the alteration the bond is evidence of the debt and of the creation of a charge upon the property mortgaged.

The *first* question is whether the alteration is of such a nature as to fall within the English rule about alteration of documents. The English cases on the subject are to be found in the note on *Master* v. *Miller* (1), and the case of *Warrington* v. *Early* (2) is very useful for the purpose of the present case. There in a promissory note the original stipulation was for "lawful interest". Subsequently, to the word interest "at six per cent. per mensem" were added in the corner of the note, and the alteration was held to be "fatal" and a "material alteration of the contract." On the authority of that case I hold that the alteration made by the plaintiff was of such a nature as to render the bond void under the English rule. It is not denied that effect is given to the English

(1) Smith's Leading Cases, 11th Ed., Vol. I, 767; 4 T. R. 320; 2 H. Bl. 141; 2 R. R. 399; 100 E. R. 1042.

(2) (1853) 2 El. & Bl. 763; 2 C. L. R. 398; 23 L. J. Q. B. 47; 18 Jur. 42; 2 W. R. 78; 118 E. R. 953; 95 R. R. 789.

rule in this country. So I need not cite the cases bearing on this point.

Next comes the question whether the alteration can be sustained on the ground that it was made in order to bring the document into agreement with the original intention of the parties. The cases of *Cariss* v. *Tattersall* (3), *London and Provincial Bank* v. *Roberts* (4) and *In re Howgate and Osborn's Contract* (5) are quoted, but an examination of those cases shows that they are quite different from the present one. It cannot be inferred from the document as it stood originally that the interest was to be per centum, and external evidence to that effect is not admissible. The *last* contention of the respondent is that the principle adopted in *Ramasamy Kon* v. *Bhavani Ayyar* (6) is applicable, but that argument is disposed of by the remarks made in the Full Bench case of *Christacharlu* v. *Karibasayya* (7). In this case, also, the plaintiff's suit is founded on the instrument as altered and on nothing else.

I am of opinion that the decree of the lower Appellate Court cannot be sustained. The application of the English doctrine may seem harsh to the plaintiff, but it is his own wrong and foolish act that has brought him into trouble. The only relief he can be allowed is that he should not be made to pay costs to a defendant who has escaped from a moral obligation on a technical plea.

The appeal is allowed, and the plaintiff's suit is dismissed, but the parties will bear their own costs in all Courts."

Babu *Jogesh Chandra Roy* (with him Babu *Asita Ranjan Ghosh*), for the Appellants.—An alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument.

Refers to *Cariss* v. *Tattersall* (3), *Dodge* v. *Pringle* (8), *In re Howgate and Osborn's Contract* (5).

Such an alteration, it is submitted, should be considered as an immaterial alteration and hence the deed would not be made null and void on account of such alteration.

See notes to *Master* v. *Miller* (1), Pollock's Contract Act, 3rd Edition, notes to section 62, pages 271-272.

The cases of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (9) and of *Gour Chandra Das* v. *Prasanna Kumar Chandra* (10) are distinguishable, as in both of them the alteration was fraudulently made and did not carry out the original intention of the parties. The Indian decisions are all discussed by Pollock in his Commentaries on the Contract Act, 3rd Edition, pages 272—276.

Secondly, the plaintiff-appellant is, it is submitted, entitled to enforce the charge created in his favour by the registration of the document.

Refers to *Davidson* v. *Cooper* (11), *Doe* d. *Beanland* v. *Hirst* (12), *Hutchins* v. *Scott* (13), *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (14), *Ramasamy Kon* v. *Bhavani Ayyar* (6), *Christacharlu* v. *Karibasayya* (7), *Subramania Ayyan* v. *Krishna Ayyan* (15), *Mangal Sen* v. *Shankar Sahai* (16).

Babu *Troilokya Nath Ghose*, for the Respondent.—The alteration in the document was a material alteration. The test of materiality of an alteration is to see whether the addition gave a different legal character to the writing and whether it would completely change the nature of the relation towards each other of the parties.

Refers to *Gour Chandra Das* v. *Prasanna Kumar Chand* (10), *Gogun Chunder Ghose* v. *Dhuronidhur* (9).

The English cases on the subject are collected in the notes to *Master* v. *Miller* (1). The case of *Warrington* v. *Early* (2) is very similar to the present case. In that case it was held that the addition of the words "six per cent. per mensem" at the corner of a pro-

(3) (1840) 2 Man. & G. 890; 3 Scott. (N. R.) 257; 10 L. J. C. P. 187; 133 E. R. 1004.
(4) (1874) 22 W. R. 402.
(5) (1902) 1 Ch. 451; 71 L. J. Ch. 279; 86 L. T. 180.
(6) 3 M. H. C. R. 247.
(7) 9 M. 399 at p. 410.
(8) (1860) 29 L. J. Ex. 115; 121 R. R. 880.
(9) 7 C. 616; 9 C. L. R. 257.
(10) 33 C. 812; 3 C. L. J. 363; 10 C. W. N. 788.
(11) (1844) 13 M. & W. 343; 1 D. & L. 377; 13 L. J. Ex. 276; 153 E. R. 142; 67 R. R. 638.
(12) (1821) 23 R. R. 756; 3 Starkie 60.
(13) (1837) 2 M. & W. 809; 1 M. & H. 194; 6 L. J. Ex. 186; 1 Jur. 265; 150 E. R. 984; 46 R. R. 770.
(14) (1851) 16 Q. B. 432; 20 L. J. Q. B. 244; 15 Jur. 489; 117 E. R. 944.
(15) 23 M. 157.
(16) 25 A. 580; A. W. N. (1903) 122.

missory note in which the original stipulation was for lawful interest only was a "material alteration" of the contract and was, therefore, fatal to the validity of the contract.

As regards the second point, it is submitted that the cases do not apply, as the plaintiff's suit was based not on a right outside the altered document but on the altered document itself.

Refers to Pollock's Contract Act, 3rd Edition, pages 274-275.

JUDGMENT.

WOODROFFE, J.—This appeal has been heard at great length. The point which is raised is a simple one. The suit was brought on a mortgage-bond of Rs. 200. The defence which has been found to be false is that money was not borrowed, that the bond was not executed or registered as the plaintiff alleges, but that the defendant with a view to defraud his own creditors got up a sham mortgage and in order that the *benami* character of this transaction should not be discovered, he made it over to the plaintiff who has taken advantage of the fact. Subsequently, it is alleged that there was a dispute between the plaintiff and the defendant about some tin-shed and other matters and the plaintiff then put in force this mortgage against the defendant. The defendant alleges that there was no consideration. It is further alleged that when the mortgage-bond was in possession of the plaintiff, the mortgage interest being in terms Re. 1 per mensem, the plaintiff fraudulently inserted the words "per cent." in the bond, thus making the interest from eight annas per cent. per annum to Re. 1 per cent. per annum. The defence of the *benami* character of the document was abandoned; and the learned Judge found that consideration had been received for this document as was evidenced by a previous deposition of the defendant. Thereupon stress was laid upon the alleged alteration in the document. It has been found as a fact that the document has been altered. It has also been found as a fact that there has been no fraud and that the document was not fraudulently altered. It has been found as a fact too that it was the intention of the parties, as it seems to me to be obvious upon reading the document, that interest was to be paid at the rate of Re. 1 per cent. per mensem. Anybody reading this document (Re. 1 per mensem) could not fail to read it in the sense in which both the Munsif and the Subordinate Judge have done, namely, that interest was to be paid at the rate of Re. 1 per cent. per mensem. The finding is that this was the agreement between the parties, and in making this alteration effect was given to the common intention of the parties. It has been held as a matter of law, as has been pointed out in the judgment of the Subordinate Judge, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. That is the rule of law and applying the facts found to this rule, the finding of the Subordinate Judge disposes of this question.

It is unnecessary, therefore, to consider the other point which has been raised on behalf of the appellant, namely, that apart from this question altogether, there are a number of decisions which show that as soon as a document is registered, a charge is created in favour of the plaintiff and the plaintiff is entitled to enforce the charge and no alteration subsequent to the registration of the document can affect the validity of the document. A large number of cases has been cited in support of this proposition. It is unnecessary to decide that question, because this case is disposed of upon the ground which I have already stated.

In my opinion the judgment and decree of Mr. Justice Walmsley should be set aside. I accordingly set aside the judgment and decree of Mr. Justice Walmsley and restore the judgment and decree of the Subordinate Judge.

The appellants will be entitled to their costs of this appeal and of the hearing before Mr. Justice Walmsley from the respondent.

CHAUDHURI, J.—I agree

Appeal allowed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1376 OF 1914.

February 22, 1916.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

PANDILLAPALLI SINGA REDDI—DEFENDANT—APPELLANT

versus

YEDDULA SUBBA REDDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Same 'subject matter', meaning of—Withdrawal of suit, whether bars fresh suit wherein causes of action and reliefs claimed different—Right of plaintiff in second suit to contest defence pleas in withdrawn suit—Alienation by widow—Reversioners' suit for declaration, withdrawal of—Subsequent suit for possession after widow's death, maintainability of.

The term 'subject-matter' in Order XXIII, rule 1 (3), must be construed strictly. [p. 190, col. 1.]

Where, after withdrawing a suit without permission to bring a second suit, the plaintiff institutes a fresh suit based on a different cause of action and claiming a separate relief, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit within the meaning of Order XXIII, rule 1 (3), Civil Procedure Code. [p. 190, col. 1.]

In such a case the plaintiff in the second suit is not debarred from contesting the truth of the allegations made by the defence in the first suit. [p. 190, col. 1.]

The reversioners of a Hindu widow sued, during her lifetime, for a declaration that an alienation made by her was not binding on them. The alienee, in defence, pleaded that he was the *illatom* son-in-law of the last male owner. The widow having died during the pendency of the suit, the plaintiffs withdrew the suit and subsequently brought a suit for possession of the property alienated:

Held, that the second suit was not barred by the provisions of Order XXIII, rule 1 (3), Civil Procedure Code. [p. 190, col. 1.]

Gopal Chandra Banerjee v. *Purna Chandra Banerjee*, 4 C. W. N. 110, approved.

Achuta Menon v. *Achutam Nayar*, 21 M. 35; *Machana Vajhala Dikshatulu* v. *Gorugantulu Yaggamma*, 8 Ind. Cas. 1066; 9 M. L. T. 468; (1910) M. W. N. 782; *Sennava Reddiar* v. *Venkatachala Reddiar*, 28 Ind. Cas. 91; 2 L. W. 177, overruled.

Second appeal against the decree of the District Court, Nellore, in Appeal Suit No. 170 of 1913, preferred against that of the Court of the Temporary Subordinate Judge, Nellore, in Original Suit No. 26 of 1913 (Original Suit No. 40 of 1912 on the file of the District Court of Nellore).

This second appeal and memorandum of objections coming on for hearing on 5th November 1915 and having stood over for consideration till 16th November 1915, the Court (Sadasiva Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH.

SADASIVA AIYAR, J.—The defendant is the appellant. The plaintiffs are the sons of the daughter of Pera Reddi by his first wife. The defendant is the husband of the deceased daughter of Pera Reddi by his second wife. The wives and the daughters are all dead, the second wife who was the defendant's mother-in-law having died in 1912. Till her death, she was entitled to enjoy the plaint lands as her husband's heir. After her death, the plaintiffs as reversioners are entitled to possession. These are the facts found. The plaintiffs' case succeeded on the merits in the lower Courts as regards most of the properties in dispute. The defendant's learned Vakil, Mr. T. Venkatarama Aiyar, did not and could not seriously argue on the merits, the *illatom* son-in-lawship set up by his client having been found against by the lower Courts.

The learned Vakil, therefore, based his strenuous contentions on a technical question of law. To understand that question, a few further facts have to be stated. The plaintiffs had brought Original Suit No. 46 of 1911 during the lifetime of the defendant's mother-in-law, Venkatammal, against the present defendant (as the 1st defendant) and against Venkatammal (as the 2nd defendant), for a declaration that the alienation by settlement deed made by Venkatammal in December 1909 in favour of the present defendant (then 1st defendant) making several false recitals as to the defendant being an *illatom* son-in-law and so on, may be declared invalid and not binding on the reversioners after Venkatammal's death. Venkatammal died in 1912 during the pendency of that suit. The present defendant set up the very same false defences on the merits which he has set up in this suit. During the pendency of that suit Venkatammal died. Then the plaintiffs withdrew that suit as, from having been merely contingent reversioners,

they became vested reversioners on her death and had become entitled not only to sue for a declaration of the invalidity of Venkatammal's acts after her death but also to sue for possession itself of the lands. They did not ask for permission to bring a fresh suit on the freshly acquired cause of action for fresh reliefs; evidently they thought it would be unnecessary to do so. (See Exhibit IX*a*.) The defendant contended at a late stage of the trial of this suit in the first Court that the suit was barred as *res judicata* by the withdrawal of the former suit. It was clear that there could be no *res judicata* in the usual and strict sense of that term, as the first suit was not heard and decided and was only withdrawn from the adjudication of the Court. What the defendant meant by the plea of *res judicata*, however, appears to be that the suit was barred by rule 1 (3) of Order XXIII of the Civil Procedure Code. This statutory bar cannot, in my opinion, be called *res judicata*.

In the lower Courts, the case of *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1) was relied upon by the defendant. That case was almost, but not quite, on all fours with the present suit. The plaintiffs there were also reversioners who had first sued for a declaration that the alienations by the widow were invalid, withdrew that suit against some of the defendants and as against some properties in the possession of those defendants without obtaining liberty to bring a fresh suit and then brought a second suit after the death of the widow against those defendants for possession of those properties. The judgment of the learned Judges (Munro and Sankaran Nair, JJ.) is contained in the following sentence:—"Following *Achuta Menon* v. *Achutan Nayar* (2), we dismiss the second appeal with costs." The Subordinate Judge in his judgment refers to this decision as follows:—"There are no reasons given in the judgment, which is very brief. It merely follows the case of *Achuta Menon* v. *Achutan Nayar* (2). The full facts have not been given. It is very probable that the plaintiff who proceeded to trial in respect of some property in the previous suit was held not entitled to maintain a second suit with reference to the property as to which he withdrew the claim. But in the present case, the plaintiffs did not proceed to trial at all as the widow died. They withdrew the entire suit and instituted this fresh suit for possession of the entire property." I am unable to concur with the learned Subordinate Judge that the fact that the first suit was not withdrawn in its entirety in the case reported as *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1) could make any difference in principle, having regard to the language of section 373, corresponding to present Order XXIII, that language making no difference in the result between the withdrawal of a portion or the withdrawal of the whole of a suit as regards the effect of such withdrawal on the suit or the portion of the suit, as the case may be. Then the learned Subordinate Judge says in paragraph 52 of his judgment that in the case of *Achuta Menon* v. *Achutan Nayar* (2) the first and the second suits were both suits for the relief of ejectment and that the titles set up in the two suits were also substantially the same and that the general observations in *Achuta Menon* v. *Achutan Nayar* (2), namely, that where the first suit was withdrawn without liberty to bring a fresh suit, the plaintiff cannot contest in the second suit the allegations which constituted the defence or part of the defence to the claim made in the first suit, must be confined to cases where the causes of action for the two suits and the reliefs claimed in the two suits are substantially the same.

The learned District Judge in paragraph 20 of his judgment says:—"The only case on which the appellant can rely is *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1), but I find it difficult to apply this case in the absence of a full report of the facts." I have perused the printed papers in Second Appeal No. 389 of 1908 and I find the facts are not so different in material particulars as to affect the applicability to this case of what I must hold to have been the principle of the decision in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1). Further in *Sennava Reddiar* v. *Venkatachala Reddiar* (3) Ayling and Tyabji, JJ., held themselves bound by the decisions in *Achuta Menon* v. *Achutan Nayar* (2) and *Machana*

(1) 8 Ind. Cas. 1066; 9 M. L. T. 468; (1910) M. W. N. 782.

(2) 21 M 35.

(3) 28 Ind. Cas. 91; 2 L. W. 177.

Vajhala Dikshatulu v. *Gorugantulu Yaggamma* (1) and dismissed an absolutely similar suit to the present one as barred by Order XXIII, rule 1 (3), of the Civil Procedure Code. In that case also, the widow died during the pendency of the first suit. The learned Judges held that the slight difference in language between section 370 and Order XXIII, rule 1 (3), (the word 'matter' being substituted by the words 'subject-matter') did not make any difference. Tyabji, J., says: "In the face of the above" two decisions "there is no room for any further discussion of the law." I am free to confess that I feel grave doubts as regards the discussions in *Machana Vajhala Dikshatulu* v. *Gourgantulu Yaggamma* (1) and *Sennava Reddiar* v. *Venkatachala Reddiar* (3). So far as *Achuta Menon* v. *Achutan Nayar* (2) is concerned, my learned brother and myself followed it recently in *Paykat Manakkal* v. *Theyyankaran* (4). But in that case, the cause of action for and the relief claimed in the first suit were found for the purposes of that decision to have been substantially identical with the cause of action and the relief claimed in the second suit and we held that the facts mentioned in the defence in the first suit cannot be controverted in the second suit. We did not, however, dismiss the second suit but gave relief to the plaintiff on the basis of the facts pleaded by the contesting defendant in the first suit. Mr. Varadachariar wished to attack *Achuta Menon* v. *Achutan Nayar* (2) on the ground that on the facts of that case the second suit could not be held to have been on substantially the same cause of action as the first suit and hence that decision itself was wrong. I do not think when dealing with a question of law such as this, we could go behind the statement of the learned Judges as to the nature of the relationship between the causes of action in the two respective suits. At page 39 the learned Judges say: "In our opinion, it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a complete difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place." Then, no doubt, they go on to say "suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit," and to express the opinion that even in that case the plaintiff would be barred from controverting the defence allegations in the first suit.

While I am prepared to follow the ruling in *Achuta Menon* v. *Achutan Nayar* (2) where the causes of action for the two suits are substantially the same, I regret that I cannot follow the *obiter dictum* that even if the causes of action are substantially different, the facts stated in the defence in the first withdrawn suit cannot be controverted in the second suit. If the causes of action are the same and if the reliefs *claimable* (though not claimed) are the same, then also Order XXIII will apply, read with Order II, rule 2. Where the causes of action are substantially different and *a fortiori*, where not only the causes of action are different but the reliefs claimed are different, and still more, where not only the causes of action are substantially different, but the reliefs claimed are bound to be different, I do not think that the defence pleas in the first suit are made incontrovertible in the second suit by the provisions of Order XXIII. Nor do I think that the difference in language by the substitution of the word "subject-matter" [which is the word used in the Order XXIII, rule 1 (3)] for the word "matter" (which was the word used in paragraph 2 of section 373) can be held to make any difference in the scope of the two provisions. While paragraph 1 of section 373 used the word "subject-matter", paragraph 2 used the word "matter" and this was corrected in the new Code for the sake of uniformity. I might further respectfully point out that no authority is quoted for giving such a very wide interpretation to the word "subject-matter" or "matter" in *Achuta Menon* v. *Achutan Nayar* (2), that is, so as to include the defence allegations in the first suit even where the second suit is brought on a different cause of action. Let me take an extreme case to show the length to which we would have to go if the *obiter dictum* in *Achuta Menon* v. *Achutan Nayar* (2) is followed. Suppose *A* brings his

(4) 32 Ind. Cas. 624; (1916) 1 M. W. N. 171.

first suit against *B*, a trespasser who trespassed on the plaint lands one year before suit, *A* claiming title as purchaser from *C* whom he treated as the heir of *D*, the admitted former owner. *B* sets up a false claim of ownership in himself as heir to *D* (the admitted former owner who died two years before suit) in preference to the plaintiff's vendor *C*. During the course of the suit, *A* finds that neither *C* nor *B* is the real owner but *E* is the owner as the real heir of *D*. He, therefore, withdraws his first suit against *B* without permission to bring a fresh suit. He then gets a conveyance from *E* and within 3 years of the death of the admitted owner *D*, brings a second suit against *B* basing it on the title obtained by the purchase from *E*. Can it be argued that his second suit based on the purchase from *E*, the real owner, is barred by the incontrovertibility of the false defence raised by *B* in the first suit, though the plaintiff honestly and properly withdrew his first suit, which he brought through his mistaken notion that *C* was the heir of *D* and which suit was bound to fail ?

I am further clear that the suit for declaration brought by a contingent reversioner, who has really no title in the eye of the law [see section 6, clause (*a*), of the Transfer of Property Act and section 60, proviso, clause (*m*), of the Civil Procedure Code] and who is given a special cause of action by the current of decisions in the Privy Council to bring a suit to declare the widow's alienation invalid as against the reversioners and whose suit as recently decided by the Privy Council in *Venkatanarayana Pillay* v. *Subbammal* (5) is brought on behalf of all the possible contingent reversioners, is brought by him in a quite different character from a suit brought by the same person in whom the inheritance became fully vested on the death of the widow to recover possession of the property from the widow's alienee. The fact of the widow's death is a most important fact which thoroughly changes the nature of the cause of action and which vests the cause of action in a particular defined person and not in the whole body of possible contingent reversioners. Further, while in the contingent reversioner's suit he cannot claim the relief of possession but only the relief of declaration (and relief appurtenant to the declaratory relief), in the second suit he cannot claim the relief of declaration as a substantial relief or as the only relief but can and ought to claim the relief of possession [see *Siliman Sahib* v. *Bontala Haman Sahib* (6)], which is a still stronger case in favour of the plaintiff because it was held that a suit for declaration by a person out of possession was on a different cause of action from that on which a second suit for possession on the same title was based]. Again in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (7) Banerji, J., says at pages 112 and 113: "The mere fact of two suits being in respect of the same property would not be sufficient to make the latter suit one for the same matter as the former, *when the state of facts leading to the two suits* and the reliefs claimed under them are different." In *Kamini Kant Roy* v. *Ram Nath Chuckerbutty* (8), Banerjee and Rampini, JJ., held that where the causes of action were different, the fact that the defence was the same in both suits and the first suit was withdrawn without liberty to bring a fresh suit, did not prevent the plaintiff from controverting in the second suit the defence made in the first suit and repeated in the second.

In section 11 of the Civil Procedure Code which treats of bar by *res judicata*, the word used in the section in explanations 3 and 4 is 'matter'. In the statutory bar prescribed in Order II, rule 2, the expressions used are 'subjects in dispute' 'cause of action' and 'claim'. In the statutory bar enacted in Order XXIII, the word is 'subject-matter.' In *Kaveri Ammal* v. *Sastri Ramier* (9) the word 'object-matter' is used (see line 2) when considering the question of *res judicata*. In *Ramaswami Ayyar* v. *Vythinatha Ayyar* (10) Sir Bashyam Iyengar considers fully the provisions of the old Civil Procedure Code corresponding to the provisions of section 11 and Order II of the new Code. At page 763 he says: "The first contention is mainly based on the argument

(5) 29 Ind. Cas. 298; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125; 38 M. 406; 28 M. L. J. 535.

(6) 20 Ind. Cas. 418; 25 M. L. J. 125; (1913) M. W. N. 554; 38 M. 247.

(7) 4 C. W. N. 110.

(8) 21 C. 265.

(9) 26 M. 104 at p. 109; 13 M. L. J. 58.

(10) 26 M. 760; 13 M. L. J. 448.

that the phrase 'the subjects in dispute' occurring in section 42 connotes the corpus or object-matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision in the suit. In our opinion the expression 'the subjects in dispute' signifies *the jural relation between the parties to the suit, for the determination of which the suit is brought.* In other words, the object of section 42 is to require the plaintiff to bring forward his whole case as to the *matter of litigation on the question of right involved in the suit* and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit." Then at page 766 he says: "it is clear that the expression 'subjects in dispute' means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon." At page 768, he refers to Mr. Justice Holloway's decision where the expressions 'matter of litigation', 'question of right', 'particular kind of claim' occur.

It may be that there are subtle and refined distinctions between the meanings of the different expressions 'subject-matter', 'corpus', 'object-matter', 'cause of action', 'matter,' 'transaction' [a word used in some places in *Ramaswami Ayyar* v. *Vythinatha Ayyar* (10)], 'ground of claim' and so on. I do not mean to venture upon a discussion of such differences. In *Achuta Menon* v. *Achutan Nayar* (2) the word 'matter' in section 373 was held to include the question which is raised in the allegations of the defendant. The expression 'fresh suit for the same matter' was considered as meaning a fresh suit which involves the truth of the allegations of the defendant forming part of the matter to be decided in the former suit. It may, therefore, be that the word 'matter' has a larger meaning than 'cause of action'. But can the "matter" in the second suit be held to be the same when the cause of action is substantially different though the defence is the same? In respect of the bar by *res judicata*, it has now been settled by the decisions in *Krishna Behari Roy* v. *Bunwari Lall Roy* (11), *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed* (12), *Allunni* v. *Kunjusha* (13) and *Ramaswami Ayyar* v. *Vythinatha Ayyar* (10) that, where the causes of action are different, even a dismissal of the first suit by the Court after contest on the merits is no bar to the maintainability of a second suit on a substantially different cause of action, even though the defences may be the same in the two suits. Is a plaintiff who, honestly in order to save the time of and trouble to the Court, withdraws the first suit instead of allowing it to be dismissed on the unsustainability of the rights set up by him, to be in a worse position by his said honest withdrawal than if he had delayed the disposal of that suit and obliged the Court to give its opinion on the merits of his first cause of action?

I would, therefore, refer to the opinion of the Full Bench the following question:—

Whether the rule laid down in *Achuta Menon* v. *Achutan Nayar* (2) (that a plaintiff who has withdrawn a former suit without permission to bring a second suit is prevented from agitating in the second suit the truth of the allegations which constitute the defence in the first suit) applies in the present case, where the cause of action and the relief claimed in the second suit are substantially different from those in the first suit.

NAPIER, J.—I entirely agree. It seems to me that there must be a distinction in a case like this where the first suit would not give the plaintiff all that he became entitled to when the death of the widow gave him a new cause of action; unless he got leave to amend, he would necessarily have to bring a second action founded on the declaration given in the first, and it is more reasonable that he should withdraw the first suit and bring a consolidated suit for possession.

This second appeal and the memorandum of objections coming on for hearing, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of First Instance and the Order of Reference to the Full Bench, and upon hearing the arguments of Mr. *T. V. Venkatarama Aiyar*, for the Appellant, and of Mr. *S. Varadachariar*, for the Respondents, the Court expressed the following

OPINION—We agree with the conclu-

(11) 2 I. A. 283; 25 W. R. 1; 1 C. 144; 3 S. r. P. C. J. 559; 3 Suth. P. C. J. 313.

(12) 4 M. 308.

(13) 7 M. 264.

sions of Sadasiva Aiyar, J., in the order of reference.

The question is whether the second suit can be regarded as brought in respect of the same subject-matter as the first suit within the meaning of Order XXIII, rule 1 (3), of the Civil Procedure Code. The terms "subject-matter" and "the same matter" which occurred in the corresponding section 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character. Without attempting an exhaustive definition of all that may be included in the term "subject-matter" we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. This was expressly decided in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* (7), with which we agree. It follows that the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. We think that the decision in *Achuta Menon* v. *Achutan Nayar* (2) and the decisions which followed it in *Machana Vajhala Dikshatulu* v. *Gorugantulu Yaggamma* (1) and *Sennava Reddiar* v. *Venkatachala Reddiar* (3) must be overruled.

Reference answered in the negative.

PRIVY COUNCIL.

APPEAL FROM LOWER BURMA CHIEF COURT.

March 21, 1916.

Present:—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

PRANJIVANDAS JAGJIVANDAS MEHTA—PLAINTIFF—APPELLANT

versus

CHAN MAH PHEE—DEFENDANT—RESPONDENT.

Mortgage—Equitable mortgage—Written agreement along with deposit of title-deeds—Construction—Scope of security—Burden of proof.

Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where, however, titles are handed over accompanied by a bargain, the bargain must rule. When the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. [p. 191, col. 2.]

It is for persons who hold security to satisfy the Court of the true scope thereof. The use of the singular term "grant of land" cannot ordinarily include the subject of three other plots of land. [p. 192, cols. 1 & 2.]

The maker of a promissory note deposited title-deeds of certain properties with the holder, who, in a suit to enforce the equitable mortgage thus created, claimed priority over a subsequent purchaser for value by virtue of a notandum on the back of the pro-note mentioning a house by way of security. The endorsement was afterwards altered by an interlineation, the effect of which was to add other properties as security:

Held, that the security was by the written contract limited and its scope could not be extended to include other properties added to by interlineation, inasmuch as the well-established rule of equity that a deposit of title-deeds without more, without writing or without word of mouth created in equity a charge upon the property in question, did not apply to a deposit accompanied by a contract in writing, in which case the written contract alone determined the scope of the security. [p. 191, col. 2.]

Shaw v. *Foster*, (1872) 5 Eng. & Ir. App. 321 at p. 340, applied.

Held, further, that it was the duty of a mortgagee to establish the identity of the mortgaged property and that a word in the singular could not [be] extended to cover other properties which the same word in the plural might include. [p. 192, cols. 1 & 2.]

Quære:—Whether, where an alteration in a written contract has been made, any rights in law could be founded upon that document. [p. 191, col. 2.]

Appeal from a judgment and decree of the Chief Court, Lower Burma, dated May 6, 1914, reversing those of the same Court in its Original Civil Jurisdiction, dated August 16, 1911.

FACTS.—In the year 1902, the plaintiff-appellant's predecessors lent a sum of Rs. 5,000 to one Ko Tha Gywe and got a promissory note executed therefor as well as a deposit of title-deeds as security. Ko Tha Gywe died in the same year and on his death the lender took a fresh promissory note for Rs. 6,000 from his daughter Mah Saw, to cover the prior note and other sums of money. Subsequently the daughter borrowed further sums of money and in 1906, she and her husband executed a fresh promissory note for Rs. 13,000 and the deposit of title-deeds was also continued and an entry was made on the back of the note to the following effect:—"As security, grant of a house in 14th Street, Rangoon"

and the same was signed by the parties. Later one Mul Chand, a creditor of Mah Saw, obtained a decree against her and in execution of that decree brought one of the properties covered by the title-deeds to sale and the present respondent became the purchaser in Court-auction. The present suit was brought by P. J. Mehta to obtain a mortgage-decree against all the properties comprised in the title-deeds deposited with him.

The first Court gave a decree in plaintiff's favour, but on appeal the said decree was modified and the property which had been purchased by the defendant was released from the operation of the mortgage-decree. The plaintiff thereupon preferred this appeal to the Privy Council.

Messrs. *De Gruyther*, *K. C.*, and *J. M. Parikh*, for the Appellant.—The point whether the mortgage extended also to the house purchased by the respondent was never raised in the Court of first instance. There was nothing about it in the defendant's written statement and no isssue was framed upon it.

The only question raised and argued there was whether or no any equitable mortgage was created at all in favour of the plaintiff. The contract must be taken to comprise all the properties covered by the title-deeds deposited and must not be confined or limited to the notandum on the back of the note. The writing in question was taken only as an additional acknowledgment of liability and it has no other effect. Even if the notandum was the contract between the parties, oral evidence was admissible to prove the intention of the parties. The evidence in the case clearly showed that a mortgage of all the properties was intended by all the parties.

The deposit of title-deeds was the only real criterion to determine the properties which were intended to be mortgaged.

Sir *Erle Richards*, *K. C.*, and Mr. *F. J. Coltman*, for the Respondent, were not called upon.

JUDGMENT.

LORD SHAW.—Their Lordships think it unnecessary in this case to call upon learned Counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships' view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of Rs. 13,000 from the respondent on the 1st June 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether this alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June 1906, as definitely limiting and describing the scope of the security. It was a "grant", in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw* v. *Foster* (1):—

"Although it is a well-established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that the general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer

(1) (1872) 5 Eng. & Ir. App. 321 at p. 340.

to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted n argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw), namely, the question of identification of the term "grant of a house in 14th Street, Rangoon." To identify this grant, a reference has been made by learned Counsel for the appellant to the various title-deeds of the properties called Plots Nos. 65, 66, 66A and 67. These deeds are as follows: With reference to Plot No. 65, there is a lease of land in favour of a person named Ma Thit, who was the mother of Mah Saw. With reference to Plot No. 66, and apparently also to No. 66 A, there is a document for sale of a house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot No. 67, there is a "grant of a house", a conveyance of a house on the 3rd January 1901, in favour of Ko Tha Gywe. Ko Tha Gywe was the husband of the grantee, or lessee of the other plots of ground covered by the other documents. He was the father of Mah Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot No. 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October 1902, he borrowed a sum of Rs. 5,000 from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot No. 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the "grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gwye, which house had been his property when the original advance of Rs. 5,000, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street, there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that under the term "grant of a house", which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited, and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant : Mr. *E. Dalgado.*

Solicitors for the Respondent : Messrs. *Arnold and Son.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1865 OF 1914.

March 4, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

RADHE SHIAM—PLAINTIFF—APPELLANT

versus

CHUNNI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—'Attest", meaning of—Attestors not present at execution—Mortgagor admission, effect of—Personal decree, if allowable.

A mortgage-deed signed by attestors who did not see the mortgagor sign is not an operative document, and cannot be enforced by the mere admission of its execution by the mortgagor. [p. 193, col. 1.]

The Court can, however, in such a case grant a personal decree. [p. 193, col. 1.]

Second appeal against the decree of the Subordinate Judge, Muttra, dated the 31st of August 1914.

Mr. *Kailas Nath Katju* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellant.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—We think the view taken by the Court below was correct, namely, that the document, not being executed in the manner prescribed by section 59 of the Transfer of Property Act, did not operate as a mortgage. The appellant asks us to give him a personal decree. He has not asked for such a decree in his plaint. What he asked for there is the ordinary relief which is granted under section 90 in the event of the mortgaged property not being sufficient. We are prepared, however, to treat the case as one in which we were asked to amend the plaint and had allowed the amendment on the terms that plaintiff should confine his claim to the principal sum of Rs. 165, and simple interest at 12 per cent. per annum. We accordingly allow the appeal to this extent that we grant the plaintiff a personal decree for Rs. 165, with simple interest at the rate of 12 per cent. per annum from the 9th of August 1905 up to the present time. Hereafter the rate of interest will be 6 per cent. per annum simple interest. In all other respects the appeal is dismissed. The parties will pay their own costs.

Decree varied.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 5, 1916.

Present:—Lord Shaw, Lord Sumner, Lord Parmoor, Sir John Edge and Mr. Ameer Ali, WITH *Nautical Assessors*, Vice-Admiral Robert N. Ommanney, C. B., and Commander W. F. Caborne, C. B., R. N. R.

THE RIVERS STEAM NAVIGATION COMPANY (LIMITED)—APPELLANTS

versus

THE HATHOR STEAMSHIP COMPANY (LIMITED)—RESPONDENTS.

Admiralty, court of—Collision between vessels—Negligent navigation—Trial Judge, finding of, on questions of fact—Appellate Court, duty of.

In collision cases, a Court of Appeal should be most chary of interfering with the decision of the Trial Judge, who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court, which has not had this advantage, reverse the judgment of the Trial Judge on questions of fact. [p. 193, col. 2.]

Appeal from a judgment and decree of the High Court, Calcutta, dated February 13, 1914, reversing those of the same Court in its Ordinary Original Civil Jurisdiction, dated February 6, 1915.

FACTS of the case are sufficiently set forth in their Lordships' judgment and the arguments of Counsel turned upon the questions of fact only.

Messrs. *Aspinall*, *K. C.*, and *Dumas*, for the Appellants.

Messrs. *Roche*, *K. C.*, and *Noad*, for the Respondents.

JUDGMENT.

LORD SUMNER.—The respondents, owners of the steamship "Hatumet", sued the appellants, owners of the paddle steamer "Punjab," in the High Court of Judicature at Fort William in Bengal, in the Ordinary Original Civil Jurisdiction of the Court, for negligent navigation in the Hooghly on the 27th December 1911. Fletcher, J., who tried the case, decided against them. The Court of Appeal (Sir Lawrence Jenkins, C. J., and Woodroffe, J.) having reversed the judgment of Fletcher, J., the owners of the "Punjab" have brought the present appeal. The case was such as is regularly tried in Courts of Admiralty, and the practical rules of Admiralty Courts are applicable. The only material difference arising from the fact that the action was brought in the Ordinary Original Civil Jurisdiction of the Court is that neither Fletcher, J., nor the Court of Appeal enjoyed, as their Lordships have done, the benefit of the advice of Nautical Assessors.

In collision cases, no rule is better established than this that, where questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a Trial Judge who had seen the witnesses and had the opportunity of forming his estimate of a them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the Trial Judge on questions of fact. This rule has long been observed and often laid down. It is unnecessary to cite authorities in which it has been formulated.

The Appellate Court, in effect, treated the appeal as a re-hearing of the whole case. Presumably, therefore, their opinion

was (though they do not so say in terms) that Fletcher, J., had not rightly addressed himself to the questions before him, so that there had been a mistrial; if they merely differed from Fletcher, J., as to the effect of the evidence, they would not have thought themselves justified in allowing the appeal. Before their Lordships, Counsel for the respondents submitted that Fletcher, J., had failed to appreciate the relative importance of the different incidents, and in a question of seamanlike navigation, had allowed his judgment to be influenced, if not determined, by tests inapplicable to two vessels approaching one another so as to involve risk of collision. Accordingly, it becomes necessary to consider the facts, not in order to see how their Lordships would have decided at the trial, but in order to see whether Fletcher, J., so misapplied his mind to the incidents proved before him as to warrant the reversal of his judgment on what, after all, are exclusively questions of fact.

The scene of the occurrence was the reach of the Hooghly a little below Calcutta opposite the Sibpur College. Here the river runs about east and west, and the deep-water channel is on the south side of the river. On its north side there is an extensive bank called the Sibpur College Sand, where the water is shallow over a considerable distance outwards from the north bank. As the sands rise steeply from the deep channel, their edge, constituting its northern limit, is marked by a line of three buoys: the Upper, Central, and Lower College Sand buoys.

It was already daylight, the morning was clear and still, and the "Hatumet," which had left the Kidderpore Dock a little earlier, was proceeding down to sea drawing 23 feet 2 inches forward and 24 feet 4 inches aft, in charge of a Hooghly pilot named Wheeler. There is no reasonable doubt that some obstruction or appearance of obstruction ahead caused this pilot to shift her helm and to handle her engines in a series of rapid manœuvres, the result of which was that she took the College Sand with her stem at a point afterwards fixed by compass bearings as about 400 feet below the Central College Sand buoy, where she remained fast for some hours and sustained considerable damage. The natural course for an ocean steamer proceeding down this reach would be to keep in mid-channel or a little to the northward of mid-channel, but, on perceiving any vessel coming upstream, to close somewhat on the line of the buoys under a port helm so as to pass her port to port. The plaintiffs' case was that the "Hatumet," coming down mid-channel at half-speed, saw the "Punjab" at a considerable distance coming up-river, exchanged port-helm whistle signals with her, edged to the north side of the deep-water channel under a slight port helm, and was about to pass her port to port, when she saw the "Punjab" suddenly take a sheer to the northward, as if acting under a starboard helm (truly a most astonishing and almost suicidal thing to do), so that she began to cross the "Hatumet's" bows at a distance of only 300 feet. The "Hatumet" is about 350 feet long. Thereupon the "Hatumet's" engines were put at slow and her helm was hard-a-starboarded. Then, after an interval, according to her engine-room log, of one minute, her engines were put full speed ahead for another minute in order to cant her bow to port, but, as she did not cant, they were then put full speed astern. The "Punjab" passed the "Hatumet," apparently at this juncture, starboard to starboard, but the "Hatumet," with a right-handed screw going astern, took a sheer to starboard about three points off her course, grounded, and remained fast. It may be observed that although the "Punjab" had passed by at a distance of only a few yards, those on board the "Hatumet" did not hail her. They "refrained even from good words."

Now it is common ground that the "Punjab," a shallow-draught river paddle-steamer, actually was coming up at this time with two lighters lashed on her port side and one on her starboard. She did sight the "Hatumet" coming down at a considerable distance; she did starboard her helm; and she did pass the "Hatumet" starboard to starboard, and, what is more, the serang, who was directing the navigation at the time, said that, as he understood, when a big ship gave one shot blast to a small ship it meant "get out of my way." That way danger lies.

Fletcher, J., rejected the "Hatumet's" story, and, as their Lordships think, must have meant that he believed the "Punjab's" serang, though he did not expressly say so. He said in terms that he was unfavourably impressed by the manner of the "Hatumet's" pilot and his assistant, who were called as witnesses, and that he would feel great difficulty in accepting their evidence standing alone. It is true that he attributed to the pilot a suppression of fact, of which he was not guilty; but their Lordships do not think that this was his only or indeed his main reason for doubting his veracity. He certainly was greatly and unfavourably impressed by the fact that, according to the "Hatumet's" case, the "Punjab" was fine on her port bow, only about 300 feet away, when she was seen to be starboarding. To this all the "Hatumet's" witnesses quite unequivocally pledged themselves from the first. On finding that the "Hatumet" was hard and fast aground the pilot sat down and wrote a report then and there, in which he made that statement. The captain signed it as correct. A similar account was entered in the log. The captain and mate were examined on commission in England and adhered to this story, and so did the pilot at the trial. It was so manifest that the "Hatumet's" manœuvres, after perceiving the "Punjab's" alteration of course up to the time when the two vessels passed starboard to starboard, could not have been crowded into the short time in which the two ships, after being only about 300 feet apart, would meet and pass, that, at the end of a very long and full trial, the plaintiffs' Counsel admitted collision to have been inevitable if the vessels were anything like so near to one another as 300 feet. It is doubtful whether the Appellate Court appreciated that the plaintiffs had been driven to abandon this most important feature of their case.

The respondents' very forcible argument was this: If the "Hatumet" gave a port-helm signal it could only have been for some vessel on her port hand; vessels on her starboard hand were out of her way on the shoals, where she could not follow them. The rapid and unsuccessful manœvures, to which she had resort, must have been taken in view of some vessel navigating so near to her as to involve risk of collision, and that risk could only arise, in the case of vessels about to pass port side to port side, if the approaching vessel suddenly directed her course to port, and appeared to be crossing the "Hatumet's" bows. No steamer but the "Punjab" was in sight, so the thing speaks for itself. To distrust, and still more to reject, the "Hatumet's" case because her pilot misjudged her distance from the "Punjab," showed on the part of Fletcher, J., a lack of nautical judgment. The distance between two vessels approaching one another in a river is peculiarly difficult to estimate with precision. Even at a distance of 1,000 feet (and so their Lordships are advised is the case) such a manœuvre was unseamanlike and involved risk of collision.

This argument, though strong, falls short of being convincing. If there was no other vessel in the neighbourhood of the "Hatumet" except the "Punjab," whose presence, or supposed presence, at close quarters more or less on the port bow could have led to the "Hatumet's" manœuvres, it might well have been inferred that the "Punjab" was the cause of them and that they would never have been resorted to if the "Punjab" had kept her course so as to pass port side to port side. It is not to be supposed that the "Hatumet" would have been handled in such an urgent manner in order to avoid the imaginary encounter of a non-existent vessel. Accordingly, though it was enough for the "Punjab" to show that the "Hatumet's" witnesses failed to prove their case without herself accounting for the "Hatumet's" manœuvres, it was evidently important for her to suggest some explanation of those manœuvres. One suggestion was that the "Hatumet" had approached close to the steep southern edge of the College Sand, and, as seamen say, "smelt the ground" so that she took a sheer to starboard. Their Lordships are advised that in the position and in the depth of water in which the "Hatumet" must have been at the time this could not have happened. The other suggestion is that the manœuvres are explained by the presence of a country boat somewhere ahead of the "Hatumet." Such a boat there was, and somehow the "Hatumet's" pilot failed to appreciate its presence and position. Eventually he came into collision with it on his starboard bow, though no

damage was done. Where this country boat was just previously and how she shaped her course is not known, but, without assuming to decide anything about her movements, their Lordships think that her presence so close to the "Hatumet" at the critical time provides a possible explanation of the "Hatumet's" manœuvres which is consistent with an acquittal of the "Punjab," if the "Hatumet's" witnesses are once discredited in their story.

Their Lordships think, further, that Fletcher, J., was entitled to attach great weight to the fact that from the first the "Hatumet's" witnesses placed the occurrence of the "Punjab's" sudden change of course at a distance from the "Hatumet" of only about 300 feet. The plaintiffs' error was not inconsiderable. The estimate was far from being substantially exact. A distance apart of as much as 1,000 feet at the critical time has now been suggested. Whoever was responsible for the original estimate, it was one to which three persons, all well qualified to judge, made themselves parties within a few hours of the event. They must at least have known whether they felt sure of their estimate or not. It is a grave matter for a litigant in such cases to shift his ground from that taken up in his Preliminary Act or in such contemporary documents as came into existence in this case and correspond to a Preliminary Act. When it comes to trebling the distance in question, the position of the defendants is materially prejudiced. Their Lordships are advised that the manœuvre with which the "Punjab" is charged would be dangerous and likely to involve risk of collision, even at a distance of 1000 feet: but if that distance were accepted, the appellants might have raised, with some prospect of success, the answer that within a distance of 1,000 feet the "Hatumet" ought to have eluded in safety the consequences of the initial negligence, if any, of the "Punjab." As it was, Fletcher, J., considered that he need not decide this issue; it was but lightly touched upon in the Court of Appeal, and the appellants' Counsel, at their Lordships' bar, assuming that the plaintiffs would adhere to their original case, elected not to press it. No further opinion need be expressed on this point beyond saying that, on the course which the "Punjab" admittedly took, so slight an alteration of the "Hatumet's" helm, if promptly made, would have prevented both collision and grounding, that it would not have been right to view such a shifting of their ground as anything but a grave blow to the credit of the "Hatumet's" witnesses.

It is on these witnesses that the plaintiffs had to rely for the alleged interchange of port-helm signals. The "Punjab's" serang said that he heard no such signal from the "Hatumet," and Fuller, a so-called independent witness, who did hear her whistle, was not prepared to distinguish between a mere warning blast and a signal meaning "I am directing my course to starboard." So far as he goes, Fuller appears to nagative any port-helm signal from the "Hatumet" and he certainly said that the "Punjab" did not whistle at all.

A judgment for the defendants might well be affirmed on the simple ground that Fletcher, J., considering the evidence with proper appreciation of its bearing and without misconception as to the law, found as a fact that he could not rely on the "Hatumet's" witnesses sufficiently to hold that she had made out her case. Certain considerations, however, have been pointed out, which carry the matter a good deal further. A strong attempt was made at the trial to show that, under the Hooghly Rules, it was the duty of both vessels in that part of the river to pass port side to port side, but it was shown eventually that the rule relied on did not apply to the position in question. A practice was proved for shallow-draft river vessels to cross the College Sand to the northward of the line of buoys, and of this practice the pilot of the "Hatumet" was aware. Certain factors governing the positions of the vessels are sufficiently known to make an arithmetical calculation profitable. The "Hatumet's" pilot was well acquainted with the river and well able to estimate distances on it. At a Marine Enquiry into the conduct of the "Punjab's" serang, held about a month after the incident, this pilot gave evidence that, when he first sighted the "Punjab," she was about 1,000 feet below the Lower College Sand buoy, and the "Hatumet" was then 650 to 700 feet above the Upper buoy. To this evidence he eventually elected to adhere at the trial, and this part of his evidence was accepted by Fletcher, J. From this finding their Lordships think that the plaintiffs cannot now escape. The distance between the Upper and the Lower

College Sands buoys is accurately known. It is 2,450 feet. The tide was the last of the flood, running up about 1 knot. This is given by the "Hatumet's" assistant pilot. The "Punjab's" serang gave her speed as 5 or 6 knots and this was not challenged in cross-examination. The "Hatumet's" pilot put her speed somewhat variously, but in substance at about 4½ knots. Her engines were at half-speed ahead. Without tying the respondents to unreasonably precise figures, it is easily demonstrable that at these speeds the "Punjab" could not have been still approaching the "Hatumet," where the latter must have been when those manœuvres began, which shortly afterwards brought her up at the observed point of her stranding. At that time the "Punjab," according to her witnesses, was actually astern of the "Hatumet" in the shoal water to the northward of the buoys. According to Fuller, she could not have been so far upstream, but still she was to the northward of the buoys and not in the position in which the "Hatumet" must needs place her. As a witness, Fuller must be admitted only under very considerable reserve. Of his evidence at the Marine Enquiry only a brief and obscure report is to be found in the Record. Whatever it meant, it did not agree with what he said at the trial. All the explanation of this disagreement that he could give was that he was called at the enquiry on his subpœna, apparently without having given a proof of his evidence, and, having said what he had to say, was not cross-examined so as to have the opportunity of altering it. The respondents argued that his evidence at the enquiry placed the "Punjab" on the "Hatumet's" port bow in the act of starboarding across it so as to disappear gradually on her starboard hand till she was shut out altogether. Their Lordships find Fuller's evidence too obscure to support this view. If this was really what he saw, he must have said much more or much less than he did. His statement is not inconsistent with the "Punjab's" case, but it is insufficient ground for saying that the "Hatumet's" case ought to have been accepted.

One point remains: the "Punjab's" natural course would have been to have gained the shoal water on the north side of the reach before passing the Lower College Sand buoy, but the presence of country boats at anchor near that buoy obliged her to keep in the deep-water channel until she was able to round it and begin to cross the sands by passing between it and the Central College Sand buoy. Calculations were made by the "Punjab's" superintending engineer at the instance of cross-examining Counsel, which were used to show that her turning circle was such as to prevent her from getting across the line between the Lower and the Central buoy till she had advanced within a few feet of the spot where the "Hatumet" grounded. Their Lordships have given careful attention to these calculations, but find them inconclusive. They depend on factors as to the precise position of the country boats and of the "Punjab" relatively to the Lower buoy, both laterally and downstream, at the moment of starboarding, which cannot exactly be ascertained. The sharp zigzag tacks imputed to the "Punjab" seem inexplicable, while apparently she might have made her in-and-out course round the Lower buoy on curves so flat that she would never appear to be on the "Hatumet's" port bow at any material time or even seem to be crossing her course so as to involve risk of collision. Here again the respondents fail to carry their argument far enough to warrant interference with the decision of Fletcher, J.

Perhaps the defendants were lucky at the trial, but in the result their Lordships think that judgment given for them should stand. The learned Judge tried the case at great length, and was assisted by able Counsel. He examined the evidence with care and nonetheless thoroughly because, as he himself observes, he spoke with considerable diffidence on matters of navigation. The judgment of the Court of Appeal does not point out such errors of apprehension on his part or such want of experience as justified them in reversing his decision, and their Lordships have been unable to discover sufficient ground for doing so. They will accordingly humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment for the defendants should be restored.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Waltons & Son.*

Solicitors for the Respondents: Messrs. *William A. Crump & Son.*

PRAG NARAIN *v.* PRAG NARAIN.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 23 OF 1915.

April 26, 1916.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

Munshi PRAG NARAIN—PLAINTIFF—APPELLANT

versus

Chaubey PRAG NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Cause of action—Mortgage—Lease of mortgaged property to mortgagors—Division among mortgagors—Default by some mortgagors to pay Government Revenue—Payment by other mortgagor—Payment by mortgagee of all dues—Suit against all mortgagees, if maintainable—Contract Act (IX of 1872), s. 69.

A mortgagee leased the mortgaged property to his mortgagors who divided the property among themselves. The rent payable under the lease not having been paid suits were brought and compromised, whereby it was agreed that the amount due upon the mortgage was to be paid with interest in five years and the interest was to be paid in half yearly instalments and in the event of failure to pay the interest the mortgagee was to take possession or bring the property to sale. The default was made and the mortgagee took possession. However, before he took possession, two mortgagors *P* and *B* had made default in the payment of Government revenue and another mortgagor *K* had paid off the amount. The Government again attached the shares of *P* and *B* for further arrears. The plaintiff (mortgagee) paid the amount due to Government as well as the amount which *K* had paid and sued *P*, *B* and *K* to recover these amounts:

Held, that the plaintiff had no cause of action against *K*. [p. 198, col. 2.]

First appeal from the decision of the Additional Subordinate Judge, Cawnpore, dated the 10th December 1914.

Mr. *Gokul Prasad* (with him Babu *Durga Charan Benerji*), for the Appellant.

Munshi *Gulzari Lal*, for the Respondent.

JUDGMENT.—We think that the decision of the Court below in this case is correct. The suit was brought to recover two sums of money, namely Rs. 1,478-2-4 and Rs. 3,202-7-3, from the defendants. The circumstances under which the suit was brought were these. On the 15th of November 1899, Chaubey Prag Narain and Chaubey Bishambhar Nath, defendants, and Jwala Prasad the father of Kirpa Shanker, defendant, executed a usufructuary mortgage in favour of the plaintiff. They executed other mortgages in favour of the same mortgagee. Subsequently in the year 1900, the mortgagors took a lease of the mortgaged property from the plaintiff. The rent payable under the lease not having been paid, suits were brought on the basis of the mortgages to enforce payment of the money secured by them. These suits were compromised on the 15th of April 1908, and by the compromise it was agreed that the amount due upon the mortgages was to be paid with interest in five years; that the interest was to be payable in half yearly instalments, and in the event of two instalments falling into arrear the mortgagee would have the option of taking possession or of bringing the property to sale. The interest not having been paid as agreed upon, the mortgagee took possession of the mortgaged property in May and June 1911. Meanwhile the mortgagors had divided the mortgaged property among themselves. Two of them, Prag Narain and Bishambhar Nath, had made default in the payment of Government revenue due for a period anterior to the possession of the plaintiff mortgagee. This amount was paid by Kirpa Shankar. A further amount, namely Rs. 1,478-2-4, remained due by those persons to Government and for non-payment of this sum the Government attached the shares of Prag Narain and Bishambar Nath. The plaintiff in order to obtain possession of the property paid the aforesaid amount to Government as also the amount which Kirpa Shankar had paid, and it is to recover these amounts that he has brought the present suit. He claims this sum not only against Prag Narain and Bishambar Nath but also against Kirpa Shankar. The Court below has dismissed the claim as against Kirpa Shankar and has also refused to make a declaration that the plaintiff has a charge on the mortgaged property for the amounts paid by him. We think that the view taken by the Court below is right.

As against Kirpa Shankar the plaintiff has no cause of action. What the plaintiff claimed in the suit was to recover money which he had paid for Prag Narain and Bishambar Nath. No part of the amount claimed was payable by Kirpa Shankar. On the contrary Kirpa Shanker himself had paid a sum which Prag Narain and Bishambar Nath had neglected to pay and for the non-payment of which their property was liable to be attached by Government for the realization of arrears. As against Kirpa Shankar, therefore, the plaintiff clearly has no cause of action. In the Court below the plaintiff

relied on section 109 of the Contract Act. Under that section the only persons against whom the plaintiff could maintain the suit were the two defaulters Prag Narain and Bishambar Nath, for whom the amounts claimed were paid. Kirpa Shankar never objected to his share of the property being taken possession of. It was in consequence of non-payment of revenue by Prag Narain and Bishambar Nath that their share of the property was either attached or was about to be attached by Government. As for the claim for lien on the property, we think that in view of the Full Bench ruling of this Court to which the learned Subordinate Judge has referred, the claim for this declaration of a lien has been rightly dismissed. We dismiss the appeal but without costs as the respondents are not represented.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 249 OF 1915.

June 21, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

THE BANK OF MULTAN, LTD.—PLAINTIFF—APPELLANT

versus

KAMTA PRASAD—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 85—Loan transaction—Payments of part without mentioning whether paid as principal or interest as such, effect of—Acknowledgment—Deposition of debtor, if amounts to acknowledgment to save limitation.

The defendant opened dealings with the plaintiff Bank by borrowing Rs. 500 from it on the 15th of October 1909 and borrowed further sums till the 23rd of December 1910. On various dates during the period of the account certain sums were paid in by the defendant, the last item being paid in on the 25th November 1912. These were all credited to the account and set off against the pre-existing debt. Interest was calculated every half year and the balance was carried on to the following half year. The plaintiff sued on the 24th of November 1913 for the balance of the money with interest. The defendant pleaded *inter alia* limitation:

Held, that it was not a mutual account within the meaning of Article 85 of Schedule I of the Limitation Act and that, therefore, the suit was barred by limitation, inasmuch as it was not established that any payment made as payment of the principal appeared in the handwriting of the defendant-debtor, nor did it appear that any payment was made on account of interest as such; [p. 200, col. 2; p. 201, col. 1.]

that the deposition of the debtor made in the suit and signed by him did not constitute evidence of part payment so as to save limitation. [p. 200, col. 2.]

Second appeal from the decision of the Additional Judge, Moradabad, dated the 4th of December 1914.

FACTS material for the report are as follows:—The defendant borrowed from the plaintiff Bank at Moradabad Rs. 500 on the 15th of October 1909, Rs. 500 on the 1st of November 1909 by a cheque drawn from the Delhi Bank and Rs. 1,195-4-0 on different dates from 1st of November 1909 up to the 23rd of December 1910 bearing interest at the rate of Rs. 12 per cent. per annum. The defendant paid on different dates from the 28th of April 1909 up to the 25th of November 1912 Rs. 1,827. The plaintiff brought a suit for the balance Rs. 684 on the 24th of November 1913. The defendant raised several pleas and *inter alia* pleaded that there was no floating account, as provided by the law, between the plaintiff Bank and the defendant under which he might have borrowed money, that no item was legally payable to the plaintiff by the defendant and that the suit was barred by the three years' rule of limitation. The suit was dismissed by the first two Courts. Hence this second appeal by the plaintiff Bank.

Mr. *Mohan Lal Nehru*, for the Appellant, contended that the suit was governed by Article 85 of Schedule I of the Limitation Act, inasmuch as the suit was one for the balance due on a mutual, open and current account and was not, therefore, barred by time. Even if the suit were not governed by Article 85, it was not barred as the defendant did make payments from time to time and these payments are sufficient to save limitation. Although there is nothing in the handwriting of the debtor to show that the payments were made as part-payments of the principal, still the deposition of the defendant made in the suit and signed by him obviously constitutes evidence of part payment. The suit is thus within time having been brought within three years of the last payment.

Mr. *Gokul Prasad*, for the Respondent, contended that the suit was not governed by

Article 85 of the Limitation Act. There was no mutual, open and current account. The defendant borrowed money from the Bank and whatever he paid he paid towards the discharge of his obligation. At no time was there a mutual account and the defendant could have said to the plaintiff, "I have an account against you." He referred to *Hajee Syud Mahomed* v. *Musammat Ashrufoonnissa* (1); *Ram Pershad* v. *Harbans Singh* (2).

The suit is barred by limitation as the payments relied upon by the appellant do not appear to have been paid towards principal and they do not appear in the handwriting of the debtor. Moreover the accounts do not show that the payments were made on account of interest as such. Section 20 of the Limitation Act does not help the appellant.

Mr. *Mohan Lal Nehru* was heard in reply.

JUDGMENT.—The only question for disposal in this appeal is one of limitation. The suit was one brought by the Bank of Multan now in liquidation against one Kamta Prasad to recover a sum of Rs. 684 alleged to be due by the defendant to the plaintiff Bank. In support of this claim the Bank exhibited what purported to be a running account which opened on the 15th of October 1909, and the last item of which is dated 25th November 1912. Both the Courts below have held that the suit is time-barred. The plaintiff Bank relied upon the provisions of Article 85, Schedule I, of the Indian Limitation Act. That Article relates to a suit brought for the balance due on a mutual, open and current account where there have been reciprocal demands between the parties. The Courts below have found that the account did not fall within this description, and after hearing a lengthy argument by the learned Counsel for the appellant we have come to the conclusion that the decision of the Courts below is correct. The account may be described as having been an open and current account, but it is not in our opinion a mutual account within the meaning of Article 85. In this connection we refer to the exposition of the law in the judgment of the Calcutta High Court in *Ram Pershad* v. *Harbans Singh* (2) where the principal cases decided in this country are referred to. There are also references to English cases and cases in other Courts. What the account put forward by the plaintiff discloses is that on 15th October 1909, when the dealings between the plaintiff Bank and the defendant commenced, the first item consisted of a debt item of Rs. 500; in other words, the defendant opened dealings with the Bank by borrowing Rs. 500 from it. On various dates during the period of the account certain sums were paid in by the defendant. Those were all credited to the account and set off against the pre-existing debt. Interest was calculated every half year and the balance was carried on to the following half year. An examination of the account from the beginning to the end appears clearly to indicate that it is nothing more than the record of a loan transaction between the plaintiff Bank and the defendant. The sums which were paid in by the defendant were nothing more or less than sums paid in part discharge of the obligation under which the defendant lay with respect to the plaintiff Bank. To quote the language of the judgment in *Hajee Syud Mahomed* v. *Musammat Ashrafoonnissa* (1), there was never at any time during the period of this account any occasion on which the defendant could have said to the plaintiff Bank: "I have an account against you." We are satisfied that Article 85, Schedule I, of the Limitation Act is not the proper Article to apply to this case. The Courts below were right in holding the sum claimed to have been borrowed more than three years before the date of the suit and, therefore, barred by time. It has, however, been contended here that the payments made from time to time are sufficient to save limitation. It must be established that any payment made as payment of the principal appears in the handwriting of the debtor. The writings of the accounts are certainly not the writing of Kamta Prasad. It is impossible to accept the contention that after the suit was filed and Kamta Prasad was put into the witness box, the deposition made and signed by him constitutes evidence of part payment which would be available to the plaintiff Bank in this case for the purpose of saving limitation, nor again is it made to appear that any of the payments, record of which is to be found in the copy of the account filed were

(1) 5 C. 759.
(2) 6 C. L. J. 158.

payments made on account of interest as such. There is, in our opinion, no ground on which the plaintiff Bank can succeed in this appeal, which we accordingly dismiss with costs to the respondent, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEALS NOS. 369 TO 371 OF 1914.

February 18, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

AMBALAVANA PANDARASANNADHI, THROUGH HIS AUTHORISED AGENT DAKSHINAM KARUWARVYTHILINGA THAMBIRAN—PLAINTIFF—APPELLANT IN ALL

versus

IN L. P. A. NO. 369 OF 1914

KUPPACHI JANAKI AMMAL—DEFENDANT—RESPONDENT

IN L. P. A. NO. 370 OF 1914

N. SUBBIER—DEFENDANT—RESPONDENT

IN L. P. A. NO. 371 OF 1914

R. GOPALA KRISHNA IYAR—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), ss. 63, 32 (2), 35, 65, 91—Grant, copy of translation of, annexed to report of an officer—Admissibility to prove contents—Evidence, secondary—Entry in public record.

A translation of a *parwana* or grant forming the enclosure to the report of a public officer is not admissible as secondary evidence of the contents of the grant under section 63 of the Evidence Act, nor under section 32 (2) or section 35. [p. 201, col. 2; p. 202, col. 1]

Sections 91 and 65 of the Evidence Act make it clear that, when a written grant is lost, secondary evidence can be given of it only as defined by law. [p. 202, col. 1.]

Appeals, under clause 15 of the Letters Patent, preferred against the judgment of Mr. Justice Kumaraswamy Sastri, reported as 26 Indian Cases 618, in Civil Revision Petitions Nos. 828 to 830 of 1913, preferred against the decrees of the Court of the Subordinate Judge, Tinnevelly, in Small Cause Suits Nos. 2102, 2103 and 2104 of 1912, respectively.

FACTS.—Plaintiff, the Pandara Sannadhi of the Tiruvaduthurai Mutt, brought a suit in the Subordinate Judge's Court of Tinnevelly, to recover rent from certain tenants. The latter pleaded that the village in which the suit land was situate was an "estate" within the meaning of the Estates Land Act and the suit was, therefore, cognizable by a Revenue Court alone. The plaintiff contended that the grant was of both *warams* and the village was not within the purview of the Act and produced, in support thereof, a copy of the translation of the original grant forming an enclosure to a report made to Government by the Collector. The Subordinate Judge admitted the document in evidence and, on a construction of the *purwanah*, held that the grant was of the *melvaram* alone and that the village was an 'estate.' He accordingly directed that the plaint be presented to the proper Court. Against that order, a civil revision petition was filed in the High Court. Mr. Justice Kumaraswami Sastri, before whom the revision came on for hearing, held that an alleged translation of the original grant forming an enclosure to a letter from one official to another was not secondary evidence of the contents of the document within the meaning of section 63, clause (5) of the Evidence Act and accordingly dismissed the petition. The present Letters Patent Appeal was against that order.

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Mr. *S. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.—The document, Exhibit D, is not secondary evidence of the alleged *purwanah* of 1741 as it does not fall under any of the clauses of section 63 of the Evidence Act. The Collector's report cannot fall under clause (5), which refers to oral accounts of the contents of a document. The appellant's learned Vakil Mr. Muthiah Mudaliar relied next on section 35 of the Evidence Act. Under that section, Exhibit D will only be evidence of the fact that what purported to be a *purwanah* was produced before the Collector, that the English translation put before him seemed to be a correct translation and that in his opinion, the *purwanah* looked genuine. But the relevant fact which has to be proved in this case is the contents of the *purwanah*, and an alleged translation is not secondary evidence and, therefore, not legal proof of the document.

Next, Mr. Muthiah Mudaliar relied on section 32, clause (2). The statement of the

Collector made in Exhibit D does not give the contents of the original *purwanah* and even if it did, it would not be secondary evidence. Sections 91 and 65 of the Evidence Act make it clear that when a written grant is lost secondary evidence can be given of it only as defined by law, and there is no such secondary evidence adduced in this case.

The learned Judge is, therefore, right and we dismiss the Letters Patent Appeal No. 370 of 1914.

The connected Appeals Nos. 369 and 371 of 1914 are also dismissed. The appellant will pay the respondent's costs in Letters Patent Appeal No. 371 of 1914.

Appeals dismissed.

V.R.P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 426 OF 1915.

May 18, 1916.

Present:—Mr. Justice Sundar Lal.

MOHAMMAD SHAKUR—PLAINTIFF—APPELLANT

versus

GOPI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage of occupancy holding—Covenant, personal, to pay—Suit for money, maintainability of.

A mortgage-deed provided for the payment of the mortgage-money by certain instalments and in the event of non-payment of the instalments the mortgagee was entitled to recover possession of a certain cultivatory holding in which the mortgagors had rights of occupancy. Certain instalments remaining unpaid, the plaintiff sued to recover the same. The defendants pleaded that the mortgage was void in law and the plaintiff could not recover:

Held, that the document, in so far as it involved a mortgage of the occupancy-holding, was invalid but that in so far as it contained a personal covenant on the part of the debtors to pay the amount, it was enforcible at law. [p. 203, col. 1.]

Second appeal from the decision of the District Judge, Ghazipur, dated the 17th December 1914.

FACTS.—The defendants had money dealings with the plaintiff. They executed a mortgage-deed in favour of the plaintiff on the 17th of March 1902 for a sum of Rs. 150. It was agreed that the amount was payable by ten instalments of Rs. 14 each and one and the last instalment of Rs. 10. It was also agreed that in the event of non-payment of the instalments the mortgagee shall have the right to recover possession of a certain cultivatory holding in which the mortgagors had rights of occupancy. The defendant made payments till the year 1909. The remaining instalments were not paid. The plaintiff sued to recover the amount which remained unpaid. The defendant pleaded *inter alia* that the mortgage was one of occupancy holding and was invalid in law and that the plaintiff could not recover anything on this illegal contract. The first two Courts dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Janaki Prasuda* for Mr. *Parmeshwor Dyal*, for the Appellant, contended that there was a distinct and separate covenant in the mortgage-deed for the payment of the amount and the defendant had already made payments of certain instalments and that because the deed also contained a covenant as to mortgage of occupancy holding which was invalid in law, the whole deed was not invalid. The Court could give effect to that part of the deed which was valid. The ruling relied on by the lower Appellate Court as well as the first Court is not applicable in this case. In that case the mortgage was a usufructuary mortgage and in such a case a mortgagee is not entitled to claim the money advanced from the mortgagor personally. He is entitled only to possession so long as the mortgage is not discharged. Moreover from the report of the case [*Sita Ram Tiwari* v. *Sukhdeo Kunbi* (1)] it does not appear that in that case there was a personal covenant separate and distinct as is in this case. The plaintiff-appellant is entitled at least to a money-decree.

JUDGMENT.—This was a suit on foot of a mortgage, dated the 17th of March 1902, for a sum of Rs. 150 payable by instalments of Rs. 14 a year, the last instalment being one of Rs. 10. The plaintiff's case was that the instalments had been paid up to the year 1909. He has brought the present suit to recover the amount which has remained unpaid. The document also contains a covenant that in the event of non-payment the mortgagee was entitled to recover possession of a certain cultivatory holding in which the mortgagors had rights of occupancy. This covenant in the

(1) 6 A. L. J. 88 (*Notes*).

mortgage-deed is void in law. But if the money was really advanced to the defendants on the conditions set out in the deed, namely, that it was payable by instalments specified which the defendants covenanted to pay, the suit for money on such a covenant was clearly maintainable. The Court below has relied upon a decision of this Court in the case of *Sita Ram Tiwari* v. *Sukhdeo Kunbi* (1). In that case the mortgage was a usufructuary mortgage. In the case of such mortgage the mortgagee is not entitled to claim the money advanced from the mortgagor personally. His only right is to remain in possession of the property so long as the mortgage is not discharged. There is no personal covenant for payment of the money as a debt, except under the terms of a special agreement to that effect. That case is, therefore, clearly distinguishable from the present one. In the present case there is an independent and express covenant which, if the plaintiff's case were true, had been observed up to 1909. The present suit has been dismissed by the Courts below on the ruling which I have already mentioned. That ruling has no application. The Courts below have not tried the other issues arising in the case, for instance whether or not the mortgage-bond was duly executed and whether or not the instalments were paid up to 1909. I agree with the Court below in holding that the document in so far as it involves a mortgage of an occupancy-holding is invalid, but that in so far as it contains a personal covenant on the part of the debtors to pay the amount it is enforcible at law. As the other points were not tried by the Courts below, I have no alternative but to set aside the decrees of the Courts below and to remand the case back to the Court for trial of other points arising in the case. I, therefore, allow this appeal, set aside the decrees of the Courts below and remand the case through the lower Appellate Court to the Court of first instance for trial on the merits. Costs here and hitherto will abide the event.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 30 OF 1916.

April 19, 1916.

Present:—Justice Sir P. C. Banerji, KT.

GAURI DATT BASDEO AND OTHERS—PLAINTIFFS—APPLICANTS

versus

NANIK RAM CHAUTHMAL—DEFENDANTS—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 73, ill. (c)—Contract to sell, breach of—Damages, rate of—Breach of contract, date of.

Ordinarily damages for breach of contract to sell are to be calculated at the market rate prevailing on the date on which a breach of contract was committed. [p. 204, col. 1.]

Where no time was fixed for delivery of the goods sold and the plaintiff gave notice to the defendant that he would not accept delivery after a certain date:

Held, that the contract must be deemed to have subsisted till the date fixed in the notice and the damages should be calculated on the difference between the rate prevailing in the market on that date and the contract rate. [p. 204, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Cawnpore.

Pandit *Kailas Nath Katju*, for the Applicant.

Pandit *Baldeo Ram Dave*, for the Opposite Party.

JUDGMENT.—The facts of the case are these. On the 2nd of February 1915 the parties entered into a contract by which the defendant undertook to deliver to the plaintiffs 69 maunds 30 seers of sugar at the rate of Rs. 13-4-0 per maund; no time was fixed for delivery. The plaintiff stated that the defendant from time to time promised to deliver the sugar but never did so; that in May 1915 the plaintiff gave notice to the defendant that unless the sugar was delivered by the 17th of May 1915 the contract would be deemed cancelled. The sugar not having been delivered, the plaintiff brought this suit for damages claiming the damages at the difference between the contract rate and the rate prevailing on the 17th May 1915. On that date the market rate was stated to be Rs. 17-4-0. The plaintiff accordingly claimed damages at the rate of Rs. 4 per maund. The defendant admitted the breach to contract alleged by the plaintiff, but stated that the parties had agreed that damages would be given to the plaintiff at the rate of annas two per maund. He also urged

that in such cases goods were usually delivered within two or four days and that the plaintiff could only claim damages at the rate prevailing at the end of the two or four days. The Court below disbelieved the defendant's allegation that the parties had agreed to assess damages at the rate of two annas per maund. It was, however, of opinion that the usual practice of the trade was where no date was fixed for delivery that the goods were delivered within a week or ten days and that the breach, therefore, took place on the expiry of the ten days and damages should be awarded with reference to the market rate prevailing at the time. It is contended on behalf of the plaintiff that the contract not having been put an end to until the 17th of May 1915, the market rate prevailing on that date should have been taken into consideration in assessing the damages. This contention seems to me to be correct.

Ordinarily damages are to be calculated at the market rate prevailing on the date on which a breach of contract was committed. In this case it is admitted that no time was fixed for delivery. Therefore, the contract subsisted until it was terminated by the plaintiffs giving notice to the defendant that they would not accept delivery after the 17th of May 1915. This case comes within the purview of illustration (*c*) to section 73 of the Contract Act. In this case no custom of trade was clearly asserted and proved on the question of delivery. On the contrary the plaintiffs' statement was that the defendant from time to time promised to deliver the goods and this statement stood uncontradicted. Therefore, the contract must be deemed to have subsisted till the 17th of May 1915 when the plaintiffs by notice put an end to it. The damages should, therefore, have been calculated on the difference between the rate prevailing in the market on that date and the contract rate. According to the evidence adduced the prevailing rate was Rs. 17 a maund in May 915. Therefore, the difference between the contract rate and the market rate was Rs. 3-12-0 a maund and the plaintiffs were entitled to damages calculated at the rate of Rs. 3-12-0 a maund. The amount due thus comes to Rs. 261-9-0. I allow the application and varying the decree of the Court below make a decree in the plaintiffs' favour for Rs. 261-9-0 with proportionate costs in both Courts to be paid to and received by the respective parties.

Application allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 348 OF 1914.

April 7, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

RANGASWAMY BHATTAR—PLAINTIFF—APPELLANT

versus

K. SESHADRI AIYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Temple trustees—Enquiry into conduct of hereditary temple servants—Absence of notice—Irregularity in procedure—Burden of proof—Small cause suit—Error as to burden of proof—High Court—Revision—Provincial Small Cause Courts Act (IX of 1887), s. 25.

Where the act of temple trustees in inflicting punishment on the hereditary servants of the temple is called in question by the latter on the ground that they had no notice of any intended enquiry into their conduct, the burden of proof is on the trustees to show that they gave notice of the enquiry and that their procedure was legal. [p. 205, col. 1.]

Seshadri Aiyangar v. *Nataraja Ayyar*, 21 M. 179 at p. 186, *Thiruvambala Desikar* v. *Chinna Pandaram*, 34 Ind. Cas. 57; 30 M. L. J. 274 at p. 280, (1916) 2 M. W. N. 43, followed.

Hayman v. *Governors of Rugby School*, (1874) 18 Eq. 28; 43 L. J. Ch. 834; 30 L. T. 217; 22 W. R. 587; *Bhavanishankar Ramrao* v. *Timmanna Ram Bhatta*, 30 B. 508, 8 Bom. L. R. 407, referred to.

Per *Sadasiva Aiyar, J.*—The High Court should not interfere in revision with the finding of a Small Cause Court, on the mere ground that the latter misdirected itself as to the burden of proof in arriving at a finding of fact when it weighed the evidence on both sides. [p. 205, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Sankaran Nair, in Civil Revision Petition No. 38 of 1911, preferred against the decree of the Court of the District Munsif, Srirangam, in Small Cause Suit No. 609 of 1910.

Mr. *C. Padmanabha Aiyangar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondents.

This Letters Patent appeal coming on for hearing on the 17th September 1915 the Court (Sadasiva Aiyar and Tyabji, JJ.) made the following

BIRJ BHUKAN LAL *v.* MAHADEO PERSHAD.

ORDER.—As the appellant wishes to add two more persons as respondents, the case is adjourned for two weeks to take necessary steps.

Appellant will pay respondents' day costs (Rs. 10).

This appeal coming on for final hearing after the addition of new persons as respondents on 27th March 1916, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

OLDFIED, J.—The learned Judge held that plaintiff, a hereditary *archaka*, who sued in respect of the punishment inflicted on him by the trustees of his temple, was bound to prove against them that the preliminary enquiry they held was inadequate.

The question of burden of proof as to the legitimacy of the procedure at such an enquiry, as opposed to the correctness of the decision on the merits, has not, so far as we have been shown, been the subject of any decision. But in *Seshadri Ayyangar* v. *Nataraja Ayyar* (1) and in *Thiruvambala Desikar* v. *Chinna Pandaram* (2) the language used implies that the burden of proof of the giving of notice of the enquiry is on the authority holding it. The latter case is important, because it negatives the general application of the presumption in favour of the *bona fides* of the acts of a legally constituted authority drawn in *Hayman* v. *Governors of Rugby School* (3), on which *Bhavanishankar Ramrao* v. *Timmanna Ram Bhatta* (4), a decision dealing with dismissal from an appointment not shown to have been hereditary, was founded. Here the appointment in question being hereditary, we follow the rule implied in the two judgments of this Court above referred to and need not consider whether the distinction drawn by the learned Judge between the present case and *Appaya* v. *Padappa* (5) is valid.

The learned Judge's decision must be set aside, the Letters Patent appeal being allowed with costs before us and in the civil revision petition.

SADASIVA AIYAR, J.—I agree. I do not think that the learned Judge, from whose decision this Letters Patent appeal has been filed, should have interfered in revision on the mere ground that the District Munsif in arriving at a finding of fact in a Small Cause suit misdirected himself as to the burden of proof. The order of the District Munsif was not passed solely on his opinion on the question of the burden of proof. He had evidently considered the evidence on both sides and then came to the conclusion that it was not satisfactorily proved that the plaintiff had notice of the hearing on 25th May 1907 or 26th May 1907 into the charges framed by the trustees against the plaintiff who was a hereditary *archaka*. I am also satisfied that the District Munsif's view as to the burden of proof was wrong. The Small Cause suit is one of 1910 and it was decreed in September 1910 more than $5\frac{1}{2}$ years ago. Some of the parties have dropped out and others have come in and a re-trial of the suit after such a lapse of time is not likely to advance justice. I would allow the appeal and restore the decision of the District Munsif with all costs to plaintiff.

Appeal allowed.

V.R.P.

(1) 21 M. 179 at p. 183.
(2) 34 Ind. Cas. 57; 30 M. L.J. 274 at p. 280; (1916) 2 M. W. N. 43.
(3) (1874) 18 Eq. 28; 43 L. J. Ch. 834, 30 L. T. 217; 22 W. R. 587.
(4) 30 B. 508; 8 Bom. L. R. 407.
(5) 23 B. 122.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 410 OF 1916.

June 25, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

BIRJ BHUKAN LAL—JUDGMENT-DEBTOR—APPELLANT

versus

Lala MAHADEO PERSHAD, MINOR, THROUGH *Musammat* CHAMPA—DECREE-HOLDER—RESPONDENT.

Pleader and client—Pleader, authority of—Parties, obligations of—Execution proceedings, initiation of, within time, effect of—U. P. Land Revenue Act (III of 1901), S-h. IV, r. (d), *S. Nos.* 47, 48.

Parties are bound by what Counsel do in the exercise of their discretion acting within the scope of their authority. [p. 206, col. 2; p. 207, col. 2.]

Per *Walsh, J.*—The Bar have privileges of audience, and a good deal more than audience, which

involve correlative obligations, and matters like admissions, consents, withdrawals by Counsel in the conduct of their cases made in open Court are, unless they have been induced or misled by some circumstance to make a statement under a mistake, final and binding upon the parties. [p. 206, col. 2.]

Per *Sundar Lal, J.*—All that Schedule IV, rule (*d*), serial Nos. 47 and 48 of the Land Revenue Act, 1901, require is that the proceedings for execution must be initiated within time and when once an application for execution has been made within time, it can go on for a considerable time. [p. 207, col. 1.]

Execution second appeal from the decision of the Second Additional Judge, Aligarh, dated the 15th December 1915.

Mr. *Gulzari Lal* (with him Mr. *Malcomson*), for the Appellants.

Mr. *Haidar*, for the Respondent.

JUDGMENT.

WALSH, J.—I am of opinion that this appeal must be allowed and that the only question is one of amount. I propose to say very little about the particular facts of this case, leaving it to my brother Mr. Justice Sundar Lal to deal with his great experience with the practical side of the questions which arise. Speaking for myself, so far as I appreciate the attachment proceedings, I have considerable doubt whether the question of limitation could arise, on the simple ground that it seems to me difficult to hold that in an attachment proceeding like this the attaching party was executing his decree. However, I do not think it necessary to come to any final conclusion upon that point. I propose to base my decision upon what occurred in the first Court. Whether there is anything in the limitation point or not I think it is not open to the respondent, having regard to the fact that in the first Court his Pleader stated that he would examine the account and that he had no other objection. After that it is impossible for the party which he represents to raise any other question. Counsel have full discretion as to the conduct of their cases, and what is best in the interest of their clients. And Counsel may have many excellent reasons for not pressing a point which is no business of any body else. It is entirely within their discretion to press or not to press a particular point. And when Counsel makes a statement of that kind in open Court upon which the Court acts it must be treated as final, unless he has been induced or misled by some circumstance to make a statement under a mistake. I entirely dissent from the view taken by the lower Appellate Court that it is a question of interpretation. It is not like the construction of a contract. Counsel cannot make bargains with the Court, nor the Court with Counsel. The rule is that parties are bound by what Counsel do in the exercise of their discretion acting within the scope of their authority. Such a rule is absolutely necessary for the conduct of the business. The Bar have privileges of audience, and a good deal more than audience, which involve correlative obligations, and matters like admissions, consents, withdrawals by Counsel in the conduct of their cases made in open Court are, in my judgment, subject to the condition that I have mentioned, final and binding upon the parties. When one thinks about it for a moment, it is obvious that unless the Court can act upon statements made by the Bar as being final and binding, fresh controversies would constantly arise out of the discussion of the real controversy in the suit between the parties. This rule has always been considered to be in the interest, not only of the public, but of the Bar themselves, because it involves great weight, value and responsibility to every word uttered by Counsel in open Court and in this case I am content to rest my judgment upon that ground alone.

SUNDAR LAL, J.—The facts of the case are these:—On the 19th of December 1910 one Mahadeo Prasad obtained a decree against Brijbhukan Lal in the Court of the Subordinate Judge for a sum of over Rs. 1,200. It also appears that Brijbhukan Lal obtained two decrees in the Revenue Court against Mahadeo Prasad in 1909 and 1910, respectively. Brijbhukan Lal applied to the Revenue Court to attach the decree of Mahadeo Prasad which he had obtained in the Civil Court. From the record it seems that originally the prayer was that under rule 18 of Order XXI the Revenue Court decrees might be set off against the Civil Court decree. But on its being pointed out that the decrees were not under execution in the same Court, it was held that rule 18 was not

applicable in that case. The idea of setting off one decree against the other was given up and the Revenue Court, therefore, made an order for the attachment of the decree of the Civil Court. The attachment was accordingly made, but no proceedings to execute the decree attached appear to have been taken by Brijbhukan Lal, and Mahadeo Prasad had, therefore, applied for execution of his own decree. On such application being made Brijbhukan Lal objected to the execution on the ground that he had already attached the Civil Court decree. Mahadeo Prasad urged in appeal that the Revenue Court decrees had become time-barred and Brijbhukan Lal was, thereupon, ordered to produce his decrees and show that they were within time. Under Schedule IV, rule (*d*), serial Nos. 47 and 48, an application for execution of a decree under Rs. 500 can be made at any time within three years and in the case of decrees over Rs. 500 the rules applicable to the execution of the decrees of the Civil Court are applicable to the execution of decrees of the Revenue Court, and the application for execution must be made within the time fixed by the said Article. An application so made might go on for a considerable time but all that the law requires is that the proceedings for execution must be initiated within time. In this case they were certainly within time when the application was made and the question is whether the decrees of the Revenue Court have by this time become time-barred. From the proceedings of the Revenue Court which have been sent up by the said Court and which have been placed upon the record, it appears that the execution of these decrees is still pending in the Revenue Court. If the execution proceedings are still pending the attachment subsists. At any rate until an order under rule 57 has been made the attachment subsists. In this case, however, it appears that when Mahadeo Prasad applied for the execution of his decree, Brijbhukan Lal objected to the application on the ground that the decree had been attached by the Revenue Court. Mahadeo Prasad thereupon urged that the Revenue Court decrees had become time-barred. Brijbhukan Lal, therefore, was called upon to produce copies of his decrees of the Revenue Court and to show that they were still within time. The proceedings in execution lasted for a considerable period. From the *rubkars* of the Revenue Court which are upon the record, it seems that the decrees are still under execution and that the attachment has not come to an end. It also appears that the judgment-debtor asked the Court to set off the amount of his decrees of the Revenue Court against the decrees of the Civil Court which was for the larger amount. The debtor offered to pay in the balance in Court. The Court granted him one week's time to pay in the balance. Brijbhukan Lal thereupon deposited the sum of Rs. 325 and stated that that is all that was due after setting off the decrees. The Pleader for the decree-holder Mahadeo took time to examine the account and to obtain instructions from his client. The case then stood over for a considerable period and at last the Pleader for the decree-holder stated that he would examine the account and seek execution only for the balance of what was really due after setting off the decrees of the Revenue Court. He expressly stated that he had no further objection to offer. Upon this state of things the Court of first instance went into the account, set off the Revenue Court decrees against the Civil Court decree and ordered execution to issue for the balance after crediting the payment of Rs. 325. Mahadeo appealed against the said decree. The learned Judge who has held that the statement by his Pleader did not amount to an abandonment of all his objections to the execution of the decree and to setting off the Revenue Court decrees in the Court below, was obviously wrong. The decree-holder's Pleader had clearly consented to the set-off being made and had withdrawn all other objections. The decree-holder could not go behind his Pleader's admission. I think that the order of the Court below should be set aside and that of the Court of first instance restored.

BY THE COURT.—The order of the Court is that the order of the lower Appellate Court be set aside and that of the Court of first instance restored. The appellant will have his costs in all the Courts, which in this Court will include Counsel's fee on the higher scale.

Order set aside.

GOVIND RAM *v.* G. I. P. RAILWAY.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 150 OF 1915.

March 7, 1916.

Present:—Justice Sir P. C. Banerji, KT.

GOVIND RAM—PLAINTIFF—APPLICANT

versus

G. I. P. RAILWAY—DEFENDANT—OPPOSITE PARTY.

Contract—Principal and agent—Agent acting beyond scope of authority—Principal, liability of.

The plaintiff consigned certain goods at a station outside the limits of the United Provinces of Agra and Oudh to a station within the limits of the United Provinces and was charged at special famine rates, which applied only to consignments booked at stations within the limits of the United Provinces. When the goods arrived at the destination the defendant company claimed the difference between the ordinary rates. The plaintiff sued for damages:

Held, that the station master at the consigning station acted beyond the scope of his ordinary authority as the defendants' agent and, that, therefore, the defendant company was not liable for breach of the contract entered into by the agent.

Civil revision from an order of the Judge of the Court of Small Causes, Muttra.

Mr. *Jawahar Lal Nehru* (for Pandit *Kailas Nath Katju*), for the Applicant.

Mr. *Ladli Prasad Zutshi*, for the Opposite Party.

JUDGMENT.—This application for revision must fail. The plaintiff consigned certain goods at the Keratpur Railway Station, which is outside the limits of United Provinces of Agra and Oudh, for despatch to Muttra. He was charged at special famine rates which applied to consignments booked at stations within the limits of the United Provinces. The Keratpur station being outside the United Provinces, the plaintiff could not be charged at special famine rates. When the goods arrived at Muttra station, the defendant Company claimed the difference between the ordinary rates.

The plaintiff thereupon brought the present suit for damages. In my opinion the suit has been rightly dismissed. The contract made with the plaintiff was by a person who had no authority on behalf of the defendant Company to enter into a special contract, *viz.*, a contract to carry goods at concession rates sanctioned by the Government. Those rates did not apply to places outside the limits of the United Provinces. The Station Master of Keratpur acted beyond the scope of his ordinary authority as the defendant's agent and, therefore, the defendant Company is not liable for breach of the contract entered into by the agent.

The application is dismissed with costs.

Application dismissed.

RANGI LAL *v.* JASSA.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1475 OF 1914.

February 11, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir George Knox, KT., and Mr. Justice Tudball.

RANGI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JASSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Lease—Rent in cash and in kind—Rasum zemindari—*Cess.*

A usufructuary mortgagee of certain *zemindari* property made a letting of the property to the defendants on the terms that the defendants should pay a certain sum in cash and in addition to this a certain amount in *bhusa*, *chari*, grain and sugarcane. In the *kabuliat*, however, the expression *rasum zemindari* was used. On a suit for rent:

Held, on the construction of the *kabuliat*, that the defendants had agreed to deliver the produce as part of the rent. [p. 209, col. 1.]

Sisram v. *Asghar Ali*, 16 Ind. Cas. 422; 35 A. 19; 10 A. L. J. 416, distinguished.

Second appeal from a decree of the District Judge, Saharanpur, dated the 23rd July 1914, modifying that of the Assistant Collector, First Class, Saharanpur, dated the 27th of June 1913.

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent in the Revenue Court. The facts are that the plaintiffs, or their representatives, having lent money to the defendants, or their representatives, took a usufructuary mortgage of certain *zemindari* property. The mortgagees then made a letting of the property to the defendants on the terms that the defendants should pay a certain sum in cash (which included a sum sufficient to pay the Government revenue). In addition to this they agreed to deliver a certain amount in *bhusa*, *chari*, grain and sugarcane. In the *kabuliat* the expression "*rasum zemindari*" is used. The Court of first instance found in favour of the plaintiffs but calculated the value of the produce at Rs. 24 per annum. The plaintiffs claimed interest on all the arrears of rent from the time they became due up to the time that they were

paid. This included interest on a sum of Rs. 200 which the defendants paid into Court. The first Court disallowed the interest on the Rs. 200 even prior to the suit. The plaintiffs appealed and contended that the value of the produce was more than Rs. 24 per annum. They further contended that they were entitled to interest on the Rs 200 which had been disallowed by the Court of first instance. The defendants filed a cross-appeal on the strength of the ruling in *Sisram* v. *Asghar Ali* (1) and they contended that having regard to the provisions of the sections 56 and 86 of the Land Revenue Act the plaintiffs were not entitled to the *bhusa*, and other produce which we have mentioned. This contention found favour with the lower Appellate Court, who disallowed the plaintiffs' claim in respect of the *bhusa, etc.* The plaintiffs come here in second appeal and contend that the Court below was wrong in disallowing their claim for the *bhusa, etc.*, and also that they should have he interest which the Court of first instance had disallowed them. On the *first* point, namely, the liability of the defendants to deliver the *bhusa, etc.*, or to pay its equivalent in cash, we think the Court below was wrong. It is quite clear that on the construction of the *kabuliat* the defendants agreed to deliver the produce as part of their rent. The suit was brought in the Revenue Court and the claim which the plaintiffs made to it was as rent. In the ruling referred to the plaintiffs sued in the Civil Court to recover the *rasum zemindari* as something over and above the rent. The ruling accordingly does not apply. On the *second* point we think that the plaintiffs were entitled to the interest on the Rs. 200 up to the time of payment into Court. The parties very properly, instead of prolonging the litigation, have agreed to a lump sum for the interest and the value of the produce. We allow the appeal, set aside the decree of the Court below and restore the decree of the first Court with Rs. 10 added. We wish to say that the calculation of Rs. 24 as the value of the produce is not to be taken as a final decision that this is the value for all time. The value will necessarily vary in different years. The appellants will have their costs both in this and the lower Appellate Court.

Appeal allowed.

(1) 16 Ind. Cas. 422; 35 A. 19; 10 A. L. J. 416.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 26 OF 1915.

April 25, 1916.

Present:—Justice Sir P. C. Banerji, KT, and Mr. Justice Piggott.

NIDDHA LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE COLLECTOR OF BULANDSHAHR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Appropriation of money by agent - Decree—Mortgage to pay off antecedent debt—Liability of sons and grandsons under mortgage—Civil Procedure Code (Act V of 1908), s. 105, O. XXII, r. 9 (2), O. XLIII—Abatement—Defect, error, irregularity.

Where a Hindu father executed a mortgage to pay off a simple money-decree passed against him for not having accounted for some money belonging to a person whose agent he was:

Held, that the consideration was an antecedent debt binding on the sons and grandsons of the mortgagor. [p. 210, col 1]

Semble. If an antecedent debt relates to a transaction which was tainted with immorality, its existence would not entitle the subsequent mortgage to be enforced against the joint family property. [p. 210, col. 1.]

The words "error, defect or irregularity" in section 105, Civil Procedure Code, mean error, defect or irregularity affecting the decision of the case on the merits. [p 210, col. 2.]

Tasaddaq Hussain v. *Hayat-un-nissa*, 25 A. 280; A. W. N. (1903) 39, followed.

First appeal from a decree of the Third Additional Subordinate Judge, Aligarh, dated the 21st September 1914.

Mr. *Gulzari Lal* (with him Mr. *Durga Charan Banerji*), for the Appellants.

Mr. *A. E. Ryves*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to enforce a mortgage, dated the 12th of January 1892, executed by Shankar Lal in favour of Ram Sarup, the predecessor-in-title of the plaintiffs-respondents. The mortgage was executed in lieu of money due upon two decrees obtained against Shankar Lal by Ram Sarup. The appellants are the sons and a grandson of Shankar Lal and their contention in the Court below was that the debt was not one for which the family property could be rendered liable. They raised various other pleas denying the genuineness of the bond, denying consideration and also denying the validity of the amount of consideration. The Court below has decreed the claim. The main contention in this appeal is that the decree which formed part of the consideration for the bond was a decree for

money embezzled by Shankar Lal and that, therefore, this part of the consideration was tainted with immorality and is not binding on the appellants. On the face of it part of the consideration was an antecedent debt, namely, the decree obtained against Shankar Lal, but if that decree relates to a transaction which was tainted with immorality, the existence of the decree would not entitle the plaintiffs to enforce the mortgage against the joint family property belonging to the mortgagor and the appellants. The decree was passed in a suit brought by one Chaudhri Lachman Singh against Shankar Lal. Shankar Lal and his brother Mahbub were the agents and servants of Lachman Singh. He alleged that these persons had received from him Rs. 4,000 odd for payment to a creditor of Lachman Singh; that they did not pay the creditor; and that they subsequently did not return the money. Shankar Lal denied having received the money, but the Court found that he had received it and made a decree against him. This was not exactly a case of criminal misappropriation of money by a person to whom it had been entrusted. It was a case of money received by an agent who had not accounted for it and had thus incurred a civil liability. Had it been a case of embezzlement of a criminal nature which rendered Shankar Lal liable to a criminal prosecution, or had it been a case in which he had executed a bond for the purpose of suppressing a criminal prosecution, other considerations would have arisen, but in the present case it cannot be said that the decree was passed for recovery of money which had been criminally embezzled. Therefore, the rulings which the learned Vakil for the appellants has referred to and on which he relies, do not apply to the present case. One other question was raised on behalf of the appellants, namely, that the suit having once abated and having been subsequently restored, the order restoring the suit was improper. It appears that the suit was dismissed on the ground that it had abated, but under Order XXII, rule 9, of the Code of Civil Procedure the abatement was set aside, and the case was restored. Under Order XLIII no appeal lies from an order setting aside an abatement. Reliance is placed upon the provisions of section 105 of the Code of Civil Procedure. It is urged that there was an error, defect or irregularity in the order passed by the Court restoring the case. and that this entitled the appellants in the present appeal to question the validity of the order. In our opinion this contention is without force. The words "error, defect or irregularity" in the section evidently mean error, defect or irregularity affecting the decision of the case on the merits. This has been held in a number of cases of which we need only refer to *Tasadduq Husain* v. *Hayat-un-nissa* (1). The result is that the appeal fails and we dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

(1) 25 A. 280; A. W. N. (1903) 39.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1759 OF 1914.

March 17, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

KHURSHED ALI AND OTHERS—PLAINTIFFS —APPELLANTS

versus

ABDUL MAJID AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption — Custom — Wajib-ul-arz — *Mortgage—Construction of document*—Intiqal, *meaning of.*

A document provided that the executants would pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*). The *wajib-ul-arz* of the village recorded a right of pre-emption in case of a transfer of any kind to co-sharers in a certain order and also provided that in case of a mortgage, "if the owner of the property be not capable of redeeming or do not wish to redeem, then *hissadar karibi, etc.*, will have power to take the property for himself by depositing the mortgage money together with the costs. If any *hissadar* of *arazi* or *hissa* take any additional sum of money from the creditor to whom the property is mortgaged by making a *maqful* of the same property, then the terms of the mortgage bond will apply to the said debt also:"

Held, (*Richards, C. J., dubitante*) that the document did not purport to create a mortgage. [p. 212, col. 2.]

Per *Richards, C. J.*—The word *intiqal* is a very general word and includes all classes of transfers. [p. 212, col. 1.]

An extract from a *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not a custom of pre-emption exists; the record is supposed to be the record

of an old custom existing for a long time. But the mere production of the extract from the *wajib-ul-arz* is insufficient to prove the existence of the custom which it is necessary for the plaintiff to prove in order to entitle him under the circumstances of the case to be substituted for the defendant. [p. 212, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Azamgarh.

Dr. *Tej Bahadur Sapru* and Mr. *Iqbal Ahmad*, for the Appellants.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs seek to enforce their claim for pre-emption. The document which gave rise to the alleged cause of action is in the following terms:—

"We agree that we shall pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*) and if the creditors make delay in realising the principal and interest, then the aforesaid creditors shall not be entitled to recover their dues under the deed from any other property of myself excepting the property mortgaged (*makbuza*.)"

The plaintiffs came into Court alleging that in reality the transaction was a sale and that they were entitled to get possession upon payment of the consideration. They further claimed, however, in the alternative that if the transaction was a mortgage they might be substituted for the mortgagees. The Court of first instance held that the transaction was not a sale but a mortgage and granted the plaintiffs the alternative relief. The lower Appellate Court, agreeing with the Court of first instance that the transaction was not a sale and that the document merely operated as a "charge" on the property, held that there was no right of substitution, and accordingly dismissed the suit.

Section 58, clause (*b*), of the Transfer of Property Act is as follows:—"Where without delivering possession of the mortgaged property the mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

If we omit from the definition the words, "mortgage" and "mortgaged" and substitute for the word "mortgagor" the word "borrower" and the word "lender" for the word "mortgagee," the document in question seems to me to come clearly within the definition of a simple 'mortgage.' The borrowers had bound themselves to pay the money lent and had agreed that in the event of the money not being paid, the lenders should have a right to cause the property made security for the loan to be sold. I have substituted the words "borrower" and "lenders" for "mortgagor" and "mortgagee" in order to get over the difficulty created by the previous part of section 58, which defines "mortgagor" as "the transferor of an interest" and "mortgagee" as "the transferee of an interest". I do not think the substitution alters the meaning of the clause. I think what are ordinarily treated as "simple mortgages" in these provinces are not strictly "simple mortgages" within the definition of section 58, because I think there is in almost all these documents no "transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced." If, therefore, I was satisfied that the present plaintiffs were entitled to be substituted for what is generally called a simple mortgage, I would hold that they were entitled in the present case to be so substituted, because I find the greatest difficulty in distinguishing the transaction which is evidenced by the document in question from what is ordinarily called a "simple mortgage." The mere fact that a somewhat unusual word (*makbuza*) is used, does not make the document either more or less a "simple mortgage" than if the more usual word "*maqful* or *mustagaraq*" was used.

There remains the question whether or not the plaintiffs have proved the existence of a custom which gives a right to be substituted in the case of what is ordinarily called a simple mortgage. The only evidence adduced in support of the alleged custom is the

wajib ul-arz of 1872. The entry is in the following terms:—"If any co-sharer wishes to make a transfer of any kind, he will first do so to a *hissadar karibi*, next to the *hissadar* of that *thok*, next to the *hissadar* of another *thok*. If none of the co-sharers of the village takes it he may then transfer it to a stranger. If he does not conform to it, then *hissadar karibi*, *hissadar thok* and *hissadar* of another *thok*, according to the aforesaid order of priority, have the preferential right to take the property by pre-emption. If at the time of the issue of a proclamation or at the time of the expiry of the limitation prescribed in clause 15 of section 1 of Act XIV of 1859, or of any other Act relating to redemption of mortgage (*chhorane miad rehān*), the owner of the property be not capable of redeeming, or do not wish to redeem, then *hissadar karibi*, *etc.*, will have power to take the property for himself by depositing the mortgage money together with the costs. If any *hissadar* of *arazi* or *hissa* take any additional sum of money from the creditor to whom the property is mortgaged (*rehan hai*) by making a *maqful* of the same property, then the terms of the mortgage bond will apply to the said debt also."

It seems to me that this record points very much to transactions which involve an actual change of possession. According to the most natural meaning of the earlier part of the clause, transactions of this kind seemed to be contemplated. Then the latter part of the record deals, I think, with possessory mortgages and shows that the right intended to be recorded was that even where co-sharers had not availed themselves of their right when the transfer was originally made, they would still have a right of getting the property at any time before the right of redemption was entirely gone. It was pointed out, and no doubt correctly pointed out, that the word *intiqal* (transfer) is a very general word and includes all classes of transfers but, in my opinion, the decision does not depend upon the interpretation to be put upon particular words occurring in the *wajib-ul-arz*. The extract from the *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not the custom exists. The record is supposed to be the record of an old custom existing for a long time, and I think that it will be found that in olden times mortgages without possession (or at least the right to possession) were hardly recognised. In my judgment the mere production of the extract from the *wajib ul-arz* was insufficient to prove the existence of the custom which it is necessary for the plaintiffs to prove in order to entitle them to be substituted for the defendants. On these grounds, I would dismiss the appeal.

TUDBALL, J.—I agree that the appeal fails, chiefly for the reason that I have considerable doubt that the parties to the document in suit ever intended to create a mortgage at all. Assuming that the custom as alleged by the plaintiffs does exist and that the mortgage falls within that custom, the bond in question does not use the ordinary vernacular terms which are used in these provinces when parties wish to create a mortgage and give the mortgagee the right to sell the property. Beyond doubt it is difficult to distinguish between a document which merely creates a charge and a simple mortgage. But there are certain terms which are in common use in these Provinces in vernacular documents when the parties wish to create what is commonly known as a simple mortgage. The word *makbuza*, which is used in the document, has been considered and discussed by a Bench of this Court in *Dalip Singh* v. *Bahadur Ram* (1), and I agree with the conclusion of the learned Judges who constituted that Bench, that in using this word the parties can hardly be said to have contemplated anything more than a charge. It was for this reason that the Court below dismissed the suit. I must also add that I have considerable doubt that the custom which the plaintiff has put forward as evidenced by the *wajib-ul-arz* ever contemplated a case like that of the present. However, as the appeal, in my opinion, ought to be dismissed on the other ground I think it unnecessary to decide this point.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(1) 15 Ind. Cas. 435; 9 A. L. J. 550; 34 A. 446.

SUNKARA VENKATARATNAM *v.* VARADARAJAH APPA RAO.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 20 OF 1915.

March 15, 1916.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

SUNKARA VENKATARATNAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sri Rajah VARADARAJAH APPA RAO BAHADUR, ZAMINDAR GARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 3 (7), cl. (1), 6—Main principle of Act—Old waste, what is—"At the time of letting," meaning of—Interpretation of Statutes.

Where land which had been uncultivated for 10 years prior to 1900 was let in that year and was re-let to the defendants at the expiry of the lease and was in their occupation at the time of the passing of the Estates Land Act and a suit for ejectment was brought by the landholder:

Held, that the land in suit did not fall within the definition of old waste in the Act; [p. 214, col. 2; p. 216, col. 1; p. 217, col. 2.]

(2) that the period of 10 years mentioned in section 3 (7), clause (*i*), must be immediately prior to the letting to the defendants and the plaintiff could not eject them but was entitled to the stipulated rent. [p. 214, col. 2; p. 215, col. 1; p. 216, col. 1.]

Per *Wallis, C. J.*—(1) The main principle of the Estates Land Act is that every one in occupation of *ryoti* land at the passing of the Act or thereafter admitted to occupation acquires an occupancy right; [p. 213, col. 2.]

(2) old waste means *ryoti* land admission to which is not to confer a right of occupancy. [p. 213, col. 2.]

Per *Abdur Rahim, J.*—Of two possible constructions the one which gives a consistent meaning to the different parts of an enactment should be preferred. [p. 215, col. 2.]

Per *Srinivasa Aiyangar, J.*—The words "at the time of letting" refer not to the first letting but to the letting which is the subject of dispute. [p. 217, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Oldfield, in Second Appeal No. 94 of 1914, reported as 28 Ind. Cas. 252, preferred against the decree of the District Court of Kistna, in Appeal Suits Nos. 491 and 516 of 1912 (Summary Suit No. 9 of 1910 on the file of the Court of the Head Assistant Collector, Bezwada).

Mr. *V. Ramadoss*, for the Appellants.

Mr. *P. Nagabushanam*, for the Respondent.

This Letters Patent Appeal coming on for hearing on the 23rd February 1916 and 6th March 1916 and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—The question in the case is whether land which had been uncultivated for 10 years immediately preceding 1900, and was let in that year, and was re-let to the present defendants after the expiry of the first lease, and was in the occupation of the defendants at the time of the passing of the Madras Estates Land Act, comes within the definition of old waste in that Act. The main principle of the Act, as declared in section 6, is that every one in occupation of *ryoti* land at the passing of the Act or thereafter admitted to occupation acquires an occupancy right; but at a late stage of the Bill, as is wellknown, it was provided as a concession to landholders that this should not apply to 'old waste', as defined in the Act. The term old waste is rather a misnomer. "Ten years' old waste" would better describe what is meant, and even this would not be satisfactory as in some cases it is not necessary to show that the land was waste for ten years. Old waste means *ryoti* land admission to which is not to confer a right of occupancy, and was no doubt so called because the landholders in whose favour the exception was made specially objected to the creation of occupancy right in land which had long been waste, which they claimed to be their private property. The definition consists of two parts, and to satisfy the first part, the land must have been in the possession of the landholder for a continuous period of not less than 10 years and have been out of cultivation during that period. Such continuous period may be before or after the passing of the Act or partly before and partly after the passing of the Act, but must not have commenced before July 1888. Further, the land must have been in this condition for a continuous period of ten years "at the time of letting," the words we have to construe. There is no provision in the first part of the definition such as we find in the second part that the prescribed period of ten years must have been "immediately prior to such letting," and it has to be considered whether the omission of these words makes any difference. Supposing the lands to have been in possession of the landholder and out of cultivation for ten years after 1888 and the landholder to have then cultivated them himself for

some years and subsequently let them, they might in one sense be said "at the time of letting" to have been owned by him for a continuous period of ten years during which period they were continuously out of cultivation, even though such period was not immediately prior to the letting, but such a construction appears to deprive the words "at the time of letting" in this part of the definition of all force and effect, and may, I think, be rejected upon that ground.

If then we assume that under the first part as well as in the second the prescribed condition must be immediately prior to letting, the next question is, what letting? Is it any letting by the landholder or letting to the particular tenant who is claiming occupancy right? In the first part of the definition the words are "at the time of letting" and in the second part "at the time of any letting after the passing of the Act," but I think the only difference is that in the second case the letting must be after the passing of the Act; and, therefore, the same question as to what letting is meant arises as regards both parts of the definition. As regards both parts it may be observed that the second part would cover all cases coming within the first part, if it were not confined to lettings after the passing of the Act. This restriction was, no doubt, rendered necessary by the fact that it would have been opposed to a main principle of the Act as embodied in section 9 (1) to allow of occupancy right being questioned in the case of *ryots* in possession at the time of the passing of the Act on the ground that before the passing of the Act they were not entitled to occupancy right. It was, therefore, considered desirable to devise some other test which should be applicable to cases arising both before and after the passing of the Act, and this is what is done by the first part, in which the ten years' period may expire before or after the passing of the Act. If the words "at the time of letting," mean whenever immediately after the prescribed period the lands have been let by the landholder, then the land must be held to have acquired the character of old waste as from that moment and to retain it until something happens to deprive it of that character, such as the acquisition of occupancy right by the tenant under section 46, and the land now in question must be regarded as old waste. If that be the meaning the words "had or shall have" would have been more appropriate than 'has' which, on the other hand, is quite correctly used if the letting referred to is the letting in question, that is to say, the letting to the *ryot* who is claiming occupancy right under section 6 (1) on the strength of his admission. Here it may be observed that the words "letting" and "tenant" appear to be used throughout the Act only in cases where no occupancy right is conferred: *cf.* section 6 (3) and (4) and section 157, as admission to ordinary *ryoti* land is not regarded as creating the relation of landlord and tenant properly so called. "Letting" in the one case is, therefore, more or less equivalent to admission in the other; and if we bear in mind that the main principle of the Act is that admission to *ryoti* land confers occupancy right except in the case of admission to or letting of old waste, this affords some reason for holding that "the time of letting" intended in the definition is the time of admission which under section 6 (1) would confer occupancy right if the land were not old waste; and refers, therefore, to the time of admission of the person who is claiming occupancy right by virtue of such admission. I have felt considerable difficulty as to the correct construction of the definition which is by no means clearly drafted, but on the whole I think that this is the preferable construction, and if the construction be doubtful we shall, I think, best effectuate the intention of the Legislature by leaning to the construction under which the land does not lose its character of ordinary *ryoti* land. See section 23. In coming to the conclusion I have abstained from basing any inferences on the presumed intention of the Legislature as to the precise point at issue except in so far as it appears from the terms used. The appeal must be allowed to this extent and the suit dismissed, in so far as it seeks to eject the defendants from possession, with costs.

ABDUR RAHIM, J.—The appellants obtained the land, from which the respondent-landholder seeks to eject them, under a lease for 3 years which expired on the 30th June 1909. Their first contention is that as they were in possession after the 1st July 1908, the date on which the Madras Estates Land

Act came into force, the land-holder is precluded by section 6 of the Act from ejecting them. That is conceded, if the land is not 'old waste' as defined by the Act. The definition of 'old waste', so far as it bears on the facts of this case, is to be found in section 3, clause 7, sub-clause (1), in these words: "'old waste' means and includes any land in an estate which, not being private land, has at the time of letting by the landholder been owned and possessed by him or his predecessors-in-title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act." The facts found are that the land was not cultivated until 1901; when it was for the first time leased out for cultivation for a period of five years from 1901 to 1905. Thereafter the lease to the defendants was granted.

The contention on behalf of the landholder is that by the words 'at the time of letting' is meant the first letting, while the *ryots* contend that what is meant is the particular letting in question. Both Mr. Justice Oldfield and Mr. Justice Tyabji, who disagreed on another point, agreed in upholding the former interpretation. With all respect, however, I do not find sufficient warrant for confining the operation of sub-clause (1) only to cases where the land has been waste for 10 years before it was first let without any regard to the subsequent condition of the land. That seems to be inconsistent with the idea underlying another class of 'old waste' defined by sub-clause (2), according to which any land acquires that character, whether cultivated or not, if it remains without occupancy rights being held therein within ten years prior to any letting after the passing of the Act. Under this sub-clause, therefore, land which was once 'old waste' may cease to be so and become 'old waste' again, its character varying with the conditions of its occupation. It is difficult to understand why it should be otherwise under sub-clause (1) so that land which was not 'old waste' at the time of the first letting cannot become 'old waste' afterwards or land which was once 'old waste' must remain so for ever, although it might be cultivated for any length of time. It is suggested that the phrase 'old waste', which is quite inapt as applied at least to cases under sub-clause (2), must be treated as a merely conventional expression and the cases dealt with under the two sub-clauses must be kept quite distinct and separate. But it is a well-established principle of interpretation that of two possible constructions the one which gives a consistent meaning to the different parts of an enactment should be preferred. If sub-clause (1) be taken to apply to cases where the land at the time of the particular letting with reference to which the question has arisen, such as, whether the occupier is liable to be ejected, has remained uncultivated for a continuous period of ten years prior thereto, there would be no conflict of ideas between the two sub-clauses. For as under sub-clause (2) so under sub-clause (1) the character of land, whether it is to be classed as 'old waste' or not, would change with its condition. An examination of the provisions of the Act shows that one principal object of the Legislature was to assure the *ryots* or cultivators of *zemindari* lands in the possession of their holdings on payment of fair and customary rent. Only with respect to a very limited class of land was the right of the landholder to direct possession or to free disposition recognised to a greater or less extent, *e. g.*, the landholder's private lands and 'old waste.' Even with reference to 'old waste' once the landholder admits to it a tenant, his power of disposition and freedom of contract with respect thereto becomes considerably narrowed. (See sections 157, 153 and sections 46 to 49.) Whatever especial rights in such lands have been reserved to the landlord were so reserved by reason of the fact that they were not in the possession of cultivators of the class whose rights or supposed rights the Legislature wanted to protect. If the construction that if any land was not 'old waste' at the time of first letting it cannot acquire that character afterwards either, and that once a land is found to be 'old waste' within the meaning of sub-clause (1) to clause (7) that description must adhere to it permanently were correct, the reasons underlying the definition of 'old waste' would at least partially disappear. In this case before the tenancy of the appellants

began the land was under cultivation for several years and, therefore, counting from the commencement of the appellants' tenancy the land was not uncultivated for a continuous period of ten years. So it cannot be said to be 'old waste.' This finding is sufficient to dispose of the appeal and it becomes unnecessary to deal with the other questions raised by the appellants. I, therefore, agree in the order proposed.

SRINIVASA AIYANGAR, J.—This appeal arises out of a suit by a landholder to eject the defendants from land let to them before the passing of the Estates Land Act, on the expiry of the term. The first question for determination is whether the land when let was 'old waste,' and this depends on the correct interpretation of the first clause of the definition of 'old waste', or rather of a few words in it. The clause in question is in these terms: "Any land which has *at the time of letting* by the landholder been owned and possessed by him or his predecessors-in-title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act," and the material words to be construed are 'at the time of letting.' Does it mean at the time of the letting in question, or the first letting of land which till then remained uncultivated? I think the former is the correct interpretation of the words and not the latter.

Broadly speaking, lands were divided into two main classes, the first consisting of lands which remained uncultivated for a continuous period of ten years at the time of letting, and the second of those which, though cultivated either by the landholder's own labour or by *ryots*, were still lands in which no occupancy right had been acquired. It is only where the letting was after the passing of the Act that any lands of the latter class could be or become old waste. (Sub-clause 2 of the definition.) Sub-clause (1) includes cases of letting both before and after the Act. A consideration of the two sub-clauses shows that in cases of admission to occupation after the Act, it was wholly immaterial whether the land let was cultivated or not, whether it was cultivated by hired labour or by the landholder's servants, or whether it was let to tenants from time to time, so long as they did not acquire occupancy right under the provisions of the Act. If, for example, the land remained uncultivated and was owned and possessed by the landholder for a continuous period of ten years at the time of *any letting* after the passing of the Act, whether it was the first letting or otherwise, it would be old waste. Such would be the result whether sub-clause 1 or 2 is applied. As regards letting *before the Act*, the land, to fall under the category of 'old waste,' should in the first place have remained uncultivated for a continuous period of ten years after 1888 (*i.e.*, 20 years before the passing of the Act). It is also, I think, necessary that it should remain uncultivated for a period of ten years at the time of the letting in controversy. If for example waste land was brought under cultivation by the landholder by his own servants or by hired labour in 1898, and let for the first time to a tenant in 1899 or any year thereafter but without a contract in writing, the tenant would acquire occupancy rights under section 6, clause (1). A comparison of clause (5) with clause (3) makes it clear that such a land does not come within the definition of old waste. Clauses 2, 3 and 5 of section 6 are illustrations, or state the consequences, of the definition of 'old waste.' It is to be observed that in the illustration which I have given above the land was waste for ten years continuously from 1888. But at the time of the letting it was not uncultivated, though nobody could possibly have acquired an occupancy right during the period when the land was under cultivation prior to the letting. If in the case supposed the land would not be 'old waste' by reason of its cultivation by the landholder himself prior to the letting, it is impossible to conceive any reason why, if let to tenants in the intervening period, it should still remain old waste. It is to be observed that in waste lands brought under cultivation by the landholder he was given higher rights than in old waste. This makes it clear that under the first clause for a land to come within the definition of old waste, it really must remain uncultivated for a continuous period of *ten years prior to the letting in question*, and not merely at the first letting, whether such letting was before or after the Act,

Some support is given to this construction by the clause at the end of the definition, *viz.*, old waste "includes *ryoti* land in respect of which before the passing of this Act the landholder has obtained a final decree of a competent Civil Court establishing that the *ryot* has no occupancy right, and so long as no right of occupancy has been acquired subsequent to the date of such decree." Taking the present case as an illustration, if the term of the tenant had expired before the 1st of July 1908, and if the landlord had obtained a final decree of a Civil Court that he had no occupancy right, the land would be old waste. According to the construction suggested by Mr. Nagabushanam, the land would be old waste even though no such decree had been passed. The last clause then as applied to cases falling under sub-clause (1) would be redundant and useless.

It might appear anomalous that land, which when first let was old waste, and which would continue to be old waste so long as that tenant was in possession, should cease to be old waste as soon as that tenant is turned out and a new tenant put in. I have already stated this would not be the case with regard to letting after the Act. As regards letting before the Act, the Legislature did, I think, intend to make a difference. The main principle of the Act is to be found in sections 6, 8 and 9. The intention was to confer occupancy rights on all *ryots* in occupation of cultivable land at the time of the passing of the Act; as regards letting after the Act, the Act safeguarded the position of non-occupancy rights, by giving them facilities for the acquisition of occupancy rights and preventing their eviction, except on specific grounds, among which expiry of the term is not ordinarily one. In a series of cases in Madras it was held that when a landholder lets a tenant into occupation of waste lands, in the absence of any particular stipulations as regards rent or the term, the tenant had occupancy rights in the land and was bound to pay only the customary or usual rate of rent in the village. But it was conceded that the landholder was at liberty to enter into a special contract with the tenants so let, either as regards the rate of rent or the duration of the tenancy. An investigation into the question whether a *ryot* had occupancy right or not was attended with great difficulty, as the landholders generally made no distinction in admission to possession of waste lands and the ordinary cultivated lands of the estate. They issued the same kind of *pattas* in both (different from the form used for *pannai* lands where *pattas* were issued for these lands) and often introduced in ordinary *pattas* a term that the *ryots* after the *fasli* should not cultivate without permission or without a fresh *pa ta*, a term which was not intended to be enforced. The Legislature might well have intended to make an exception in the case of lands which remained continuously uncultivated for a certain period before the letting whose incidents are in controversy. If the land remained uncultivated for a continuous period of ten years at the time of the last letting before the Act, that is a matter which can easily be proved. But if it had been let often, it may be impossible to differentiate it from the ordinary cultivated lands of the estate.

The language, as it now stands, is quite apt and is capable of an exact and appropriate denotation. The first clause contemplates *letting after the Act in two cases.* In cases where the ten years' period is computed after the Act, there can be any number of lettings as old waste; where the ten years' period is, partly, or wholly, before the Act, there can be only one letting as old waste, but in all the three cases alike the land should have remained uncultivated for a continuous period of ten years before the letting in question. The introduction then of 'at the time of any letting' and 'immediately prior' would be inappropriate in the first clause. That explains the difference in the language of the two clauses.

It must also be remembered that lands which are 'old waste' at one time may become ordinary *ryoti* land, not being old waste, and *vice versa.* The question always is whether at the time of the letting in dispute the land was old waste; I, therefore, think that the words "at the time of letting" refer not to the first letting, but to the letting which is the subject of dispute. In this view the suit lands are not 'old waste;' and under clause ( ) of section 6 the *ryot* acquired an occupancy right in the land, and he could not, therefore, be ejected. It is unnecessary, therefore, to consider the other points raised in the appeal.

The appeal must be allowed and the plaintiff's suit in so far as it seeks to eject the defendants should be dismissed. He would be entitled to the stipulated rent. I agree as to the order for costs.

Appeal allowed.

V. R. P.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION No. 109 OF 1916.

June 21, 1916.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

Pandit KISHORI LAL—DEFENDANT—APPLICANT

versus

Seth BADRI DAS AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 35—Costs—Interest—Judgment not allowing interest on costs—Decree, interest on costs if can be included in—Decree, amendment of.

A Court inserting interest on costs for the first time in the decree is within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree. [p. 219, col. 2.]

In a case in which the Pleader of a party signed the decree before it was signed by the Court and no objection as to inclusion of interest on costs was taken in appeal to the High Court, it is not open to the party subsequently to object to such inclusion. [p. 219, col. 2.]

Civil Miscellaneous Application for amendment of decree, in First Appeal No. 21 of 1913.

FACTS material for this report are as follows:—One Seth Badri Das brought a suit against Kishori Lal and others for possession of certain temple and other moveable property as *mutwalli*. There was a prayer that costs of the suit may be charged against the defendants. The Subordinate Judge gave the plaintiff a decree for possession with costs. The judgment did not provide for interest on the costs, but in the decree it was provided that the defendant should pay to the plaintiff the sum of Rs. 883 on account of costs of the suit with interest thereon at the rate of 6 per cent. There was an appeal to the High Court. No objection was taken to the provision of the interest in the decree in the grounds of appeal. The High Court dismissed the appeal.

The judgment-debtor, Kishori Lal, now came before the High Court with an application for amendment of the decree, on the ground that the decree of the Subordinate Judge was not in conformity with the judgment.

Mr. *Uma Shanker Bajpai*, for the Applicant, read the judgment and the decree and submitted that the judgment did not make mention of the payment of interest on costs and the interest on costs first made its appearance in the decree. It was clearly not in accordance with the judgment.

The Hon'ble Mr. *Narayan Prasada Ashthana*, for the Opposite Parties. Order XX, rule 4 (2), of the Civil Procedure Code, says that the judgment should contain the points for determination, the decision thereon and the reasons for such decision and it is clear that if the question of costs be not in issue, it is not necessary to write anything about them in the judgment. Now, rule 6 says what the decree should contain, and there, for the first time, we find mention of costs. It shows that the judgment may not contain anything about costs and the decree may. If we refer to Schedule I, Appendix D, Nos. (1) and (2), we find the forms of decrees and the words "with interest thereon" are there. This clearly shows that, though the Judge may not write anything in the judgment about costs he may still provide for it in the decree He referred to rule 20 of the Rules of the High Court and submitted that after the decree had been prepared, it was shown to the Pleader of the applicant who signed it as correct. Then there was an appeal to the High Court and no objection was taken to the decree on that score. The applicant could not now say that the decree was inconsistent with the judgment and, therefore, wrong. It was too late now.

Mr. *Bajpai*, in reply. It is true that I have failed to see and correct the error in the decree when prepared by the Sub-Judge. It is also true that there is a High Court rule on the subject, but the rule does not debar a party from applying under sections 151, 152 and 153, Civil Procedure Code, for the correction of a decree. If that were so then there could be no case like the present. The rule is more for discipline than for shutting a door of remedy provided by section 151 *et seq.* in the Civil Procedure Code. The schedule gives a form which is complete and exhaustive, so as

to cover all cases. If no interest be allowed the same form will be used with the words about interest cut out. There is a further fact in this case. The decree-holder first applied for the execution of the decree for costs and I paid it. Now he applies again for interest. He should not be allowed to do so.

Then, again, we should refer to section 35, Civil Procedure Code. In clause (3) we find that the Court '*may*' give interest on costs. The decree was prepared in the office as usual and it is very probable that the decree-writer omitted to cut out the portion about interest. The Judge does not seem to have applied his mind to it and signed the decree. Section 34 does not apply to this case.

JUDGMENT.—This is an application by a judgment-debtor asking for the amendment of the decree passed against him on the 30th of March 1912 by the learned Subordinate Judge of Agra, which was affirmed by this Court on the 16th of December 1914. The suit in which the decree was passed was brought by Seth Badri Das as a *mutwalli* for the recovery of possession of a temple and the property appertaining to it. The Court of first instance decreed the claim with costs. No mention was made in the judgment of the first Court as to interest on costs, but in framing the decree interest on costs was inserted. The decree of the first Court was signed by the Vakils of the parties to the suit. The present applicant preferred an appeal to this Court and no objection was taken in the memorandum of appeal to the award of interest on costs in the decree. A Bench of this Court affirmed the decree of the learned Subordinate Judge. The applicant makes this application for the amendment of the decree, on the ground that the insertion of interest on costs in the decree without any direction to that effect in the judgment makes the decree differ from the judgment. He, therefore, asks that the decree should be brought in conformity with the judgment by eliminating the direction of interest on costs from the decree. The application, it is to be noted, does not mention the provision or section of the Civil Procedure Code under which it is made. It is contended on behalf of the applicant that if a Court wishes to award interest on costs it should say so in its judgment. If the Court omits in its judgment to award interest on costs, it cannot for the first time award interest on costs in the decree. During the course of argument we have been referred to various sections and rules of the Civil Procedure Code, but none of them supports the contention of the applicant. The learned Subordinate Judge said in his judgment that costs were awarded to the plaintiff against the defendant but made no mention of interest on costs. The actual amount of costs is not to be settled prior to the delivery of judgment but has to be determined subsequent to the judgment for entry in the decree. A Court inserting interest on costs for the first time in the decree is, in our opinion, within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree. In the present case it is hardly open to the applicant to object to the decree, as his Pleader signed the decree before it was signed by the Court and no objection was taken in appeal to this Court. We are, therefore, of opinion that considering all the circumstances of the case, the application should not be allowed. We accordingly dismiss it with costs.

Application dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 118 OF 1915.

March 22, 1916.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

M. R. P. R. S. SHANMUGANATHA CHETTIAR AND OTHERS—PLAINTIFFS NOS. 2 TO 4—APPELLANTS

versus

K. SRINIVASA AIYAR AND ANOTHER—DEFENDANTS NOS. 6 AND 7—RESPONDENTS.

Partnership—Promissory note, execution of, for partnership debt—Liability of partner not party to note—Payment of consideration simultaneous with execution of note—Action on debt, whether lies.

Where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie, as also in the case where the advance of money and the execution of the note are simultaneous, though in the latter case it may be open to the parties to show that the debt should become merged in the negotiable instrument executed for it. [p. 221, cols. 1 & 2.]

A partner is always liable for the partnership debt unless there is a restriction, express or

implied, on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for partnership purposes. [p. 221, cols. 1 & 2; p. 222, col. 1.]

Karmali Abdulla Allarkhia v. *Bora Karimji*, 26 Ind. Cas. 915; 39 B. 261; 17 M. L. T. 35; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48, followed.

Somasundaram v. *Krishnamurti*, 17 M. L. J. 126; *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*, 21 Ind. Cas. 864; 26 M. L. J. 19; 14 M. L. T. 520; (1914) M. W. N. 58; 38 M. 660, distinguished.

Appeal against the decree of the Subordinate Judge of Coimbatore, in Original Suit No. 93 of 1912.

Messrs. *A. Krishnaswami Aiyar* and *M. Subbaraya Aiyar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The learned Subordinate Judge of Coimbatore has found that the execution of the promissory notes in question has been proved and also that consideration was paid for them. These notes were executed by the first defendant, father of defendants Nos. 2, 3 and 4, and by the 5th defendant. Defendants Nos. 5, 6 and 7 are brothers and members of a joint Hindu family. They have nothing to do with the 1st defendant, except so far as this business is concerned.

There can be no doubt that there was a joint business carried on in rice and tobacco by the 1st, 5th and 6th defendants. But so far as the liability of the 7th defendant goes, the evidence does not show with sufficient clearness that he was a partner in the joint business carried on by the 1st, 5th and 6th defendants. Exhibit W, which was relied on by the Subordinate Judge in order to make out that the 7th defendant was a partner, does not prove anything of the kind. Nor does Exhibit R. Exhibit R apparently refers to some business other than the one which is under consideration in this suit. Then we have the evidence of the plaintiffs' 1st witness with regard to the liability of the 7th defendant. No doubt, he seeks to make out that the 7th defendant was interested in the joint trade in question. On the other hand, the plaintiffs' 2nd witness, who was the 1st defendant and who cannot be said to be prejudiced in any way in favour of the 7th defendant and whose knowledge as to who were the partners cannot be disputed, distinctly states that the 7th defendant was not a partner. It must be held that the evidence does not make out that the 7th defendant was interested in the business carried on by the 1st, 5th and 6th defendants.

The 5th defendant's liability cannot be disputed because he was one of the two executants of the promissory notes. It is strongly contended on behalf of the 6th defendant that inasmuch as he did not execute the promissory notes, and these notes do not purport to have been executed on behalf of the firm so as to make the firm liable, he cannot be held liable in this action at all. It is argued that the present suit is on the promissory notes and not for recovery of the debt evidenced by those notes. The position taken up is this:—that where money is borrowed on a promissory note, it should be held that the debt became merged in the promissory note and a suit would lie only on the note, at any rate, unless there is evidence of intention that the defendants were to be liable for the debt as well. Strong reliance is placed in support of this contention on the cases of *Somasundaram* v. *Krishnamurthi* (1) and *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* (2). As regards the latter case which is a decision of Sadasiva Aiyar and Spencer, JJ., the learned Judges (at least Sadasiva Aiyar, J.) based the decision mainly on the provisions of section 91 of the Indian Evidence Act. The promissory note on which action was brought in that case was inadmissible in evidence as it was an unstamped note. The view taken by the learned Judges was that as the suit was based on the note and that was inadmissible in evidence the suit must fail. In that case, there was no question of the liability of the partners on account of the debt evidenced by the promissory note. In the case of *Somasundaram* v. *Krishnamurti* (1) that question did arise. It does not seem quite clear whether the learned Judges Subramania Aiyar, J., and the present Chief Justice intended to lay down that, if the suit was so framed as to make the defendants liable on their original obligation for the debt, the action could not be maintained because of the existence of the promissory note. The proposition contended for on behalf of the

(1) 17 M. L. J. 126.

(2) 21 Ind. Cas. 864; 26 M. L. J. 19; 14 M. L. T. 520; (1914) M. W. N. 58; 38 M. 660.

respondents amounts to nothing less than this, that if a member of a firm who is authorized to borrow money borrows it and executes a promissory note, the firm will not be held liable for the debt at all, though it would be liable if he had not executed the note. This is *prima facie* untenable and I think the matter is concluded by a recent decision of the Privy Council in *Karmali Abdulla Allarkhia* v. *Bora Karimji* (3). In that case, each of the two partners who were found to have been carrying on a joint venture drew bills of exchange for his share, and the plaintiff who accepted those bills afterwards sought to make the partner who did not execute the bill in question also liable. The High Court of Bombay in reversing the decision of the Trial Judge pointed out that the suit was not based on the bill, but their Lordships held that it was erroneous to treat the question as purely a question of liability on the bill. Then, having found that as a matter of fact there existed the relationship of partners between the two defendants and that the money which was paid on the bill was required and utilised in the partnership business, they held that the partner who did not draw the bill was also liable.

It is true that the question whether, the bills having been drawn and accepted, the suit could be maintained against a partner who did not take any part in drawing the bill was not discussed before the Board; but the decision could not be explained unless the Judicial Committee were of opinion that although the person sought to be made liable was not the drawer of the bill, still he was liable because the money was raised for and used in the partnership business. Apparently no contention was raised to the contrary because no question could be raised with any chance of success as to the liability of a partner for a debt properly incurred on behalf of the partnership simply because a promissory note had been executed for the debt. There is no doubt, so far as it appears from the authorities referred to at the Bar, that where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. The whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction. It may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument executed for it. But no such case was sought to be made here. I think, therefore, that the 6th defendant's liability is made out.

It is pointed out by Mr. T. R. Ramachandra Aiyar, the learned Pleader for the respondents, that the Subordinate Judge has allowed interest on Rs. 7,000, the principal amount borrowed on the promissory notes from the date of the institution of the suit, while that sum, as a matter of fact, included Rs. 167-8-0, the amount of interest taken in advance. Interest, therefore, ought to be allowed only on Rs. 6,832-8-0 from the date of the suit instead of on Rs. 7,000. The decree of the lower Court will be modified by declaring that the 7th defendant is not liable and by calculating the interest payable in the manner I have indicated. The 6th defendant will bear the costs of the appellants and the appellants will pay the costs of the 7th defendant.

SRINIVASA AIYANGAR, J.—I agree. There is a distinction between liability on the bill or the note and liability on the consideration for the bill or the note. This is clearly brought out in cases in England where an infant executes a note or gives a bill for what are called necessaries. In these cases he is not liable on the bill or the note, but is liable for the consideration which he gets in the shape of necessaries. If the bill or note is endorsed, the endorsee cannot recover anything, because the endorsement does not pass title to the consideration, but only to the bill or the note. That is one illustration.

So far as I am able to see, there is absolutely nothing in the Negotiable Instruments Act to prevent *A* from promising to pay *B*'s debt or from promising to be jointly liable along with *B* either as a partner or otherwise, so that in cases of partnership, where one partner borrows for the benefit of the joint trade, the other partner

(3) 26 Ind. Cas. 915; 17 M. L. T. 35; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48; 39 B. 261.

agrees to make himself liable for the debt, though he may not be liable on the bill or the note which was executed by the other partner, unless, of course, his signature appears on the face of the bill either as signed by him or his agent duly authorized to sign his name. Unless, therefore, there is any particular restriction, express or implied, in respect of any liability to be incurred by one partner with regard to a bill or promissory note which may be executed by the other partner, I really do not see how he can escape liability for a partnership debt. If, no doubt, the bill or note is endorsed to a third party, it may be that the endorsee will not be able to bring an action on that bill or note against the other partner or even on the debt against the other party. Except for that difference, the debt is certainly payable by the partner who did not sign the bill. That distinction is clearly brought out in a recent decision of the Privy Council reported as *Karmali Abdulla Allarakhia* v. *Karimji* (3). In that case, the 1st defendant firm and 2nd defendant firm were found, upon a construction of the agreement between them and from other evidence, to be partners in a certain sugar trade. The plaintiff was financing that trade, and the arrangement was that the bills drawn either by the 1st defendant firm or the 2nd defendant firm with respect to the sugar shipped by them should be honoured by the plaintiff by accepting them. By so accepting those bills, if they were issued by the 2nd defendant firm, the 2nd defendant firm will be liable and if issued by the 1st defendant firm, that will be liable on the bills. It so happened in that case that the bills which were drawn by the 1st defendant firm had all been retired, while those drawn by the 2nd defendant firm had not been, and the 2nd defendant firm had become insolvent. The 1st defendant firm made itself liable for the debts borrowed by the 2nd defendant firm for the purpose of the partnership transactions. In these circumstances, an action was brought to recover the balance due on these acceptances by the plaintiff on behalf of the 2nd defendant firm of bills drawn by it after crediting the value of the goods sent along with the bills. The suit as against the 1st defendant firm was put in as an action for the balance of the debt; it is called an action of accounting against it in the course of the judgment. The 1st defendant firm was held liable for the money due on account of the acceptance by the plaintiff of the bills drawn by the 2nd defendant firm.

Appeal dismissed; Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 745 OF 1915.

June 22, 1916.

Present:—Mr. Justice Rafique.

RAHAS BIHARI LAL, MINOR, THROUGH L. SITAL PERSHAD—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL BOARD, CAWNPORE—DEFENDANT—RESPONDENT.

U. P. Municipalities Act (I of 1900), ss. 87, 88, 52—Erection without permission—Notice—Civil suit, maintainability of—Remedy.

The plaintiff applied to the Municipal Board of Cawnpore for permission to re-erect his house on the old foundations and attached a plan with his application in which a *sandas* and *chhajja* were shown but a *tora* with the *antiya* was not shown. The Municipal Board granted permission to re-build the house with the exception of the *chhajja* and the *sandas*. The plaintiff re-built his house with the *sandas* and *chhajja* and the *tora* and *antiya*. The Municipal Board served a notice upon him. The plaintiff sued in the Civil Court for issue of a perpetual injunction restraining the Municipal Board from interfering with the constructions and for damages:

Held, that the notice by the Municipal Board was partly under section 87 and partly under section 88 and was a valid notice and that the civil suit was not maintainable, the only remedy of the plaintiff being that laid down in section 52 of the Municipal Act. [p. 224, col. 1.]

Section 87 of the Municipalities Act is not applicable only to that part of a building which abuts on and overhangs a public street, inasmuch as a building may adjoin a public street and yet may not overhang or project into it. [p. 223, col. 2.]

Second appeal from the decision of the District Judge of Cawnpore, dated the 11th February 1915.

The Hon'ble Mr. *Moti Lal Nehru*, for the Appellant.

Mr. *A. E. Ryves*, for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are as follows:—The plaintiff, who is a minor, made an application to the Municipal Board of Cawnpore on the 11th November 1911, stating that he was the owner of a house in *Mohalla Butcher-*

khana, which he wanted to pull down and rebuild according to the old plan and on the old foundations and asked for permission to do so. He submitted a plan of the house also with his application. In the month of January 1912 the application of the plaintiff was granted and according to the finding of the Court below the permit pass together with the approved plan was made over to the father of the plaintiff in February 1912. The plaintiff, however, says that he received no permit pass and in June 1912 he sent a reminder to the Municipal Board but received no reply. He waited for a month and receiving no acknowledgment of his reminder also, he started building the house and completed it in a few months. The Municipal Board issued a notice on the 26th May 1913, which was received by the plaintiff on the 3rd June 1913, asking him to demolish the three constructions, *viz.*, a *chhajja*, a *sandas* and a *tora* with an *antiya*. The plaintiff ignored the notice and was consequently prosecuted by the Municipal Board more than once and was fined. He remained obstinate and did not carry out the instructions contained in the notice of the Municipal Board. On the 16th July 1914 the plaintiff instituted the suit, out of which this appeal has arisen, against the Municipal Board of Cawnpore for issue of a perpetual injunction restraining it from interfering with the three constructions mentioned above and for a declaration that the plaintiff is entitled to keep and maintain the said three structures in their present state. He also prayed that Rs 100 as damages should be awarded to him for mental worry and a further sum of Rs. 100 for expenses incurred by him in the criminal prosecutions by the Municipal Board. The latter raised various pleas in defence. It was urged that the suit was not maintainable in the Civil Court and that the Board was within its right in issuing the notice of 26th May 1913. The claim to damages was denied. The learned Munsif dismissed the claim and his decree was affirmed on appeal.

The plaintiff has come up in second appeal to this Court. He contends that his suit is cognisable by a Civil Court and that the notice issued by the Municipal Board is *ultra vires* and not binding upon him. I think that both the contentions are untenable in view of the finding of the Courts below. The plaintiff made the application presumably under section 87 of the Municipalities Act for permission to re-erect his house on the old foundations. He attached a plan with his application, in which the *sandas* and *chhajja* were shown but the *tora* with the *antiya* was not shown. The Municipal Board granted permission to re-build the house with the exception of the *chhajja* and the *sandas*. The plan submitted by the plaintiff was returned to him with the correction by which the *sandas* and the *chhajja* were struck out. Both the Courts have found that the permit pass with the corrected plan was, as a matter of fact, made over to the plaintiff's father at the end of January or the beginning of February 1912. The finding is one of fact and must be accepted. It has also been found that the *tora* with the *antiya* did not exist in the old house and was not shown in the plan submitted with the application of the 11th November 1911. The *tora* with *antiya* was, therefore, a new construction. According to section 87 of the Municipalities Act every person who intends to erect or re-erect any house which abuts or adjoins a public street, must first give notice in writing of his intention to do so to the Municipal Board and the latter might either refuse to sanction the said building or may sanction it absolutely or with certain reservations. Under section 88 of the same Act no one can build a structure overhanging or projecting into any street without the sanction of the Municipal Board. The Municipal Board could under section 87 of the Act impose restrictions as to *sandas* and under section 88 as to *chhajja*. The contention for the plaintiff is that section 87 is only applicable to that part of the building which abuts on and overhangs a street. I do not agree with this interpretation. The language of section 87 in clause (*a*) is quite clear. It is to the following effect:—"Any building abutting on or adjoining a public street, or any public place or property vested in Her Majesty or in the Board." A building may adjoin a public street and yet may not overhang or project into it. Sub-clause 3 of clause 3 of section 87 distinctly gives a right to the Municipal Board to impose conditions as to the building or re-building of a *sandas*. It is in evidence, and has been found as a fact by the Courts below,

that the Municipal Board refused permission to the plaintiff to re-build the *sandas* and the *chhajja*. They then served a notice upon him in which no section was mentioned and which was served on the plaintiff on the 5th June 1913. The plaintiff under section 52 of the Act could have contested the notice by way of appeal to the Commissioner. He could not bring a regular suit in the Civil Court for contesting the validity of that notice. In fact the contention of the plaintiff is that the notice was not valid inasmuch as it does not fall either under section 87 or section 88 of the Act and, therefore, the present suit was maintainable in a Civil Court. As I have held that the notice by the Municipal Board was partly under section 87 and partly under section 88, it was a valid notice and the only remedy open to the plaintiff was that laid down in section 52 of the Act. The same reasoning applies to the *tora* with the *antiya* which is a new structure and about which the Municipal Board could have withheld permission under section 88. In my opinion the finding of the learned Judge of the lower Appellate Court that the suit is not maintainable in the Civil Court, is correct. The case must also fail on the merits, as the Municipal Board was within its rights in giving the plaintiff a qualified permission as to the re-building of the house. The appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 86 OF 1915.

February 2, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

THE RAJAH OF KALAHASTI—DEFENDANT—PETITIONER—APPELLANT

versus

Sree Mahant PRAYAG DOSSJEE VARU—PLAINTIFF—COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 52—Decree against legal representative of deceased as such—Legal representative in possession of assets belonging to deceased—Duty to account for assets—Burden of proof—Mesne profits, whether included in assets—Mortgagee becoming absolute owner of equity of redemption—Merger.

Where a decree is passed against a party as the legal representative of a deceased person, it is for the decree-holder in the first instance to prove that some assets came to the legal representative, and the onus is then shifted on the latter to show how the assets were applied. Once it is admitted or proved that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received and to account for them. [p. 227, col. 1.]

Rajah of Kalahasti v. *Achigadu*, 30 M. 454; 17 M. L. J. 367, *Zamindar of Karvetnagar* v. *Trustee of Tirumalai*, 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401; *Ranchode Das Govardhana Das* v. *Krishna Das Vittal Das*, 12 Ind. Cas. 253; 21 M. L. J. 1096; 10 M. L. T. 272; (1911) 2 M. W. N. 271, followed.

Mesne profits, whether accruing in the shape of rent or interest, are for this purpose assets just as much as the real estate. [p. 227, col. 2.]

Aseemoonnissa v. *Ameeroonnissa Khatoon*, 15 W. R. 285; *In re Hyatt, Bowles* v. *Hyatt*, (1888) 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297, followed.

Rani Kanno Dai v. *Lacy*, 19 A. 235; A. W. N. (1897) 38, distinguished by Moore, J. and dissented from by Sadasiva Aiyar, J.

Where, therefore, the plaintiff, who had obtained a mortgage decree against the defendant as legal representative of the mortgagor, finding that the mortgaged property had been exhausted, obtained a personal decree against the defendant which he sought to execute:

Held, that the defendant, having failed to satisfy the Court that he had duly applied the property of the deceased, was personally liable to the extent of the property in respect of which he had failed so to satisfy the Court. [p. 227, col. 2.]

Veerasokkaraju v. *Papiah*, 26 M. 792; 13 M. L. J. 258, distinguished.

Where a mortgagee becomes also absolute owner of the equity of redemption, the equitable estate merges in the legal, unless there are any puisne or mesne encumbrances against which the equity of redemption is required to be kept alive [p. 228, col. 1.]

Arumugasundara Maharaja Pillai v. *Narasimha Iyer*, 29 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110; *Bhawani Kumar* v. *Mathura Prasad Singh*, 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 39 I. A. 228 (P. C.); *Laxman Ganesh Rajendra* v. *Mathurabai Narayan Govind*, 23 Ind. Cas. 121; 16 Bom. L. R. 26; 38 B. 369, followed.

Per *Sadasiva Aiyar, J.*—Assuming that a Court is bound to bring a non-existent equity of redemption to sale at the instance of a decree-holder and is not entitled under section 151, Civil Procedure Code, to stop the sale altogether on account of its having ceased to exist, it is a matter for consideration for the Court whether under Order XXI, rule

66, clause (e), Civil Procedure Code, it ought not to notify in the sale proclamation that the attached property is a right which had ceased to exist long ago. [p. 229, col. 1.]

Appeal against the order of the District Court of North Arcot, dated the 2nd February 1915, in Civil Miscellaneous Petition No. 765 of 1914, in Execution Petition No. 42 of 1914, in Original Suit No. 40 of 1910.

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar* (with him Mr. *A. Ramachandra Aiyar*), for the Appellant.—The doctrine of merger will apply only when the debt is actually kept alive. In *Forbes* v. *Moffatt* (1) it was decided that merger is presumed from the advantage arising to the party. The question in all these cases is the intention of the parties.

Davis v. *Barnett* (2), *Hatch* v. *Skelton* (3), *Jameson* v. *Stein* (4), *Pitt* v. *Pitt* (5), *Whiteley* v. *Delaney* (6), *Mohesh Lal* v. *Mohant Bawan Das* (7), *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (8), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (9), *Shankar Venkatesh Karguppi* v. *Sadashiv Mahadji Kulkarni* (10).

The doctrine of merger cannot apply to the case.

2. The District Judge holds the Raja to be personally liable because he has misapplied the income of the estate to his personal use and hence a personal decree should be passed against him. The order of the District Judge is under section 52 of the Civil Procedure Code. In the case of a widow it is open to her to use the money personally provided she keeps down interest.

Rani Kanno Dai v. *Lacy* (11) which decides that a creditor has no right over the income of the property in possession of the widow is in favour of the heir.

Kishan Lal Atal v. *Ummat-ul Fatima Begam* (12), *Richardson* v. *Horton* (13), *In re Hedgely, Small* v. *Hedgely* (14), *Veerasokkaraju* v. *Papiah* (15) are to the same effect.

As decided in *Indra Narain Misser* v. *Kristo Chunder Mahto* (16) the duty of the decree-holder is to proceed first against the heirs. An heir cannot stand in a worse position than a mortgagee. There is nothing in section 52, Civil Procedure Code to suggest it.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Offg. Advocate-General (with him Mr. *S. Gopalaswami Aiyangar*), for the Respondent.—Section 52 of the Civil Procedure Code applies. The appellant's contention is that the impartible estate is not assets; there is no reason why the income is not assets. The cases in Beaven and Chancery can be distinguished that in case alienation is for value the alienee cannot be touched.

In *In re Hyatt, Bowles* v. *Hyatt* (17) assets is defined to include income also. The same view was taken in *Aseemoonnissa* v. *Ameerconnissa Khatoon* (18). *Rani Kanno Dai* v. *Lacy* (11) also is distinguishable. There was an agreement by the creditor not to execute the decree against the estate of the widow. There is no other case which goes this length. *Mullapali Taravathil* v. *Gopala Menon* (19) does not touch this point. In *Mullapali Taravathil* v. *Gopala Menon* (19) it has

(1) 18 Ves. 384; 11 R. R. 222; 34 E. R. 362.
(2) 14 Beav. 542; 51 E. R. 394; 92 R. R. 209.
(3) 20 Beav 453; 52 E. R. 678; 109 R. R. 494.
(4) 21 Beav. 5; 52 E. R. 759; 25 L. J. Ch. 41; 25 L. T. (o. s.) 300; 111 R. R. 2.
(5) 22 Beav. 294; 52 E. R 1121; 2 Jur. (N. S.) 1010; 27 L. T. (o. s.) 257; 111 R. R. 372.
(6) (1914) A. C. 132 at p. 144; 83 L. J. Ch. 349; 110 L. T. 434; 58 S. J. 218.
(7) 9 C. 961 (P. C.); 13 C. L. R. 221; 10 I. A. 62; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424.
(8) 29 C. 154; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 29 I. A. 9 (P. C.).
(9) 14 Ind. Cas. 496; 39 C. 527; (1912) M. W. N. 367; 11 M. L. J. 265; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68.
(10) 21 Ind Cas. 39; 38 B 24; 15 Bom. L. R. 817.
(11) 19 A. 235; A. W. N. (1897) 38.
(12) 25 Ind. Cas. 384; 17 O. C. 207.
(13) 7 Beav. 112; 49 E. R. 1006; 64 R. R. 28; 13 L. J. Ch. 186; 7 Jur. 1144.
(14) (1887) 34 Ch. D. 379; 56 L. J. Ch. 360; 56 L. T. 19; 35 W. R. 472.
(15) 26 M. 792; 13 M. L. J. 258.
(16) 14 W. R. 362.
(17) (1888) 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297.
(18) 15 W. R. 285.
(19) 30 Ind. Cas. 383; 18 M. L. T. 127.

been held that property includes also income. The term "property" in section 52, Civil Procedure Code, includes also the income of the corpus and not merely the corpus, which, while impartible, is assets in the hands of the mortgagee decree-holder. *Rajah of Kalahasti* v. *Achigadu* (20) has been followed in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (21). If it could be attached, rents and profits are equally attachable. An impartible estate cannot be split up into several life-estates. Section 50 deals with execution against the *zemindar*, section 52 with his successor.

[SADASIVA AIYAR, J.—Impartible estates came into effect after the decree].

In *Depuru Kalappa Reddi* v. *Akkappa Nayanim* (22) the impartible estate is an asset of the successor. The decree is binding. As regards the omission of the legal representative to account see *Ranchode Das . Govardhana Das* v. *Krishna Das Vittal Das* (23). That follows the case of *Magaluri Garudiah* v. *Narayana Rungiah* (24). The Judge is justified in his statement that appellant never kept down the interest; he has failed to account for rents and profits. There is also a confusion of rights. The doctrine of merger has not been held available against a creditor. [*Bhawani Kumar* v. *Mathura Prasad Singh* (25), *Arumugasundara Maharaja Pillai* v. *Narasimha Iyer* (26).] Both these decide that, unless there is a mesne incumbrance, the appellant can avail himself of this shield. Neither against Government nor against the Rajah can this equity be set up.

Mr. *L. A. Govindaraghava Aiyar*, in reply.—*Bhawani Kumar* v. *Mathura Prasad Singh* (25) comes under an exception. Section 101 has nothing to do with this.

(20) 30 M. 454; 17 M. L. J. 367.
(21) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401.
(22) 8 Ind. Cas. 392; (1911) 2 M. W. N. 75; 8 M. L. T. 297.
(23) 12 Ind. Cas. 253; 21 M. L. J. 1096; 10 M. L. T. 272; (1911) 2 M. W. N. 271.
(24) 3 M. 359.
(25) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 935; 12 M. L. T. 352; 23 M. L. J. 311; 16 C. L. J. 606; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 39 I. A. 228 (P. C.).
(26) 29 Ind. Cas. 916; 29 M. L. J. 583; (1915) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110.

The Advocate-General.—The only question is whether he can be both a debtor and a creditor.

JUDGMENT.

MOORE, J.—The respondent, the Mahant of Tirupati, obtained a mortgage decree in Original Suit No. 40 of 1910 in the District Court, North Arcot, on the 23rd day of February 1911 against the appellant, the Rajah of Kalahasti, as the legal representative of the late Rajah Akkappa Nayanim Varu by whom the mortgage has been executed. The appellant, it may be mentioned, succeeded to the estate in May 1905. The mortgaged property having been exhausted, a personal decree for nearly three lakhs of rupees was passed against the appellant on the 7th day of April 1914. It appears that on the 14th day of July 1896 the then Rajah had executed a simple mortgage for one lakh of rupees in respect of certain villages in favour of the appellant for arrears of maintenance and other debts due to the latter. The respondent decree-holder applied in Execution Petition No. 42 of 1914 to attach the mortgage right possessed by the appellant, the judgment-debtor under the mortgage dated the 14th day of July 1896, alleging that the judgment-debtor had not properly applied the assets of the late Rajah which had come to his hands. The appellant then put in a petition asking for the release from attachment of the mortgage right on the ground that the decree having been obtained against him on a mortgage-bond executed by his predecessor-in-title, the decree-holder could not attach a debt due to him, the appellant, in his private capacity. He further stated that he had sold the equity of redemption of the properties on the 15th day of February 1913.

The District Judge found that the appellant had appropriated to his own use large sums which ought to have been applied in paying off charges on the estate, and that he was, therefore, personally liable for at least the amount of the mortgage which had been attached, and dismissed the petition.

The questions for determination in this appeal are (1) whether it is competent to the decree-holder to attach the mortgage

right which is said to be the private property of the appellant and (2) whether upon the appellant succeeding to the Kalahasti Estate the mortgage right in his favour became extinguished.

It cannot be doubted that the property of the deceased Rajah must be regarded as assets in the hands of his legal representative for the purpose of section 50 of the Civil Procedure Code. See *Rajah of Kalahasti* v. *Achigadu* (20) which was followed in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (21). Section 52 of the Civil Procedure Code provides that where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property. (2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed to satisfy the Court in the same manner as if the decree had been against him personally.

The judgment-debtor had only to account up to the full value of the assets he received as legal representative. It is for the decree-holder in the first instance to prove that some assets came to the legal representative, and the onus is then shifted on the latter to show how the assets were applied.

Once it is admitted or proved that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received and to account for them, *Ranchode Das Govardhana Das* v. *Krishna Das Vittal Das* (23). The District Judge finds (and this is in fact not disputed) that the appellant has failed to pay even the interest due under the mortgage decree, and further that he has also appropriated large sums which ought to have been applied in paying off charges on the estate.

The argument adduced on behalf of the appellant was that the income of the *zemindari* cannot be regarded as property of the deceased which came into the hands of the present Rajah, that his liability is confined to the extent of the property which came into his hands, and that he is not bound to pay the debts of the late Rajah out of the income of the estate. In *Aseemoonnissa* v. *Ameeroonnissa Khatoon* (18) it was held that where a person is proceeded against as the representative of a deceased judgment-debtor and it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon the person against whom execution is sought, to account for all the property of the deceased judgment-debtor which has come into his hands, and that in so accounting, mesne profits whether accruing in the shape of rent or interest, must be brought into account. I agree with that decision, and think that the rents and profits received are assets just as much as the real estate. See *In re Hyatt*, *Bowles* v. *Hyatt* (17). The learned Vakil for the appellant relies in support of his contentions on the rulings in *Rani Kanno Dai* v. *Lacy* (11) and *Veerasokkaraju* v. *Papiah* (15). The *Veerasokkaraju's* case (15) is clearly not in point, as payments had been made by the legal representative to the extent of the full value of the property which had come into his hands and it was consequently held that a decree could not be executed even though he might still have in his possession property which had originally belonged to the deceased. *Rani Kanno Dai* v. *Lacy* (11) may be distinguished on the ground that the decree-holder had agreed for consideration not to execute his decree against the moveable property of the widow.

I am of opinion that the District Judge was right in holding that the appellant, having failed to satisfy the Court that he had duly applied the property of the deceased, was personally liable to the extent of the property in respect of which he had failed so to satisfy the Court. It remains to consider the question (which was not raised in the lower Court) whether the mortgage right possessed by the appellant under the mortgage of 1896 became extin-

guished when he succeeded to the estate and became the owner of the equity of redemption. It is argued on behalf of the appellant that the doctrine of merger does not apply, the appellant being only a qualified owner, and that the appellant has by his conduct signified his intention of keeping the mortgage alive for his benefit. I do not think it necessary to refer to the various English cases cited by Mr. Govindaraghava Iyer. Courts in India are governed by the statutory provision contained in section 101 of the Transfer of Property Act, which is as follows:—"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

The Advocate-General contends that the section presupposes the existence of puisne incumbrances and that the appellant cannot reserve in his favour his own mortgage which had become extinguished when he acquired the equity of redemption. I think that this contention must be upheld. The earlier part of the section states the doctrine of merger. An extinguishment of the debt will ordinarily take place where the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal. The effect of the proviso to the section, which states the exception to the rule of merger, is (1) to enable the person in whom the titles are united to keep the incumbrance alive and (2) to declare that the incumbrance should continue to subsist, where the result would be for his benefit. Ordinarily the only object and advantage of keeping an incumbrance alive is that it may be used against the holder of a subsequent incumbrance.

Reference may be made to a recent case, *Arumugasundara Maharaja Pillai* v. *Narasimha Iyer* (26), where the learned Chief Justice held that where there are no mesne incumbrances outstanding on the date of the purchase of the equity of redemption by the mortgagee there is merger under section 101 of the Transfer of Property Act. Mr. Justice Seshagiri Aiyar put the matter very clearly at page 594* of the report where the learned Judge says: "It is clear that the section (*i.e.* section 101) contemplates the existence of puisne incumbrances. Unless that may be the object, the clause relating to the subsistence of the incumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage. As I read the section, it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the incumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property, the intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction should be placed on this provision of law. I am of opinion that the mortgagee purchaser can use his previous mortgage only as a shield if there are mesne incumbrances, and that also only in respect of the properties which are covered by such incumbrances." I respectfully agree with the above observations.

The observation of their Lordships of the Privy Council in *Bhawani Kumar* v. *Mathura Prasad Singh* (25) shows that where there are no incumbrances, there is an extinguishment of the right under the mortgage when the equity of redemption is acquired.

The decision in *Laxman Ganesh Rajendra* v. *Mathurabai Narayan Govind* (27) is to the same effect.

In the result the appeal is dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother. The doctrine that a widow could, by her conduct, treat the savings out of the income of her husband's estate as her separate property and that then it would become property at her absolute disposal so that her alienations

(27) 23 Ind. Cas. 121; 38 B. 369; 16 Bom. L. R. 26.

*Page of 29 M. L. J.—*Ed.*

thereof could not be questioned by her husband's reversioners, cannot be extended so as to give her the right to treat all the income as her absolute property not available to her husband's creditors. There are, no doubt, observations in *Rani Kanno Dai* v. *Lacy* (11) which seem to go to the length that the rents of the husband's estate could not be treated in law as assets of her husband for any purpose, but I respectfully dissent from those remarks.

On the ground of merger, I would hold that the appellant was not entitled to treat himself as owner of a mortgage right in lands belonging to the *zamindari* of which he became the sole owner, though certain restrictions have been placed by the Impartible Estates Act on the extent of his power of alienation. His claim for the release of a non-existent mortgage right was, therefore, rightly dismissed. As this non-existent right has not yet been sold in execution, it is a matter for consideration for the District Court whether under Order XXI, rule 66, clause (*e*), it ought not to notify in the same proclamation that the attached property is a right which had ceased to exist long ago, assuming that the Court is bound to bring it to sale at the instance of the decree-holder and is not entitled under section 151 of the Civil Procedure Code to stop the sale altogether on that account.

Appeal dismissed.

V.R.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2314 OF 1915.

March 9, 1916.

Present:—Mr. Justice Rattigan.

Musammat TAJO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ALLAH DIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Injunction - Hindu widow, whether can be restrained from alienating her estate—Reversioners, when can sue for injunction.

In ordinary cases, the reversioners of the last male owner are not entitled to obtain an injunction to restrain his widow in possession of her customary estate from alienating property. An injunction is a proper form of relief only when it is found that the widow is committing or is about to commit acts of waste in the sense in which that term is used in law. [p. 230, col. 1.]

Where, therefore, in a suit by the reversionary heirs of the last male owner for an injunction to restrain his widows from alienating and wasting the property of their deceased husband, the plaintiffs failed to prove the alleged acts of waste except in two very minor particulars:

Held, that they were not entitled to an injunction. [p. 230, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 27th July 1915, reversing that of the Subordinate Judge, 2nd Class, Gujrat, dated the 1st of May 1915.

Mr. *Beni Parshad Khosla* for Mr. *Miran Bakhsh*, for the Appellants.

Mr. *Nihal Chand Mehra*, for the Respondents.

JUDGMENT.—Plaintiffs as reversionary heirs of one Sadr Din applied to the Court of the Subordinate Judge, Gujrat, for an injunction to restrain the defendants, who are the two widows of the said Sadr Din, from alienating and wasting the property of their deceased husband The Subordinate Judge found that plaintiffs had failed to prove any acts of waste on the part of the widows, except as regards the cutting down of one *kikar* tree and the alienation of a small plot of land consisting of 10 *kanals*, and accordingly dismissed the suit with costs. Plaintiffs appealed to the District Judge who granted them an injunction in the terms prayed for. The learned Judge states that from the evidence and from the finding of the Subordinate Judge it is clear that the widows have embarked upon measures which, if unchecked, will soon result in the loss of much of the estate and in its deterioration. He further states that the widows are cutting down trees and selling them to various persons, and that they are also now beginning to sell off the land itself. This finding of the District Judge appears to be unsupported by the evidence on the record, and there was no justification for his remark that the Subordinate Judge had also held that the widows were committing waste in the manner alleged. On the contrary, the Subordinate Judge's conclusion was that except in two very minor particulars, the plaintiffs' allegations had not been proved.

I cannot find any authority in support of the District Judge's order in this case, nor do I know of any instance in which the Courts

have granted injunction to restrain a widow in possession of her customary estate from alienating property. In such cases the reversioners are entitled by custom and law to apply to the Courts for a declaration that an alienation effected by a widow (otherwise than for necessary purposes) will not affect their reversionary rights, and I fail to see how an injunction of the kind here sought for could benefit them so far as the alienations of the property are concerned. Obviously the injunction will not prevent the widows from alienating property for necessary purposes, and the question would arise in every case (whether an injunction has been granted or not) as to the existence or non-existence of necessity. No doubt an injunction would be a proper form of relief if it were found that the widows were committing, or were about to commit, acts of waste in the sense that that term is understood in law. But in the present case, so far as I can see, there is no proof of any such acts of waste. In my opinion the District Judge would have been well advised in declining to grant plaintiffs this very exceptional form of relief, and I accordingly accept the appeal and set his order aside. Plaintiffs must pay costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 286 OF 1915.

February 11, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SHIAM LAL—PLAINTIFF—APPELLANT

versus

ROSHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, O. XXI, r. 66—Sale proclamation—Objections of judgment-debtor, summary rejection of—Judicial decision—Appeal.

On a notice issued to the judgment-debtor to settle the terms of a sale proclamation, he put in a statement of objections to the effect (1) that portions of the property advertised for sale should be described as ancestral, (2) that the specification of the property was incorrect and (3) that the properties were undervalued. The Court summarily rejected all the objections. On appeal:

Held, per *Piggott, J*, that whether all orders passed by an execution Court in proceedings under Order XXI, rule 66, are decrees and appealable as such or not, an order refusing to enquire into the valuation was an appealable decision. [p. 232, col. 1.]

If after issue of notice under Order XXI, rule 66, the parties are seriously at issue with regard to the valuation of the property to be entered in the sale proclamation, the Court must go into the matter and determine it judicially, instead of accepting without question the decree-holder's valuation. [p. 231, col. 2.]

Per *Walsh, J.*—That the questions raised by the judgment-debtor were questions covered by section 47, Civil Procedure Code, and the decision complained of was a decision under the section from which an express right of appeal was given by the Code. [p. 232, col. 2.]

Sivagami Achi v. *Subrahmania Ayyar*, 27 M. 259; 14 M. L. J. 57, not approved.

Quære (per *Piggott, J.*)—Whether a question raised by a judgment-debtor under Order XXI, rule 66, Civil Procedure Code, can be again raised under Order XXI, rule 90, Civil Procedure Code. [p. 231, col. 2]

Obiter (per *Walsh, J.*)—Questions raised by a judgment-debtor under Order XXI, rule 66, as well as matters which he omitted to raise under the rule, cannot be set up after sale. [p. 232, col. 2]

Execution first appeal from a decree of the Second Additional Subordinate Judge, Aligarh.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—This is an appeal by a judgment-debtor in an execution case. A decree had been passed under Order XXXIV, rule 5, of the Code of Civil Procedure for sale of certain mortgaged property. Notice was issued to the parties fixing the 6th of October as the date on which the Court would proceed to hold an enquiry under the provisions of Order XXI, rule 66, of the Code of Civil Procedure with a view to drawing up a proper sale proclamation. On that date the judgment-debtor put in what is described as a petition of objection. On the face of it the most substantial point taken appears to be that the judgment-debtor was seeking for a review of the decree, and he wished to have a postponement of the execution proceedings until his application for review of the decree should be disposed of. For reasons not apparent on the face of the record, the learned Judge of the Court below evidently viewed this application with the utmost disfavour and was strongly disinclined to order a postponement of the execution proceedings. I may note that the judgment-debtor's application for review of the decree has since failed, and it may be that the learned Judge of the Court below had reasons for supposing that it was bound to fail. It so happened,

SHIAM LAL *v.* ROSHAN LAL.

however, that the judgment-debtor, besides asking for the postponement of the proceedings, laid before the Court certain objections to the drawing up of the sale proclamation in the terms proposed by the decree-holder.

One objection was that the decree-holder was describing the whole of the property in question as non-ancestral, where as a part of it was ancestral. The judgment-debtor did not specify what was the part of the property to which this objection referred, and as a matter of fact we are informed that the sale proclamation actually drawn up related only to a portion of the property covered by the decree and that this portion was certainly non-ancestral. *Another* objection taken was that the specification of the property sought to be sold was incorrect. Apparently the decree-holder was in a somewhat unfortunate position. His decree purported to give the description of the property ordered to be sold in village Rajpur according to the entries in the existing village papers; yet the copies of those entries put in by the decree-holder himself were not in exact accordance with the terms of the decree. This was a matter for the decree-holder to attend to. If his decree was inaccurate, that is to say, if the decree stated that the property to be sold was described in the existing village papers in such and such terms, whereas it was actually described in slightly different terms, it was obviously advisable for him to secure a correction of the decree. He could not, however, execute the decree otherwise than in accordance with its terms, and the judgment-debtor's objection that the sale proclamation should be drawn up in terms different from those of the decree was not an arguable one. The *third* point taken was as to the valuation of the property proposed to be sold. The judgment-debtor's point was that the decree-holder was grossly undervaluing it. This point the learned Subordinate Judge seems to have altogether overlooked. He evidently regarded the judgment-debtor's petition as in substance a mere attempt to gain time. He thought the objections taken, apart from the application for adjournment, to be merely frivolous objections, and he does not seem to have set himself to enquire whether the objection with regard to the valuation of the property had any substance in it or not. It is a matter in which it was incumbent on the Court to make a careful enquiry. If after issue of notice under Order XXI, rule 66, of the Code of Civil Procedure the Court finds that the decree-holder and the judgment-debtor are seriously at issue with regard to the valuation of the property to be entered in the sale proclamation, it is certainly admissible that it should go into the matter and determine it judicially, instead of accepting without question the decree-holder's valuation and leaving it open to the judgment-debtor to raise objections after the sale has taken place. When the present appeal, however, came up for hearing an objection was immediately taken on behalf of the decree-holder-respondent to the effect that no appeal lies from such an order as the one now in question. This objection is supported by a certain amount of authority, more particularly by the case of *Sivagami Achi* v. *Subrahmania Ayyar* (1), and some cases of the Calcutta High Court reported in Volumes 3, 10, 12 and 17 of Indian Cases. If, however, the order now before us is to be treated as a judicial determination between the parties that the valuation sought to be put upon the property in the sale proclamation was correct, then it is difficult to see how the judgment-debtor can be precluded from appealing to this Court against that decision, in view of the definition of the word "decree" given in the present Code of Civil Procedure, section 2 (2), and the reference to section 47 of the same Code made in the said definition. It seems to have been taken for granted in the Madras and other cases referred to above that a judgment-debtor would always be able to raise the question under the provisions of Order XXI, rule 90, if he could show that the property sold had in fact been undervalued in the sale proclamation and that he had suffered loss in consequence. But the question which we have to consider is whether, if a judgment-debtor has raised the point at a previous stage under Order XXI, rule 66, and it can be shown to have been judicially determined against him, he could be permitted to raise it at any subsequent stage. Under the circumstances of this particular case, I think we need not go into the general question of law involved.

(1) 27 M. 259; 14 M. L. J. 57.

It might be equally dangerous to lay it down that all orders passed by an executing Court in the course of proceedings held under Order XXI, rule 66, of the Code of Civil Procedure, are decrees, and appealable as such, as to lay it down that no order which can possibly be passed under the above circumstances can amount to an appealable decree. In the present case the real purpose of the judgment-debtor's application has been served by the mere admission of the appeal by this Court. There has been an order staying proceedings and before any sale can now take place, there will have to be a fresh sale proclamation. Under these circumstances I think the best course we can take is, putting on one side the question of law argued before us, to consider only the one substantial point taken by the judgment-debtor, namely, that his allegation as to the undervaluation of the property by the decree-holder has never been enquired into. I would propose, therefore, formally to dismiss this appeal, making no order as to costs; but at the same time to note that the question of the valuation of the property raised by the judgment-debtor's objection has not been judicially determined between the parties and should be considered by the Court below before drawing up the fresh proclamation which will now be necessary.

WALSH, J.—I agree substantially in the order proposed, except that I think that we are allowing the appeal and not dismissing it. We are not deciding anything beyond the legal consequence of the facts in this particular case. For my own part I do not propose to add to the existing confusion by attempting to lay down any general principle as to the right of appeal under this section. The effect of laying down general propositions beyond the facts of the particular case which a Court has to decide invariably leads to conflict of authorities and to confusion. It is quite plain that one decision at any rate, namely, that no order under the section is appealable, goes too far. It was not necessary for the decision which was come to in that case to say what the Court said, and to that extent it is impossible to agree with that decision. In my opinion the appeal is admissible in this case for the following reasons. On the 6th of October after notice given to them under Order XXI, rule 66, the judgment-debtors filed eight grounds of objection in writing. On the 7th October seven grounds were filed by the decree-holders in writing, stating the reasons why the objections of the judgment-debtors ought to be rejected. Upon a consideration of these fifteen paragraphs of controversial pleadings the Court below dismissed the objections. To my mind that was a judicial decision. The questions raised on the objections which were fought and determined, were questions which are indicated in Order XXI, rule 66. It cannot be denied that they are questions arising between the parties. It cannot be denied that they are questions relating to the execution of the decree. It follows that they are questions within section 47. The decision complained of was, therefore, a determination, call it what you like, of a question under section 47. From such determination an express right of appeal is given by the Code. If I were not led by the language of the Code to this conclusion, I should be driven to it by a decision of the Privy Council. It is clear law binding upon us that such questions as were raised by the judgment-debtors in this case, cannot be raised by them after sale, if they subsequently allege loss and attack the sale, when they have had an opportunity of raising them in this manner and have failed to avail themselves of it. The Privy Council has so decided. That decision means that having had an opportunity of obtaining a judicial decision upon a question and having neglected to take it, they must be taken as between themselves and the decree-holder to have abandoned the point for all time. It seems, therefore, to me that to hold otherwise than we are holding in this case would be to say, in respect of the same matter, that if the judgment-debtor did not avail himself of the opportunity there was a decision against him; but that if he did avail himself of the opportunity, there was no decision and he cannot appeal. Such a result would seem to me to be illogical, and as I find that the appellant's contention is consistent with the plain language of the Code I hold that in this case there is a right of appeal. I agree in the order proposed.

GURAN RAKHA *v.* BINDRABAN.

BY THE COURT.—The appeal is dismissed. No order as to costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2942 OF 1915.

February 22, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

GURAN RAKHA—PLAINTIFF—APPELLANT

versus

BINDRABAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Expiry of time allowed for appeal on a holiday—Application for copies made on re-opening of Court—Time spent in obtaining copies, whether excluded—Indulgence on ground of mistake, when allowed.

Indulgence under section 5 of the Limitation Act on the ground of mistake is only allowed where it is shown that the appellant has acted with due care and diligence. [p. 234, col. 1.]

In computing the period prescribed for an appeal, the time requisite for obtaining copies is excluded only if the application for copies is made while the right of appeal subsists, and an appellant cannot be allowed to let the whole of the period allowed for appeal to expire and then take advantage of the holiday which happens to occur towards the end of that period. [p. 233, col. 2.]

Where, therefore, the last day of limitation expired on a holiday and the appellant applied for copies on the re-opening of the Court and filed his appeal as soon as he got them:

Held, (1) that even deducting the time spent in obtaining copies the appeal was time-barred; [p. 233, col. 2.]

(2) that as the appellant had not shown due care and diligence he was not entitled to any indulgence. [p. 234, col. 1.]

Tukaram Gopal v. *Pandurang Sadaram*, 25 B. 584; 3 Bom. L. R. 143; *Pandharinath Sakharam* v. *Shankar Narayan Joshi*, 25 B. 586; 3 Bom. L. R. 244, distinguished.

Second appeal from the decree of the Additional District Judge, Ferozepore, at Ludhiana, dated the 2nd July 1915, affirming that of the Munsif, 2nd Class, Zira, District Ferozepore, dated the 13th May 1913.

Bhai *Charat Singh*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—In this case a preliminary objection has been raised to the effect that the appeal is barred by time. The judgment of the lower Appellate Court bears date the 2nd July 1915, and the present appeal was filed in this Court on the 5th October 1915, that is to say, on the 95th day, excluding, as the law requires, the day of delivery of judgment. The appellant did not apply for copy until the 1st October, that is to say, the 91st day. He received his copy on the 4th October and presented his appeal the next day. In my opinion the proper way of dealing with the matter is to deduct 4 from 95, which leaves 91 and to hold that the appeal is barred by time.

The learned Pleader for the appellant argued his client's case on two grounds, *first*, that in accordance with law, as laid down in *Tukaram Gopal* v. *Pandurang Sadaram* (1) and also *Pandharinath Sakharam* v. *Shankar Narayan Joshi* (2), the appeal is within time; and *secondly*, that indulgence should be given under section 5 of the Limitation Act in view of the appellant's affidavit. I have seen the two rulings quoted, and I do not consider that they bear the meaning attributed to them by Mr. Charat Singh. In the first of the rulings it was held that "so long as the right of appeal is subsisting an appellant is entitled under section 12 of the Limitation Act (XV of 1877) to apply for a copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal." But in the present case time, that is to say, 90 days, had already expired before the appellant applied for copy. It expired on the 30th September, and there is no foundation for the contention that the mere fact of that day being a holiday helps the appellant in any way. No doubt the law is that, if an appellant is ready to present his appeal on the last day of limitation, and on that day the Court is closed, *presentation* on the first open day is sufficient. But this is quite different from saying that, *in the matter of applying for copies*, an appellant can be allowed to let the whole of the period allowed for appeal expire and then take advantage of a holiday which happens to occur towards

(1) 25 B. 584; 3 Bom. L. R. 143.
(2) 25 B. 586; 3 Bom. L. R. 244.

the end of that period. I know of no authority in support of such a proposition. The second ruling is much to the same effect as the first, and also does not help the appellant. As to the request for indulgence, I find from the affidavit put in that all the appellant can say is that he imagined the Chief Court did not open until the 15th October 1915. It has always been held that indulgence under section 5 on the ground of a mistake is only allowed where it is shown that the appellant has acted with due care and diligence. Now it is absurd to suppose that a man of some intelligence, who had legal advice available, can have acted with due care and diligence in making a mistake like this. On the contrary it was extremely careless on his part to delay applying for copies so long, and he could easily have ascertained the date of this Court's opening.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 175 OF 1915.

February 11, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

TAJ SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

JAGAN LAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. XXI, r. 16—Res judicata—Application to recognise assignment of decree—Objection not taken by judgment-debtor.

Where the transferee of a decree applied to Court, under Order XXI, rule 16, for permission to execute the decree as transferee, and notice was thereon issued to the judgment-debtor, who did not object to the application, and the Court passed an order for execution:

Held, that it was not open to the judgment-debtor to question the assignee's title in subsequent proceedings in execution.

Oman Prasad v. *Jani Durlab Shankar*, 23 Ind. Cas. 286; 12 A. L. J. 206, approved.

Execution first appeal from a decree of the Subordinate Judge, Moradabad, dated the 17th of April 1915.

Mr. *Shafi-uz-zaman*, for the Appellant,

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—There was a decree passed nominally in favour of one Dule Ram. The respondent Jagan Lal, in the course of a suit against Dule Ram's heirs, obtained a decree to the effect that he was himself the beneficial owner of the decree. Having applied to the proper Court for that purpose, he obtained an order under Order XXI, rule 16, of the Code of Civil Procedure, granting him permission to execute the decree as transferee of the same. Before that order was passed the present appellant, who was on the record as one of the judgment debtors, had received notice of Jagan Lal's application. He took no objection to the same and submitted to the order granting the said application. Subsequently Jagan Lal applied to the Court to take certain steps to execute the decree by sale of the property concerned. Thereupon the appellant filed an objection in which he said, *first*, that Jagan Lal was not a genuine transferee of the decree, because the whole proceedings between Jagan Lal and the heirs of Dule Ram were collusive and were not binding on him. On this the Court below has held that this was an objection which should have been taken in reply to Jagan Lal's application under Order XXI, rule 16, and not having been so taken, it was concluded against the present appellant by the order of the Court bringing Jagan Lal on the record as transferee of the decree. This decision is supported by a ruling of this Court in *Oman Prasad* v. *Jani Durlab Shankar* (1), with which we are in agreement. The *other* point taken by the appellant was that there had been an adjustment of the decree, so far as he himself was concerned, between himself and Dule Ram during the lifetime of the latter. On this the Court below has held that this adjustment, never having been certified to the Court, cannot be recognised by the Court executing the decree. This order is in accordance with the clear provisions of Order XXI, rule 2, of the Code of Civil Procedure, and we find it to be correct. This appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

(1) 23 Ind. Cas. 286; 12 A. L. J. 206.

LOCHA RAM *v.* JINDWADDA KHAN.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL NO. 2319 OF 1914.
July 20, 1915.
Present:—Mr. Justice Leslie Jones.
LOCHA RAM—DEFENDANT—APPELLANT
versus
JINDWADDA KHAN—PLAINTIFF,
THAKARYA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Forfeiture caused by tenant's denial of landlord's title—Landlord's option to condone forfeiture—Subsequent act occasioning forfeiture—Suit for possession—Limitation Act (IX of 1908), Sch.I, Art. 143—Improvements—Compensation—Tenant's right to value of materials.

It is quite open to a landlord to condone the forfeiture of his tenant's right caused by the latter's denial of his proprietary title and afterwards to bring a suit for possession within 12 years from the time when a separate and entirely distinct act occasioning forfeiture occurred [p 236, col. 2.]

In executing a decree for ejectment of the tenant from land on which the latter has built a structure, the landlord is bound to pay the value of the materials. [p. 236, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Multan Division at Muzaffargarh, dated the 2nd April 1914, affirming that of the Munsif, 2nd class, Muzaffargarh, dated the 26th August 1912, decreeing the suit with costs.

Lala *Hargopal*, for the Appellant.

Mr. *H. W. Morrison*, for the Respondents.

JUDGMENT.—Jindwadda Khan, a proprietor in the village of Theri, instituted the present suit for possession of the shop in dispute, on the ground that Thakarya Mal, who held it as a permanent tenant, had mortgaged it on the 3rd of April 1905 to Locha Ram and Milap Mal and that the right of tenancy had been extinguished by that act.

The only plea of Thakarya Mal which it is necessary to notice was that unless the mortgage was cancelled, the plaintiff could not sue for possession. The alienees in their pleas denied the ownership of the plaintiff and claimed that Thakarya Mal and his ancestors were full owners. In support of the contention they cited an alleged mortgage by Thakarya Mal in favour of a certain Ganesha in 1877 and another mortgage also by Thakarya Mal, dated the 10th of August 1888, in favour of their uncle, Jattu Mal. They further contended that the alienation now in dispute was not distinguishable from the mortgage of the 10th of August 1888, and that it must, therefore, be regarded as more than 12 years' old and that accordingly the plaintiff's claim was barred by time. There were further pleas that the mortgage was not invalid and that even if it were so, it would not extinguish the right of residence. Lastly, it was urged that the plaintiff had no right to the materials of the shop.

The Munsif held that the plaintiff was the owner. He expressed no definite opinion as to whether there had or had not been a mortgage in favour of Ganesha, but he held definitely that the mortgage-deed of the 10th of August 1888 was not a genuine document. Assuming, however, that it was genuine he was still prepared to hold that it had not been brought to the knowledge, of the plaintiff and further that if it had not been brought to his knowledge it could not be used for the benefit of the defendants on the grounds that Article 143 applied and time did not begin to run until the plaintiff became aware of the act which enabled him to insist upon forfeiture. He held accordingly that the suit was within time and that the right of tenancy had been forfeited apparently for the reason, though this is not expressly stated, that in the deed of mortgage, dated the 3rd of April 1905, Thakarya Mal had denied plaintiff's title. Plaintiff, therefore, obtained a decree for possession on payment of the sum of Rs. 18 which was held to be the value of improvements effected by the defendants. The plea that plaintiff was not entitled to any of the materials appears to have been overlooked.

The defendants then appealed to the Additional Divisional Judge, who concurred in the findings of the first Court as to the ownership of the plaintiff, forfeiture and limitation. He discussed briefly and disposed of a new contention that the mortgage of the 3rd of April 1905 was not really a mortgage and held that the cause of action arose from its date. He also remarked that the defendants had failed to show they were entitled to the value of the shop, *i.e.*, the materials, and after stating that all the grounds of appeal had been considered affirmed the decree of the first Court.

The defendants have now preferred a second appeal. It is conceded before me that Jindwadda Khan was the owner of

the shop. No reference has been made in argument to the alleged mortgage in favour of Ganesha of 1877 as in any way supporting the defendants' case. It is contended, however, that the mortgage of the 10th of August 1888 is a perfectly genuine document and that it was clearly brought to the notice of the plaintiff so long ago as 1899. It is clear that there is great force in both these contentions. It appears that in 1899 Jindwadda Khan was defending a suit brought by the alienee of another house in this village. In the course of that suit, No. 9 decided by Lala Chela Ram, Munsif, 1st class, on the 21st of April 1899, the alienee endeavoured to prove a custom by which non-proprietary residents had the right of alienation and in support of that contention this deed of the 10th of August 1888 was produced. The record of that case shows that the present plaintiff was in Court on the day of its production, and I am not impressed by the argument of the Munsif that he ought not to be supposed to have been present because his presence at the exact time when the deed was produced is not separately recorded and because he was not questioned on the subject. The reasons given by the Munsif for holding that this deed of 1888 was fictitious are equally poor. They have not been discussed by the Additional Divisional Judge and I have no hesitation in saying that they betray such misconception as to form a legitimate ground of attack even in second appeal. It is not, however, necessary for me to discuss either point in detail, partly because Counsel for the respondents states that he does not attempt to support the Munsif's opinion and partly because there is absolutely nothing in the deed of 1905 to show, as the defendants contend, that it has the character merely of an additional mortgage.

As already stated, plaintiff's contention is that the right of the tenant was forfeited by the deed of 1905. That deed contains a clear denial of the plaintiff's ownership and here again Counsel for the respondents does not contend that such denial does not operate to cause forfeiture. It was never pleaded by them that forfeiture had already taken place in 1888 as the result of a separate deed. In their pleas a reference to the deed of 1888 was made, chiefly with the object of shewing that the plaintiff was not the owner and it was not their position that forfeiture had taken place at all. It seems to me that in such a case it is necessary to hold them strictly to their pleas. Having denied that the mortgage of 1905 is distinguishable from the mortgage of 1888 or that there was forfeiture in 1888, it is not open to them now to say that even if the deed of 1888 was a distinct mortgage it caused forfeiture and that, therefore, the suit of the plaintiff, if, as is agreed, it is governed by Article 143, is barred by time. It appears to me to have been quite open to the plaintiff to condone the first forfeiture and afterwards to bring a suit within 12 years from the time when a separate and entirely distinct act occasioning forfeiture occurred. At all events it is the result of the attitude taken by the defendants in their pleas that this question has not received discussion and in the circumstances, I think, we must adhere to the allegation in the plaint that forfeiture took place in 1905.

As regards this question of limitation I need only add that the sixth ground of appeal on the subject of adverse possession has not been argued. My finding is, therefore, though for different reasons from those given by the lower Courts, that the plaintiff's suit is within time, and he is, therefore, entitled to take possession of the shop.

As regards the question of the value of materials, the ordinary rule is that the materials belong to the tenant and that in such circumstance the proprietor before taking possession is required to pay their value. There is no reason why this rule should not be followed in the present case and Counsel for the respondents does not contest the point. The value of the improvements is not the same thing as the value of the materials. The value of the latter was found by the local Commissioner appointed for the purposes of ascertaining the value of the property to be Rs. 119. His opinion was accepted for the purpose of the valuation of the suit and Counsel for the respondents is now willing to accept it as accurate.

Accordingly, I accept the appeal to this extent that the sum payable by plaint-

iff to the defendants be fixed at Rs. 119 instead of Rs. 18 and as the value of materials is considerably greater than that of the site, I order the parties to bear their own costs throughout.

Appeal partly accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 103 OF 1915.

May 6, 1916.

Present:—Justice Sir P. C. Banerji, KT.

KUBER SAITHWAR RAM TAHAL UPADHIA—PLAINTIFF—APPELLANT

versus

GUPTAI SAITHWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 3—Judgment—No record of findings—Report, evidentiary value of.

Where the judgment of the lower Appellate Court was in the following terms:—"Counsel for the respondents admits that the evidence of the Naib-Tahsildar recorded in this Court is the best evidence available on either side. It follows that the appeal must be decreed. The appeal is, therefore, decreed with costs:"

Held, that it did not comply with the requirements of the law.

The report of a Tahsildar or Naib-Tahsildar, being the result of the investigation made by him, is only an expression of his opinion in the matter. It cannot be the sole basis of a decision in regard to a question of title.

Second appeal from the decision of the Additional District Judge, Gorakhpur, dated the 11th November 1914.

The Hon'ble Mr. *Narain Prasad* (for Mr. *Iswar Saran*), for the Appellant.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This case must go back to the lower Appellate Court for trial according to law. The judgment of that Court is in the following words:—"Counsel for the respondents admits that the evidence of the Naib Tahsildar in this Court is the best evidence available on either side. It follows that the appeal must be decreed. The appeal is, therefore, decreed with costs." The judgment does not comply with the requirements of the law. It does not set forth the matters in dispute between the parties, and it does not record any findings of the learned Judge upon these matters. The report of a Tahsildar or Naib-Tahsildar is only the result of the investigation made by him and is only an expression of his opinion in the matter. That report alone cannot be the sole basis of a decision in regard to a question of title. The appeal before the lower Appellate Court not having been properly tried according to law, I set aside the decree of that Court and remand the case to the lower Appellate Court with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the Cause.

Decree set aside; Case remanded.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 18 OF 1915.

March 24, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

PENUGONDA RATTAM AND ANOTHER—PLAINTIFFS COUNTER-PETITIONERS—APPELLANTS

versus

KORASIKA THATHA AND ANOTHER—DEFENDANTS—PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—"Proper Court", meaning of—Step-in-aid of execution, when will save limitation—Decree for possession, and for mesne profits and costs—Subsequent transfer of jurisdiction—Petition for execution—Jurisdiction.

A petition, although it is a step-in-aid of execution, will not save limitation, unless it is presented to the proper Court. [p. 238, col. 2.]

Maharaja of Bobbili v. *Narasaraju Peda* 15 Ind. Cas. 738; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 236, followed.

Where the Court which passed a decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which, at the time of making the application for execution, would have jurisdiction to try the suit in which the decree sought to be executed was passed. [p. 239, col. 1.]

Subbiah Naicker v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; (1914) M. W. N. 205; 37 M. 462; 26 M. L. J. 189; 1 L. W. 251; *Parthasaradhi Appa Rao* v. *Maka Venkatadri Appa Rao*, 27 Ind. Cas. 88; (1914) M. W. N. 896, followed.

In 1903 a decree for possession and mesne profits and costs was passed by the Rajahmundry Munsif's Court The jurisdiction over the village

of Tadimella, where the suit property was situated, was in 1905 transferred to the Tanuku Munsif's Court and again to the Kovvur Munsif's Court in May 1912. In 1908 the decree, so far as the delivery of property was concerned, was executed in the Tanuku Munsif's Court. In 1909 an application for execution of the decree for mesne profits was presented to the Tanuku Munsif's Court and it was dismissed on 4th January 1910. The decree-holder and his heirs then presented two different applications to the Rajahmundry Munsif's Court on 20th September 1912 and 1st August 1913 respectively in respect of the unsatisfied portion of the decree for mesne profits and costs. The judgment-debtors did not reside within the jurisdiction of the Rajahmundry Court nor was their property situated within it. The present application for execution was then presented to the Kovvur Munsif's Court on 13th November 1913:

Held, that the execution petitions of 20th September 1912 and 1st August 1913, having been presented to the Rajahmundry Court, were not presented to the "proper Court" within the meaning of Article 182 of the Limitation Act and did not, therefore, save limitation. [p. 239, col. 1.]

Appeal against the order of the Court of the Subordinate Judge of Kistna at Ellore, dated the 26th October 1914, in Appeal Suit No. 160 of 1914, preferred against that of the District Munsif, Kovvur, in Interlocutory Appeal No. 2748 of 1913, in Execution Petition No. 1522 of 1913, in Original Suit No. 638 of 1902.

Mr. *M. Patanjali Sastri* for Mr. *P. Narayanamurthi*, for the Appellants.

Messrs. *P. Chenchiah* and *T. Prakasam*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether the execution applications Execution Petitions Nos. 776 of 1912 and 800 of 1913 were made to the proper Court so as to save limitation. The decree in the suit was passed by the District Munsif's Court of Rajamundry on September 22nd, 1903. In 1905 the jurisdiction over the village Tadimella, where the plaint property was situated, was transferred to the Tanuku Munsif's Court. The decree, so far as the delivery of the property was concerned, was executed in 1908 in the Tanuku Munsif's Court. On 4th May 1912 the jurisdiction was again transferred from the Tanuku Court to the Kovvur Munsif's Court. The original decree-holder presented the application (Execution Petition No. 776 of 1912) and his heirs presented the application (Execution Petition No. 800 of 1913) in respect of the unsatisfied portion of the decree for mesne profits and costs to the Rajamundry Munsif's Court on 20th September 1912 and 1st August 1913, respectively. In the first petition, the decree-holder merely asked for transmission of the decree to the Kovvur Munsif's Court. In the second petition, the prayer was for transmission of the decree to Kovvur and for recognising the petitioners Nos. 2 and 3 (appellants) as legal representatives of the deceased decree-holder. The last preceding application Execution Petition No. 1335 of 1909, which was presented in the Tanuku Munsif's Court, was dismissed on 4th January 1910. The present execution petition Execution Petition No 1522 of 1913 was presented on the 13th November 1913. It follows, therefore, that unless Execution Petitions Nos. 776 of 1912 and 800 of 1913 were presented to the "proper Court," Execution Petition No. 1522 of 1913 is barred. (See clause 5 of Article 182 of the Limitation Act.) It cannot be doubted that a petition, although it is a step-in-aid of execution, will not save limitation unless it is presented to the proper Court. *Maharaja of Bobbili* v. *Narasaraju Peda* (1).

Section 38, Civil Procedure Code, provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. Section 37, Civil Procedure Code, defines the expression "Court which passed the decree" as including "(B—) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, *the Court which, if the suit wherein the decree was passed was instituted at the time of the making the application for execution of the decree, would have jurisdiction to try such suit.*"

In *Subbiah Naicker* v. *Ramanathan Chettiar* (2) it was held that where owing to a change of venue, a Court has lost jurisdiction to continue pending proceedings affecting property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court. This principle is also applicable to

(1) 15 Ind. Cas. 738; 37 M. 231; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 236.

(2) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

proceedings at their institution. *Parthasaradhi Appa Rao* v. *Maka Venkatadri Appa Rao* (3).

We think it is clear that where the Court which passed the decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed.

The portion of the decree which remained to be executed was that relating to "mesne profits" and costs. "Mesne profits" are claimed "in respect of" immoveable property [see Order II, rule 4 (*a*), Civil Procedure Code], and the village in which the property is situated was within the jurisdiction of the Kovvur and not the Rajamundry Munsif's Court when the applications of 1912 and 1913 were made and a suit for such profits would, on the dates of the presentation of the applications, have lain only in the Kovvur Court, unless the defendants resided within the Rajamundry Munsif's jurisdiction, which seems not to have been the case. As regards costs the judgment-debtor was residing on the dates with which we are concerned within the jurisdiction of the Kovvur Munsif's Court, and it was apparently for that reason that the decree-holder applied for transmission of the decree to the Kovvur Court. It is also legally impossible to institute a suit solely for recovery of the costs already incurred or to be incurred in conducting a suit without asking for some other relief in that suit and without praying for the recovery of the costs merely as appurtenant to such other relief or reliefs. In our opinion the application in question ought undoubtedly to have been presented to the Kovvur Court and not having been made to the "proper Court" cannot save limitation.

We think the decision of the Subordinate Judge is right. The appeal is dismissed with costs.

V.R.P. *Appeal dismissed.*

(3) 27 Ind. Cas. 88; (1914) M. W. N. 893.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 647 OF 1915.

April 25, 1916.

Present:—Justice Sir George Knox, KT., and Mr. Justice Lindsay.

RAM SARUP SAHU—PLAINTIFF—APPELLANT

versus

Raja RATAN SEN SINGH—DEFENDANT—RESPONDENT.

Costs, imposition of terms, as to payment of—Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25, 27—Remand—Conditional order.

Where the Court of first instance came to findings on all the points raised and the lower Appellate Court, purporting to act under Order XLI, rule 23, Civil Procedure Code, remanded the case for trial on the condition that the plaintiff deposited the costs of the defendant in both Courts within seven days, the High Court set aside the order of remand and directed the lower Appellate Court to take up the case at the stage where it had left off and to act under Order XLI, rule 27, if it was of opinion that either of the parties had made out a case for the reception of additional evidence. [p. 240, cols. 1 & 2.]

Second appeal from the decision of the Subordinate Judge of Gorakhpur, dated 3rd February 1915.

Messrs. *Haribans Sahai* and *Lakshmi Narain Tewari*, for the Appellant.

Dr. *Tej Bahadur Sapru* and Mr. *Iswar Saran*, for the Respondent.

JUDGMENT.—These two appeals, First Appeal from Order No. 78 and Second Appeal No. 647 of 1915, have arisen out of certain proceedings in an appeal before the Subordinate Judge of Gorakhpur and Basti.

It appears that the plaintiff-appellant Ram Sarup Sahu brought a suit for possession against the defendant. The suit was dismissed by the learned Munsif, who framed eight issues and came to findings on every one of them. As the result of the trial by the first Court the plaintiff's suit was dismissed with costs. The appeal came before the Subordinate Judge of Gorakhpore and Basti. After hearing the case submitted to him by the plaintiff-appellant he passed an order which purported to be under Order XLI, rule 23, of the Code of Civil Procedure, that is, he set aside the decree of the Court of first instance and sent the case back for trial on the merits with directions to admit any further evidence which the parties might desire to produce. When he came to draw up the remand

order he put upon the plaintiff certain terms, for from the language of the remand order it is very clear it was being made in the interests of the plaintiff. Accordingly when drawing up the remand order the Subordinate Judge called upon the plaintiff to pay the costs of the respondent in both Courts within seven days, and in the event of default of payment the appeal was to stand dismissed with costs.

The plaintiff appeals to this Court and the appeal is directed against the order for the payment of costs, *i. e.*, it is argued here for the plaintiff that the Subordinate Judge had no power to impose the terms as to the payment of costs just referred to. The Second Appeal No. 647 is directed against the decree by which the learned Judge of the Court below set aside the decree of the Munsif and remanded the case to that Court to be decided on the merits. We have already mentioned that the Munsif dealt with all the issues which arose in the case and came to findings on them and this being so, the order of the lower Appellate Court in so far as it remanded the case under Order XLI, rule 23, was not a proper order and cannot in any way be supported, as the Court of first instance did not dispose of the case on a preliminary point and it follows, therefore, that the learned Subordinate Judge had no authority to remand the case for trial on the merits. It was open to him to remit an issue under Order XLI, rule 25, and from what he subsequently ordered it appears that this was his intention; however, this was not done.

It has been objected on behalf of the defendant that the plaintiff is not entitled to attack this order of remand, inasmuch as he submitted to the case being sent down and undertook to comply with the terms imposed by the learned Subordinate Judge. It has, however, been contended by the learned Counsel for the appellant that when he undertook to pay costs it was on the understanding that only one particular issue was to be remitted for trial to the Court of the Munsif.

We have no alternative but to set aside the order of remand and direct the learnd Subordinate Judge to take up the case at the stage where he left off and if he is of opinion that either of the parties has made out a case for the reception of additional evidence he will act under Order XLI, rule 27.

The result is that we allow the Second Appeal No. 647 of 1915, set aside the order of the lower Appellate Court and direct that the case go back to the lower Appellate Court for disposal according to law. In view of our decision in Second Appeal No. 647 it is not necessary for us to go into the question raised in First Appeal from Order No. 78 of 1915, which is naturally allowed. We direct that each party bear his own costs.

Appeal allowed ; Order set aside.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 19 OF 1914.

August 12, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

VALIAKATH PUTHIAH MALIYAKKAL MAMMI KUTTI HAJI—COUNTER-PETITIONER No. 2—APPELLANT

versus

THACHAR A. MANAKKAL PARAMESWARAN NAMBUDRI—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57, scope of—Attachment—Sale stayed by Appellate Court—Execution petition dismissed in consequence, effect of.

Under Order XXI, rule 57, of the Civil Procedure Code an attachment shall cease only if the application for execution has been dismissed for any default of the decree-holder. In all other cases of dismissal, the Courts will have to decide on the facts of each case whether the order removing a petition from the file amounted to an adjudication of it so as to prevent the attachment from subsisting. [p. 241, col. 1.]

Aziz Bux v. *Kaniz Fatima Bibi*, 15 Ind. Cas. 49; 34 A. 490; 10 A. L. J. 48, followed.

Namuna Bibi v. *Roshun Meah*, 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 426; 13 C. L. J. 621, approved.

Where, therefore, after an attachment by a Court of first instance was stayed by an order of the Appellate Court the Court of first instance dismissed the application for execution:

Held, that the dismissal did not bear the effect of putting an end to the attachment under rule 57. [p. 241, col. 1.]

RAMANANDI *v.* CHHAJJU SINGH.

Appeal against the order of the Court of the Temporary Subordinate Judge, Palaghat, in Appeal Suit No. 538 of 1913, preferred against that of the Court of the District Munsif of Tirur, in Execution Petition No. 1591 of 1912 (Original Suit No. 620 of 1899).

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant.

Mr. *S. Ranganatha Aiyar*, for the Respondent.

JUDGMENT.—In this case an interesting question relating to the construction of Order XXI, rule 57, of the Code of Civil Procedure, 1908, was argued before us. After the respondent had got the property attached, on an appeal preferred by the judgment debtor, the sale was stayed. Thereupon the District Munsif dismissed the application. It is contended that this dismissal had the effect of putting an end to the attachment under rule 57. We are unable to agree. Under the Code of Civil Procedure, 1882, dismissals for default by Courts of first instance were regarded with disfavour, as there was an impression that these were attempts to increase the number of disposals without really deciding the matter in dispute, and as there was no provision for striking off applications, the attachments made under them were held as still subsisting, notwithstanding the disposal. Rule 57 has been passed to provide against this indefinite prolongation of execution proceedings. Under that rule, if the application is dismissed for any default on the part of the decree-holder, he has to apply for a fresh attachment. In all other cases of dismissal, the Courts will have to decide on the facts of each case whether the order removing a petition from the file amounted to an adjudication on it, so as to prevent the attachment from subsisting. We see no warrant for extending the provisions of the rule to cases of dismissal, when there has been no default on the part of the decree-holder.

In *Namuna Bibi* v. *Roshun Meah* (1), the learned Judges corrected the mistake into which the lower Court had fallen in holding that default must be construed as not including failure to take steps to carry out the directions of the Court. It is also authority for the position that Courts are not entitled to reserve a right against a plain provision of law. On the other hand, *Aziz Bux* v. *Kaniz Fatima Bibi* (2) decides that the rule should be strictly construed. We think that this is the proper view to be taken of rule 57.

As the last application was within three years of the one preceding it, the application was in time. We dismiss the Civil Miscellaneous Second Appeal with costs.

Appeal dismissed.

V.R.P.

(2) 15 Ind. Cas. 49; 34 A. 490; 10 A. L. J. 48

(1) 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1797 OF 1914.

March 31, 1916.

Present:—Mr. Justice Piggott.

Musammat RAMANANDI—DEFENDANT—APPELLANT

versus

CHHAJJU SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Vendee's mortgagees in possession—Vendor's widow's name recorded in revenue papers—Declaratory suit—Limitation.

One *K* obtained a pre-emption decree against *G* on the 2nd of November 1837 and obtained possession on the 2nd of April 1888. He then executed a mortgage with possession in favour of certain persons who were tenants of the land. *G's* name remained recorded in the village papers till his death, when his widow's name was entered. The mortgagees then sued for and obtained a declaration of their title as mortgagees. The plaintiff, who claimed through *K*, applied for mutation of names, but was successfully opposed by *G's* widow. He then brought the present suit for a declaration of his proprietary right three years after the death of *G* but more than six years after the date of *K's* obtaining possession:

Held, that the suit was not barred by the six years' rule of limitation [p. 242, col. 2.]

Francis Legge v. *Rambaran Singh*, 20 A. 37; A. W. N. (1897) 193, referred to.

Allah Jilai v. *Umrao Husain*, 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810, followed.

Second appeal from the decision of the Subordinate Judge, Meerut, dated the 26th August 1914.

Mr. *Mohanlal Sandal*, for the Appellant.

Mr. *P. N. Banerji*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises are somewhat complicated; but the essential points for determination admit of being briefly stated. The claim of the plaintiff-respondent was one for a declaration of his proprietary rights in respect of certain property. His title was based upon a pre-emption decree obtained by one Krishna on the 2nd of November 1887, under which he obtained possession on the 2nd of April 1888. He then executed a formal mortgage with possession in favour of certain persons who were tenants of the land in question. Neither he nor his mortgagees made any attempt to have their rights, other than the tenant's rights of the mortgagees, recorded in the village papers. The name of Ganga Ram, the original proprietor whose sale of the property had furnished a cause of action for the pre-emption suit, continued to remain recorded in the village papers. When Ganga Ram died, his widow applied for mutation of names in her favour, and this was allowed. Thereupon the mortgagees brought a suit impleading the same widow and their own mortgagor and claiming a declaration of their title as mortgagees, or in the alternative a decree for possession. They obtained a declaration only, the finding of the Court being that they were already in possession as mortgagees. The present plaintiff-respondent has since then acquired the rights of Krishna and brings this suit for a declaration, on the ground that his attempt to obtain mutation of names in his favour has been defeated by the defendant-appellant, the widow of Ganga Ram. Both the Courts below have decreed the plaintiff's claim, finding in his favour upon all essential points.

In second appeal two distinct pleas are raised on behalf of the defendant. *Firstly*, it is contended that the present suit for a declaration is barred by the six years' rule of limitation, reference being made to Article 120 of Schedule I to the Indian Limitation Act and to the decision of this Court in *Francis Legge* v. *Rambaran Singh* (1) and in some subsequent cases. I do not think there is any force in this contention. I am unable to suggest any date anterior to that stated in paragraph 9 of the plaint from which it could be fairly said that the plaintiff's cause of action had arisen. The date suggested in argument on behalf of the appellant is the 2nd of April 1888, the date on which Krishna obtained possession in execution of his pre-emption decree. It is, no doubt, true that Krishna was the plaintiff's predecessor-in-title, and that the 2nd of April 1888 is the date from which Krishna became entitled to apply to the Revenue Court to be recorded as proprietor of the land in suit. But I cannot see that anything happened on that date which could be held to furnish Krishna with a cause for a declaratory suit. The principles applicable to suits of this nature seem to me to have been correctly laid down in a subsequent decision of this Court in *Allah Jilai* v. *Umrao Hussain* (2); but I cannot find on any possible view of the principles laid down by this Court in *Francis Legge* v. *Rambaran Singh* (1) the accrual of the cause of action for this present suit to date back to any date more than six years anterior to the institution of the same. The only act on the part of the defendant appellant which could by any possibility be regarded as challenging Krishna's title and furnishing a cause of action for the institution of a declaratory suit would be her application to be recorded as proprietor on the death of Ganga Ram. I am not prepared to say, on the facts apparent from this record, whether it could be held that Krishna was bound to bring a declaratory suit within six years of the date above referred to; but the point is immaterial, because Ganga Ram's death took place only about three years prior to the institution of this suit. This plea, therefore, fails.

The other point taken is that the lower Appellate Court has gone too far in speaking of the decision in the suit brought by Krishna's mortgagees against their mortgagor and the present defendant-appellant as having the effect of *res judicata* against the latter on the question of possession. I am by no means clear that, on the principles laid down by this Court in *Chajju* v. *Umrao Singh* (3), the decision of the Court below could not be supported on this ground. I think

(1) 20 A. 35; A. W. N. (1897) 193.

(2) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.
(3) 22 A. 386; A. W. N. (1900) 120.

however, that apart from the question of *res judicata*, the learned Judge of the Court below has come to findings on the question of possession, findings based upon credible evidence, which are absolutely fatal to the defendant's case. She claims title through Ganga Ram who lost possession on the 2nd of April 1888 in conformity with the decree in the pre-emption suit. There is a clear finding that actual physical possession over the land in suit had been for many years, apparently from before 1888, with those tenants in whose favour Krishna subsequently executed a mortgage. From the date of the mortgage in their favour the possession of those tenants presumably became the possession of mortgagees, unless and until the contrary can be proved. There being a finding that rent was not paid to Ganga Ram by those tenants, it necessarily follows that neither constructive nor actual possession was with Ganga Ram on any date subsequent to the 2nd of April 1888. Whether or not, therefore, the present appellant is bound by the adverse decision on this point recorded against her in the suit of the mortgagees, there seems to me to be abundant evidence on the record to justify the repetition of the same finding in the present case, and I understand this to be the meaning in substance of the judgment of the lower Appellate Court. This appeal, therefore, fails and I dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL No. 239 OF 1911.

February 10, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ABDUL HUSSAIN ROWTHAN—

PLAINTIFF—APPELLANT

versus

MAHOMAD IBRAHIM ROWTHAR AND OTHERS—DEFENDANTS NOS. 1 TO 6—

RESPONDENTS.

Muhammadan Law—Guardian, de facto, *release by, when to be set aside or upheld—Family settlements, when not binding on minor—Tests—Mother, power of, as* de facto *guardian—'Delay defeats equities', limitations to the maxim—Laches and inconvenience, when no bar to re-opening of settled matters—Existence of debts proved* prima facie *by acceptance by major members—Compromise, views of parties as to, if absolute.*

A conveyance by a *de facto* guardian of a Muhammadan minor need not be set aside by the latter after attaining majority, if the document is not binding on him. [p. 245, col. 1; p. 247, col. 1.]

Mata Din v. *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49, followed.

A release deed executed by a Muhammadan mother as the *de facto* guardian of her minor son will not be upheld, unless it is shown to have been beneficial to the minor so as to justify the mother in entering into it as the *de facto* guardian. [p. 245, col. 1; p. 248, col. 2.]

Per *Seshagiri Aiyar, J.*—If in pursuance of a general purpose of settling family affairs and of bringing peace among the members of the family, separate releases are executed by the members of the various branches of the family in favour of the sole senior member of one branch, each of such releases will be valid and binding as one of a series of transactions by which the family arrangement was secured. [p. 248, col. 1.]

In re Govind Pandurang Kamat, 8 Ind. Cas. 632; 35 B. 75; 12 Bom. L. R. 936, referred to.

Under the Muhammadan law, a mother is not the *de jure* guardian of her infant son, and as a *de facto* guardian her powers of binding her son's interests are very limited. [p. 248, col. 1.]

It is well established that, under the Muhammadan law, a transaction will not be upheld against a minor unless it is found to be to his manifest advantage or for necessity. [p. 248, col. 2.]

Sita Ram v. *Amir Begam*, 8 A. 324; A. W. N. (1886) 101, *Abdul Khadar* v. *Chidambaram Chettyar*, 3 Ind. Cas. 876; 32 M. 276; 5 M. L. T. 201 and *Hyderman Kutti* v. *Syed Ali*, 15 Ind. Cas. 576; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889; 37 M. 514, referred to.

When a major member of a family executes a release deed on the footing that certain debts exist, the deed is *prima facie* evidence of the existence of such debts. [p. 249, col. 1.]

A person to whom great inconvenience will be caused by re-opening certain matters, cannot complain that the other party should have acted more promptly, if his own conduct has not been above board. [p. 251, col. 1.]

The maxim that delay defeats equities should not be applied to a case where want of fair dealing and inequality have been proved to exist. [p. 251, col. 1.]

The tests to be satisfied before transactions by way of family compromises, entered into on behalf of infants, can be upheld are:—

(1) In forming the agreement of compromise there must have been a full disclosure of all material circumstances in the knowledge of the parties thereto. It is immaterial whether the information withheld was asked for by the other contracting parties or not; [p. 251, col. 1.]

ABDUL HUSSAIN *v.* MAHOMAD IBRAHIM.

Maynard v. *Eaton*, (1874) 9 Ch. A. 414; 43 L. J. Ch 641; 30 L. T. 241; 22 W. R. 457, referred to.

(2) all the members of the family should have been treated impartially. [p. 251, col. 1.]

Satya Kumar Banerjee v. *Satya Kirpal Banerjee*, 3 Ind. Cas. 247; 10 C. L. J. 503, referred to.

(3) if the parties are not on equal terms but one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support the compromise. [p. 251, col. 1.]

Stapilton v. *Stapilton*, 1 W. & T. L. C. 234 at p. 248 referred to.

A family arrangement will not bind a minor if it is unconscionable in any way. [p. 251, col. 2.]

The proposition that a compromise should be judged, not by what the Court concludes to be the rights of the parties, but by what was regarded as just and proper by those who entered into the transaction, is subject to the proviso that the transaction should have been entered into honestly and with a view to secure full justice to the various parties to the instrument; that although mistakes in calculation or in the ascertainment of rights might exist there was no undue advantage taken by one of the members of the family and that there was an honest desire to put an end to litigation and secure family peace. [p. 251, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Negapatam, in Original Suit No. 4 of 1910.

FACTS of the case appear from the judgment.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *T. V. Gopalaswami Mudaliar*, for the Appellant—The Court below erred in holding that the suit is barred by limitation. Setting aside of the deed is not necessary. *Mata Din* v. *Ahmad Ali* (1). The release deed is invalid, as there has been an undervaluation of properties and as it is not beneficial to the minor. See *Mata Din* v. *Ahmad Ali* (1), *Sita Ram* v. *Amir Begam* (2), *Abdul Khadar* v. *Chidambaram Chettyar* (3), *Hyderman Kutti* v. *Syed Ali* (4); Ameer Ali on Muhammadan Law, Vol. II, 3rd Edition, page 590. The recital as to debts is manifestly fictitious. The 1st defendant designedly brought about revenue sales and purchased the properties himself and the trade also was carried on with family funds. All these items have to be brought into the hotchpot.

Messrs. *T. Narasimha Aiyangar*, *C. Pattabhirama Aiyangar* and *T. M. Vedantachariar*, for the Respondents.—The release deed is quite valid as being a family settlement. Similar release deeds were also taken from the other members of the family. All the deeds were taken in pursuance of a general purpose of settling family differences and disputes which had then become rife. See *In re Govind Pandurang Kamat* (5). Family settlements should be upheld and Courts should not scrutinize too closely transactions intended to secure family peace. Plaintiff has been guilty of laches and considerable inconvenience would result in re-opening matters. The release ought not, therefore, to be disturbed. 14 Halsbury's Laws of England, paragraph 1243. Further, the release had been acted upon and the plaintiff himself had received instalments of money payable by virtue of the mortgage-deed executed thereunder. If more has been given to one member, another has received less. The amount of debts has been accepted by the major member in his release. The compromise must be judged by what the parties thought was just and proper, and not by what the Court concludes to be the rights of the parties. *Muhammad Imam Ali Khan* v. *Husain Khan* (6), *Kali Dutt Jha* v. *Abdul Ali* (7), *Helan Dasi* v. *Durga Das Mundal* (8) and *Naylor* v. *Winch* (9).

JUDGMENT.

WALLIS, C. J.—This is in some respects an unsatisfactory case. The plaintiff on the 10th January 1910 instituted the present suit for a share of immoveable properties left by his deceased father in this Presidency, on the ground that he was not bound by a deed of release, Exhibit *Ia*, dated 6th July 1904, executed by his mother as his *de facto* guardian during his minority in favour of his elder half-brother, by which certain property of the alleged value of

(1) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I A. 49.

(2) 8 A. 324; A. W. N. (1886) 101.

(3) 3 Ind. Cas. 876; 32 M. 276; 5 M. L. T. 201.

(4) 15 Ind. Cas. 576; 23 M. L. J. 244; 12 M. L. T. 147; (1912) M. W. N. 889; 37 M. 514.

(5) 8 Ind. Cas. 632; 35 B. 75; 12 Bom. L. R. 936.

(6) 25 I. A. 161; 26 C. 81; 2 C. W. N. 737.

(7) 16 C. 627; 16 I. A. 96.

(8) 4 C. L. J. 323.

(9) 24 R. R. 227; 1 Sim. & S. 555; 2 L. J. (o. s.) Ch. 132; 57 E. R. 219.

Rs. 3,000 was assigned to them both in satisfaction of their 28 and 11 or 39 shares out of 176 shares in the property left by his deceased father, in addition to which it was also admitted in the oral evidence for the plaintiff that they had collected Rs. 400. According to a statement made by the plaintiff's mother, the 2nd defendant, in July 1901, Exhibit ?2, the plaintiff was then 13, and according to her statement in Exhibit I*a*, the release in dispute, he was 16 in July 1904. There is no reason to doubt these statements which agree and were made at the time, so that the plaintiff did not institute the present suit until five and a half years after the date of the release, and nearly five years after he attained majority. There is also no reason to doubt the evidence of the defendants that he himself received instalments of the mortgage for Rs. 1,000 which was executed by the 1st defendant as part of the consideration for the release. The fact that he has abstained from producing the mortgage-deed on which the payments would ordinarily be endorsed, is sufficient to warrant us in accepting the defence evidence on this point. Had it been necessary to set aside the release, the suit would have been barred, but it has been held by the Privy Council that a conveyance by a *de facto* guardian of a Mohammedan, which is not binding on the minor, does not require to be set aside by him after attaining majority [*Mata Din* v. *Ahmad Ali* (1) . In view of this decision no attempt has been made to support the judgment of the Subordinate Judge that the suit was barred as the release was not set aside within three years of attaining majority.

The defence relied upon is that the release was part of a family settlement, entered into for the purpose of quieting disputes and restoring peace in the family, and it is not disputed that if the settlement was a proper one, it would be binding on the plaintiff in spite of its having been entered into by the *de facto* guardian of the minor, because it would be clearly for his advantage. The case has also been complicated by the action of the plaintiff in disputing the legitimacy of the 1st defendant, and also the marriage of his father's third wife and the legitimacy of her son and five daughters, a course of conduct clearly prompted by an unscrupulous desire to deprive them of their shares. These allegations were put in the forefront of the plaint, and the result has been that the attention of the parties seems to have been very largely directed to these questions, and evidence as to the fairness or otherwise of the release, Exhibit *Ia*, is not as full as it might have been. We have, however, to deal with the case on the materials before us and the main question seems to be whether the share allotted to the plaintiff and his mother was a fair one, as there can be no doubt the circumstances were such as to call for a family settlement on fair lines The plaintiff's father had died in 1899 and there had been continuous disputes in the family till 1904. The 1st defendant, who had carried on business with the father at Rangoon and was appointed executor in his Will, effected a settlement with a son of the deceased by his third wife at Rangoon in January 1904 (Exhibit G). In July 1904 he made a settlement through arbitrators with the plaintiff and his mother and took from them the release deed, Exhibit *Ia*, and he made a similar settlement with the third wife and her four minor daughters and took from them the settlement Exhibit I*b*. In December of the same year he took a fresh release from the son of the third wife on the same terms as the previous one. All the releases recited that there were debts due by the deceased to the extent of Rs. 12,100 and this is to some extent confirmed by the Exhibits and the recitals in the Will of the deceased and no good ground is shown for questioning it. The valuation given in the release deeds is more open to suspicion. The total valuation given is Rs. 22,330, in respect of 52 acres odd in one village in Tanjore worth Rs. 6,000 or 8,000 including house, godown and cattle shed; 6·85 acres in another village worth Rs 800; house property worth Rs. 1,500; and 180 acres of wet and dry land at Rangoon worth Rs. 9,500 with buildings worth Rs. 1,500 and cattle Rs. 1,000, in all Rs. 22,330. Of the Rangoon properties 58·66 acres said to be worth Rs.3,200 and cattle worth Rs. 800 were assigned to the third wife's son under Exhibits G and I. As he was only entitled to 28 out of 176 shares, as against 28 to the 1st defendant, 39 (28 *plus* 11) to the plaintiff and his mother, 81 (5 *into* 14 *plus* 11) to the third wife and her five daughters, and as the property shown as

available for division was only worth Rs. 22,330 *less* Rs. 12,100 or Rs. 10,230, the assignment of the Rs. 4,000 to the third wife's son, who was entitled to less than one-sixth, was obviously unfair. On the other hand, the assignment of only Rs. 3,000 by Exhibit I (*b*) to the third wife and her four daughters in respect of at least 67 shares to which they were entitled out of 176, was greatly to their disadvantage. It appears to me, however, that in the present suit we are not concerned with them as they and their brother are not parties, and that all we have to see is whether the plaintiff and his mother were fairly dealt with in the allotment of properties alleged to be worth Rs. 3,000 by Exhibit I*a*, in addition to which the plaintiff's mother admits having collected Rs. 400. Now 39/176 is less than one-fourth and, therefore, the plaintiff and his mother had a fair share if the net estate amounted to Rs. 14,000. There is, however, evidence of serious undervaluation as to the Rangoon properties. The 58·62 acres of land in Rangoon, allotted under Exhibit I to the third wife's son, were only valued therein at Rs. 3,200 and the remaining 180 acres were only valued at Rs. 11,000 including cattle, etc., worth Rs. 1,000. Now the 1st defendant admits that two years later he sold the 180 acres in Rangoon for Rs. 18,000 and the oral evidence for the plaintiff is that they were sold for considerably more, which may well be the case as the 1st defendant has not produced copies of the registered sale-deeds. This certainly suggests that the valuation in favour of the 58·62 acres allotted to the third wife's son was entirely false. There is also a most suspicious circumstance that prior to 1904, the date of the alleged settlement, the 1st defendant allowed certain of the properties of the deceased to be sold for payment of revenue; and though there is no evidence he supplied the purchase-money, these properties appear to have been purchased by his friends and had come back to him by transfer from them before the date of the suit. Further, the evidence as to the alleged mediation under which the settlement was effected is meagre and unsatisfactory, and the 1st defendant has failed to produce the accounts of the deceased or to account for his failure to do so. In these circumstances I find it impossible to say that the settlement was one which has been shown to have been beneficial to the minor so as to justify his mother in entering into it as his *de facto* guardian, and I am of opinion it is not binding upon him and does not require to be set aside. In the present suit he only seeks to recover his share of properties in the hands of the 1st defendant with the exception of the Rangoon properties in the 1st defendant's possession, but he does not object to their being included in the account.

As regards the 3rd and 4th defendants, it is not shown that the properties in their possession belonged to the family, and the appeal as regards them must be dismissed with costs.

After considerable discussion we have decided that the proper course in the circumstances is to call for a finding on the following issues :—

1. What were the properties in the Madras Presidency left by the plaintiff's father which came into the possession of the 1st defendant?

2. What was the amount of the sale-proceeds of the Rangoon properties of the plaintiff's father actually realised by the 1st defendant ?

3. To what extent is the 1st defendant entitled to credit against the plaintiff in respect of family liabilities discharged by him up to date ?

4. To what extent are the plaintiff and the 1st defendant respectively accountable for mesne profits ?

Time for return of finding will be six months from the date of this order; and ten days will be allowed for objections.

Mr. Ramachandra Aiyar does not claim any share in the Rangoon properties as such against the 1st defendant but only against the sale-proceeds. Fresh evidence may be taken.

SESHAGIRI AIYAR, J.—This is a suit by a person who has attained majority, for a declaration that a deed of release executed by his mother during his minority is not binding upon him. The father died on the 11th January 1899. He left behind him three wives, a son by each of the three wives, and four daughters by the third wife. The 1st defendant in the case is the first wife's son. The 2nd defendant is the mother of the plaintiff. She executed Exhibit I*a* on the 6th July

1904 in favour of the 1st defendant, by which she relinquished for herself and on behalf of her son, the plaintiff, all claims to the property of her deceased husband in consideration of being given immoveable property of the value of Rs. 2,000 and cash Rs. 1,000. The plaintiff says that this release is not binding on him as it was entered into by a person who was not his legal guardian, and as its terms are inequitable and unjust. The 1st defendant pleads that the release was a *bona fide* settlement of the disputes among the members of the family, that no undue advantage was taken of the position of the 2nd defendant and that it is binding upon the plaintiff. He also pleads the bar of limitation. The Subordinate Judge upheld these contentions and dismissed the suit. The plaintiff has preferred this appeal.

The case has been complicated by the introduction of untrue averments by the plaintiff, and this has resulted in the minds of the parties and of the Court not being fully directed to the matter which was pressed in appeal, namely, that the release deed is not binding as being beyond the powers of the mother and as not being beneficial to the minor. In the plaint the plaintiff claimed seven-eighths share, on the ground that the 1st defendant was not a legitimate son as his mother was only a concubine of his father, and that the 1st defendant was not entitled to any share in his father's properties. He also pleaded that the third wife was not a married wife of his father and that the children of the third wife were equally disentitled to claim any rights in his father's properties. A great deal of evidence was directed towards ascertaining whether the first and third wives were married according to Muhammadan Law by the deceased father of the plaintiff. The Subordinate Judge came to the conclusion that they were legally married and that the children were legitimate. These findings are not contested in appeal. As regards limitation, the 1st respondent's Vakil rightly gave it up, as the question is concluded by the decision of the Privy Council in *Mata Din* v. *Ahmad Ali* (1), which is also authority for the proposition that it is not necessary for the plaintiff to seek to set aside the release deed,

The real issue which was argued in appeal is issue 2. It was framed in the Court below, mainly with reference to the contention that the properties taken by the 1st defendant and those given to the third wife's son and daughters should be restored in their entirety to the plaintiff as he was the only legitimate issue of his father. There are no doubt averments in paragraphs 24 and 25 of the plaint that the release deed was brought about by fraud and was inequitable. The plaintiff is very much to blame for having introduced false averments in his plaint and for letting in evidence to support them. However, we have to see whether the finding upon the second issue by the Subordinate Judge can be supported. Mr. Narasimha Aiyangar, who argued the case with much ability for the 1st respondent, has drawn attention to the circumstances which resulted in the execution of the release deed. After the death of the father in 1899 there were disputes among the members of the family. The 2nd defendant applied for succession certificate in 1901, Exhibit 32, in respect of her husband's property, ignoring the Will which had been executed by him, Exhibit 29. The 1st defendant also applied for a certificate in his own name. There were also disputes between the 1st defendant and the third wife's son, which led to criminal proceedings, regarding an iron trade. [See Exhibits A and A 1.] Suits were filed about this time for the debts due by the deceased father of the plaintiff. There were also sales for arrears of revenue in 1900 and 1901. Under these circumstances, Mr. Narasimha Aiyangar argues that the release deed in question was executed in order that there may be peace among the members of the family. Before Exhibit I*a* was executed by the 2nd defendant, the third wife's son, who was a major, had executed Exhibit G on the 20th February 1904 to the 1st defendant for himself and on behalf of the remaining members of the family, by which the executant obtained about 60 acres of land in Rangoon as his share of the family properties. The valuation put upon this property was Rs. 4,000. This was subsequently ratified. On the day that Exhibit I*a* was executed, the third wife, for herself and for her daughters, executed a similar release deed, Exhibit I*b*. It is contended that Exhibits G, I*a* and I*b* constitute a family arrangement and reliance

is placed upon *In re Govind Panduraing Kamat* (5) for this position. If the various documents already referred to were in pursuance of a general purpose of settling family affairs and of bringing peace among the members of the family, there can be no question that Exhibit I*a* would be one of a series of transactions by which the family arrangement was secured. I shall consider the question whether there was a real family arrangement later on.

It is undisputed law that a mother is not the *de jure* guardian of a minor under the Muhammadan Law. It is said that she was *de facto* guardian; in that capacity her powers of binding her son's interest are very limited. The Judicial Committee of the Privy Council in *Mata Din* v. *Ahmad Ali* (1) held that the acts of a guardian, if they are not for necessity or for the benefit of the minor, should not be upheld. The same principle was enunciated by Justice Mahmood in *Sita Ram* v. *Amir Begam* (2), and has been accepted as good law by the learned Chief Justice and Justice Abdur Rahim in *Abdul Khadar* v. *Chidambaram Chettyar* (3), where their Lordships point out: "In the Muhammadan, no less than in the English system of law, the State is especially charged with the care of the person and property of minors, and when the Muhammadan Law recognises the right of certain relatives to act as guardian, it does so on the assumption that the particular ties of relationship are a guarantee that such person would act for the benefit of the ward."

In a later case, *Hyderman Kutti* v. *Syed Ali* (4), Justice Abdur Rahim re-affirms the position taken in *Abdul Khadar* v. *Chidambaram Chettyar* (3) and after elaborately discussing the Muhammadan Law upon the point, says: "It seems to us to be quite clear from authoritative pronouncements of Muhammadan Jurists as well as upon the principles of Muhammadan Jurisprudence, that while the general rule is that the dealings with such a person (referring to a *de facto* guardian) do not *ipso facto* bind the minor, the law recognises certain exceptions to this rule. The exceptions are mainly based on the principles of Muhammadan Jurisprudence that 'necessity' is a valid ground for relaxing a strict rule of law."

Then he refers to the necessities of the minor and to the supply of funds for meeting them. The third exception to which the learned Judge refers is this: "Acts which are purely advantageous to the minor, such as accepting presents or gifts and keeping them for him; a power which may be exercised either by a *mootakit*, brother or uncle and also by the infant himself .....,the intention being only to open a door to the infant receiving benefactions of an advantageous nature."

The learned Judge's conclusion is that if a transaction entered into by a *de facto* guardian is for the benefit of the minor, it will be upheld. Mr. Ameer Ali in his well-known book on Muhammadan Law, Vol. II, Third Edition, page 590, thus summarises the position: "A mother is not a natural guardian..... ..... If she deals with their (*i.e.*, minors') estate without being specially authorized by the Judge or by the father, her acts should be treated as the acts of a *fazuli*. If they are to the *manifest* advantage of the children, they should be upheld; if not, they should be set aside".

It must, therefore, be taken as well established that unless a transaction on behalf of a minor is found to be to his manifest advantage or for necessity, it should not be upheld under the Muhammadan Law against the minor. The question in this case is, whether the transaction evidenced by Exhibit I*a* was for the manifest advantage of the plaintiff. I have very reluctantly come to the conclusion that it is not. I shall now refer to the arguments advanced before us to impeach the validity of this transaction; and although some of them have not been substantiated, I am of opinion that the interests of the minor have on the whole suffered by this release deed.

Mr. T. R. Ramachandra Aiyar contended that the recital regarding the extent of the debts due by the father mentioned in Exhibit I*a* was fictitious. The document says that there is a debt of Rs. 12,100 to be paid by the family in common out of the properties. It may be, as contended by the learned Vakil for the appellant, there is no strict proof of the existence of these debts and of the 1st defendant having really paid them. But this is, in a large measure, due to the introduction by his client of false

averments and of not having directed his attention to the real matters in dispute. One would have expected the plaintiff to have stated in the plaint explicitly that this large sum of Rs. 12,100 said to be due from his father was fictitious. There is not a word about the debts not being true in the plaint. On the other hand, we find that in the transaction between the third wife's son, who was himself a major, and the 1st defendant, entered into in February 1904 by Exhibit G, specific debts are mentioned as being due by the father. One of them is a debt of Rs. 7,000 due to one Vellian Chetty under a deed of mortgage. That mortgage-deed is now produced by the 1st defendant. It is said that this amount became payable during the lifetime of the father and that there is nothing to show that the debt was not paid by the father. Not a single question was put to the 1st defendant when he was in the witness box as to whether he paid the amount to Vellian Chetty, how much was so paid and when it was paid. The Will of the father, Exhibit 29, mentions the existence of debts, and when a major member of the family executes a release deed on that footing, it is *prima facie* evidence of the existence of the debts. Other payments made by the 1st defendant to the creditors of the family have been proved and I see no reason to think that the father was not indebted to the extent mentioned in Exhibit I*a*. Of course, the 1st defendant could have produced receipts showing the payments made by him and could have satisfied the Court from the accounts which he kept that these debts were really due from his father

His explanation for the non-production of the accounts is not very satisfactory; but I am not prepared to say on the evidence now before us that the entry of the sum of Rs. 12,100 as a debt due by the family is a fictitious one.

Mr. Ramachandra Aiyar's *second* argument is that the properties were grossly undervalued. I think there is force in this argument. In Rangoon there were about 240 acres of land; in British India, that is, in the Madras Presidency, there were 50 to 60 acres of *nanja* land. The value given in Exhibit I*a* of all these properties is Rs. 22,330. It was admitted by the 1st defendant in cross-examination that in 1906 he sold 180 acres of the Burma property for about Rs. 18,000. At that time the 3rd wife's son had been given about 60 acres for his share. There is no evidence that between July 1904 and 1906 the property had risen in value in Burma. Mr. Narasimha Aiyangar suggested that the Burma property as well as the properties in British India were undervalued for the purpose of evading the stamp and registration fees. I am not satisfied that that was the real motive. If that were so, and if the plaintiff had been given property worth Rs. 3,000 and not property worth Rs. 2,000 and cash Rs. 1,000, the transaction might be regarded as honest, but that is not what has happened in this case. On the whole, I am inclined to think that at least the Burma properties were very much undervalued.

Another ground taken by Mr. Ramachandra Aiyar is that the 1st defendant purposely allowed the family properties to be brought to sale for arrears of revenue and had them purchased by his father-in-law and by a friend of his; and that ultimately he got them back, thereby showing that he was not acting honestly in dealing with the other members of the family. There is no direct evidence that the original purchase-money for the properties covered by Exhibits V and V*b* came from the 1st defendant. They were first mortgaged along with some other properties belonging to his father-in-law to a third party; and finally they came into the 1st defendant's possession The transactions look very suspicious and there is reason to believe that the 1st defendant allowed these lands to be sold for arrears of revenue with the intention of defeating the rights of the other members of the family and with the object of ultimately securing them for himself.

As regards the *next* item of complaint, I am not satisfied that the iron trade was carried on by the 1st defendant and his father-in-law with the aid of any family funds and that its exclusion from the properties belonging to the family was fraudulent.

One *other* circumstance might be mentioned, Exhibit G, the release deed from the

third wife's son to the first defendant, secures to the former property worth Rs. 4,000. He was only entitled to 28 out of 176 shares, whereas the plaintiff and his mother were entitled to 39 out of 176 shares. On the face of it, it looks as if this major member of the family was given a larger share in the family property than the plaintiff and his mother. It is no answer to this grievance to point out that the third wife's daughters got a smaller share than they were entitled to. That only shows that in cases where the major members were concerned every possible advantage was secured to them as against the minor members of the family. *Lastly*, it may be mentioned that accepting the face value given in the release deed to be correct, the plaintiff and his mother were entitled for their 39 shares to nearly Rs. 200 more than what was actually allotted to them.

The circumstances detailed by me show that equality of rights was not secured to the various members of the family. Mr. Narasimha Aiyangar argued that the Courts should incline in favour of upholding family settlements and should not scrutinize too closely transactions which resulted in securing family peace. I am not satisfied that there was really any family settlement in this case. The evidence of defendant's third witness is to the effect that about ten persons belonging to the village took part in mediating between the parties. Only two of them have been called and no reason has been shown why the other persons said to have been present have not been cited to show the nature of the enquiry they held; the evidence of the two alleged mediators does not impress me as being true. The defendant's 5th witness says that he acted on behalf of the plaintiff and his mother. He admits: "I did not examine the accounts. Two small account books were produced before us. Some of the *panchayatdars* looked into them. They did not tell me what was mentioned in them. A list was prepared of the debts and outstandings. The properties were valued. I don't know what the debts were. I don't know what the outstandings were either. I don't know if the account books referred to the Rangoon properties. They said there was no income from the properties," and so on. If this man was looking after the interests of the plaintiff in settling disputes, it is clear that the interests of the plaintiff and his mother were in no way safeguarded. The 3rd witness for the defendant gives very general evidence and does not descend to particulars. He says that the settlement lasted five or six months; and yet not a scrap of paper has been produced to show what enquiries were made and who took part in them. It is admitted that no written reference was made to mediate, nor was any written award passed. The evidence relating to the settlement of the disputes among the members of the family by mediators does not convince me as reliable, and I am not prepared to act on it.

What has led me to hesitate a great deal in giving relief to the plaintiff is the fact that admittedly for three years after he attained majority he took no steps to question the transaction entered into by the 2nd defendant. There is evidence that he did receive a portion of the consideration for the release deed. I do not believe his evidence to the contrary. I am also inclined to agree with the Subordinate Judge that he has understated his age and that he was really sixteen at the time of the release deed. The result of this inaction on the part of the plaintiff and of his receiving the money due under the deed has been to bring into existence transactions with third parties and acts by the 1st defendant which he would not have undertaken had the plaintiff repudiated the arrangement earlier. Mr. Narasimha Aiyangar laid stress upon this aspect of the case and cited 14 Halsbury's Laws of England, Section 1243, in support of his contention that the plaintiff was estopped from seeking to set aside Exhibit Ia. The law is thus summarised there: "The right to relief against the provisions of a family arrangement, and to set aside or vary its terms may be lost by acquiescence; delay for a long space of time; delay causing the remedy not to be mutual; the acquisition of rights by third parties, who will not be disturbed; or by any other means by which the *status quo ante* cannot be restored." Some of the infirmatory circumstances mentioned above have been alleged to exist

in this case. However, the evidence before us does not satisfy me that it is impossible to restore the *status quo ante* : a great deal of inconvenience will be caused to the 1st defendant by re-opening the rights of the parties: but if he has not acted above board, he cannot be heard to complain that the plaintiff should have acted more promptly. The maxim that delay will defeat equities should not be applied to a case where want of fair dealing and inequality have been proved to exist. The appropriate relief in this case might be obtained from the 1st defendant without interfering with the rights of third parties: I shall now refer to the tests which have to be applied in refusing to give effect to transactions entered into on behalf of infants. "In forming an agreement of compromise by way of family arrangement there must be a full disclosure of all material circumstances in the knowledge of the parties thereto and it is immaterial whether information withheld be asked for by other contracting parties or not." [See *Maynard* v. *Eaton* (10).]

In this case, I have come to the conclusion that the 1st defendant has not made a full disclosure of the family properties and of their true value.

Another equally well-recognized proposition is that all the members of the family should have been treated impartially [per Mookerjee, J., in *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (11)]. I have pointed out that the third wife's son received more than what he was entitled to, and that the plaintiff and the third wife's daughters suffered by this preference.

The third proposition is : "If parties are not on equal terms and one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties." *Stapilton* v. *Stapilton* (12). The 1st defendant claims to be the executor under his father's Will and it was incumbent on him to give a full account of the estate and effects of his father : although I have held that it is not proved that there were not debts of the father to the extent of Rs. 12,000, I am unable to say that he has given a true and full account of that indebtedness and of his having discharged them.

A family arrangement will not bind minors if it is in any way unconscionable. I have come to the conclusion that in regard to the revenue sales the first defendant did not act honestly. Therefore, the exclusion of those properties resulted in an unconscionable bargain in his favour to the prejudice of the plaintiff. The release deed is, therefore, vitiated by the considerations above adverted to.

A large number of authorities were quoted by Mr. Narasimha Aiyangar to show that a compromise should be adjudged, not by what the Court concludes to be the rights of the parties, but by what was regarded as just and proper by those who entered into this transaction at the time. I accept this position with this proviso—that the transaction itself should have been entered into honestly and with a view to secure full justice to the various parties to the instrument. The cases [*Muhammad Imam Ali Khan* v. *Husain Khan* (6); *Kali Dutt Jha* v. *Abdul Ali* (7); *Helan Dasi* v. *Durga Das Mundal* (8) and *Naylor* v. *Winch* (9)] all presuppose that, although there have been mistakes in calculation or in the ascertainment of rights, there was no undue advantage taken by one of the members of the family and that there was an honest desire to put an end to litigation and to secure family peace. According to my view of the facts of the case, that was not the object which the 1st defendant intended to secure by entering into these release deeds. I, therefore, hold that the plaintiff has established that the release deed entered into by his mother on his behalf is not binding on him.

I agree with the order proposed by the learned Chief Justice. I only wish to add that the conclusion I have come to will not bind parties in the trial of the issues now sent down.

[*N.B.*—In compliance with the order contained in the above judgment, the Subordinate

(10) (1874) 9 Ch. A. 414; 43 L. J. Ch. 641; 30 L. T. 241; 22 W. R. 457.
(11) 3 Ind Cas. 247; 10 C. L. J. 503.
(12) 1 W. & T. L. C. 234 at p. 248.

Judge of Negapatam submitted findings and after reversing the decree of the lower Court a preliminary decree for partition was passed in plaintiff's favour by the High Court, the case being remanded to the lower Court for the passing of the final decree.]

Appeal allowed; Suit remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1752 OF 1914.

March 28, 1916.

Present:—Mr. Justice Walsh.

BENI MADHO—DEFENDANT—APPELLANT

versus

BASANTO KUNBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 4—Pleadings—Fraud, allegation of, clear statement of, necessity of—Mortgage—Redemption—Revenue Court proceedings—Ejectment of mortgagor, fraudulent—Suit for redemption, maintainability of.

Where fraud is alleged and relied upon, it must, before it can be proved, be clearly stated in accordance with the provisions of Order VI, rule 4, of the Civil Procedure Code, 1908, but the rule does not apply where the party aggrieved raises no objection and fights the case at the original hearing as though the pleadings were in proper form. [p. 253, col. 1.]

In a suit for redemption by the mortgagors the mortgagee pleaded that the mortgage had ceased to exist, because previous to this the *zamindar*, having obtained a decree for arrears of rent, had in execution proceedings under that decree obtained ejectment of the mortgagors in the Revenue Court and that the mortgage having terminated the mortgagee-defendant had become a tenant under a *patta*. It was, however, found that the Revenue Court proceedings were all collusive and fraudulent:

Held, that the mortgagors were entitled to a decree of redemption without taking formal steps to get rid of the Revenue Court proceedings which were found to have no legal validity. [p. 254, co. 1.]

Second appeal from the decision of the District Judge, Benares, dated the 15th July 1914.

Dr. *S. M. Sulaiman*, for the Appellant.

Mr. *Peary Lal Banerji* (with him Mr. *Satya Chandra Mukerji*,) for the Respondents.

JUDGMENT.—I have felt some difficulty about this case, especially the last point urged on behalf of the appellant, namely, the necessity for formal proceedings to set aside the decree for arrears of rent as against the *zamindar* by the plaintiffs in order to enable them to maintain this suit. The argument, I think, may be accurately stated in this way: inasmuch as the defendant claims title from and through the *zamindar*, the plaintiffs in order to succeed must get rid of that which conferred upon the *zamindar* the right to grant the *patta* which he granted to the defendant-appellant before me. On the other hand, the respondents' argument is that the decree in question is only a decree for arrears of rent. It is not necessary for them to have that set aside if they can show that it was fraudulently obtained as against them. The subsequent proceedings resulting in the actual ejectment, if there was an actual ejectment, are invalid in the eyes of the law and, therefore, cannot be relied upon. On the whole, I think, that answer is an effective answer. The substance of the matter is this. The suit is one brought by two persons, who were mortgagors, for redemption against the mortgagee and a substantial controversy is raised by the defence, namely, that the mortgage has ceased to exist because in 1902 the *zamindar* having obtained a decree for arrears of rent and having in execution proceedings under that decree obtained ejectment of the plaintiffs in the Revenue Court, the mortgage has been terminated and that at a subsequent date the defendant has become a tenant of the *zamindar* in the ordinary way under a *patta*. Now it is admitted by Mr. Banerji for the respondents that that defence if established is a good answer to the plaintiffs' claim and the authority cited to me *Kehar* v. *Hasan Ali Khan* (1), would appear to show that that is so. But the Court below, to put it in compendious language, has found that the whole of these proceedings were a swindle, that the plaintiffs-mortgagors were minors, that their guardian was their mother who was blind, that the *zamindar's* agent was the mortgagee's uncle, that the proceedings for arrears of rent which the mortgagee was responsible to pay related to only one out of three holdings and that they were mere conduit pipes for arriving at an *ex parte* decree which could entitle the *zamindar* to eject the mortgagors and put an end to the mortgage transaction. In answer to the question why the plaintiffs, who did not bring

(1) 2 A. L. J. 593.

this suit until ten years after attaining their majority (or of one of them), were guilty of delay, it is said that the plaintiffs themselves did not discover the real facts until the written statement was put in by the defendant. The points argued before me were two. The whole of the case alleging collusion and fraud which the plaintiffs ultimately relied upon has been established in fact in the opinion of both the lower Courts, and it is admitted on behalf of the appellant that if that decision stands his defence must fail, just as it is admitted on behalf of the respondents that if it does not the suit must fail, subject to this that the appellant further contends that in any case the *zamindar* ought to be a party to the suit. So far as fraud is concerned, it is quite clear that the plaintiffs did not institute their proceedings upon that basis in the first instance; but it has now been made clear to me that when they got into Court they did give evidence which, unless fraud and collusion were relied upon, would have been inadmissible. I cannot do better than quote my own language in the case reported as *Lakhrani Kuar* v. *Dhanraj Singh* (2). The language used there appears to me to fit in precisely with the facts of this case. So far as this allegation of fraud and collusion is concerned, the defendant not only did not object to its admission on the ground that it was not contained in the pleadings, but actually met it by calling evidence of his own. Indeed a part of the evidence upon which the findings of the Courts below were ultimately based came from one of his own witnesses, namely, the *patwari*. Under these circumstances, although the general rule, no doubt, is that where fraud is alleged and relied upon it must, before it can be proved, be clearly stated in accordance with the provisions of Order VI, rule 4, the rule does not apply where the party aggrieved raises no objection and fights the case at the original hearing as though the pleadings were in proper from.

The *second* point relied upon is this, that the plaintiffs cannot succeed in this suit without making the *zamindar* a party. I think this is the same point in another form that they must get the decree set aside. There, no doubt, is considerable force in this contention. It does seem at first sight rather a large order, inasmuch as the defendant's title rests upon the status of the *zamindar* or his capacity in the matter of granting *patta* which could only be derived through some proceedings against the mortgagors for ejectment, that while these proceedings still stand the plaintiff can notwithstanding obtain redemption without going through the form of getting them set aside. I think the answer to it is also two-fold. On the one hand, the plaintiffs are not really seeking to set the decree aside, nor is it necessary for them to do so. They are bringing an action pure and simple for redemption. They are relying upon their rights under the mortgage-deed as mortgagors in a transaction which they say has never lawfully been terminated, and when the defendant refers to certain proceedings which he says have terminated the mortgage transaction, the mortgagors merely reply "so far as you (defendant) are concerned, these proceedings do not help you and as against you do not stand in our way because they were obtained by your own collusion and fraud," and it is an invariable principle of equity that a party cannot rely upon his own fraud. I think there is also another answer. The decree has not been set aside and the judgment in this suit does not purport to have set it aside. It was a decree, as I understand it, of a Revenue Court for recovery of arrears of rent. But if the decree still stands and is not barred by the Statute of Limitation, it is open to the *zamindar*, if he still sees fit, to take proceedings under that decree and challenge the decision as to whether or not, in the *first* place, his agent was fraudulent and he, in the *second* place, is or is not bound by the fraud of his agent. It may be said in answer to that, that so far as the *zamindar* is concerned the decree was satisfied by ejectment; but so far as this case is concerned the finding of fact on the admission of the defendant's own witness is that there was in fact no ejectment and no real change of possession. On the whole it seems to me that the plaintiffs are entitled to succeed just as a man is entitled who sues for possession on the strength of his own title to succeed, although there is some invalid document standing in his way to recover possession, without taking steps to get that document formally removed by the decree of a competent Court. In this case the plaintiffs' allegation of fraud and collusion being in fact established, they have a right to obtain a decree without taking formal

(2) 32 Ind. Cas. 634; 14 A. L. J. 102 at p. 107.

steps to get rid of the proceedings relied upon by the defendant which, according to the findings of the Courts below, have no legal validity. If this view be correct it was open to the lower Courts to consider the issues of fact. Their findings are conclusive in the matter and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL SUIT No. 90 OF 1912.

February 18, 1916.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

PEMMARAJU VENKAYYA GARU (DIED) AND ANOTHER—PLAINTIFF AND LEGAL REPRESENTATIVE—RESPONDENTS.

Limitation Act (IX of 1908), s. 19, Sch. I, Arts. 115, 116—Lease—Non-delivery of portion of demised premises—Claim for damages—Cause of action—Limitation—Covenant for quiet enjoyment—Transfer of Property Act (IV of 1882), s. 108 (b)—Grants by Crown, construction of—Continuing breach—Master and servant—Admission of legal liability, whether Tahsildar or Collector can make on behalf of Government.

An action by a lessee for damages caused by the lessor's failure to deliver to him a portion of the demised premises should be brought within the period prescribed by Article 115 or 116 of Schedule I of the Limitation Act, commencing from the time when the lessee became entitled to possession under the terms of the contract. [p. 262, col. 2; p. 258, cols. 1 & 2.]

Such a contract is broken completely as soon as the lessor declines or is unable to put the lessee in possession, and the cause of action for the plaintiffs' suit arises on the date of such breach, whether the suit is construed as one for breach of a covenant to give possession or of one for quiet enjoyment. [p. 258, cols. 1 & 2; p. 260, col. 2.]

Though the provisions of the Transfer of Property Act do not apply to Crown grants, the principles laid down in section 108 (*b*) of the Act may be referred to for construing them. [p. 257, col. 2; p. 260, col. 2.]

A lessee was entitled under a lease, dated March 1896, to get possession of 777 acres of land. On 11th March 1903. He sued the lessor for damages for breach of covenant for quiet enjoyment in respect of 109 acres, an area of which he failed to get possession owing to adverse title set up by a third person. The refusal on the part of the lessor was communicated to him on 2nd July 1896 and he brought a suit for damages on 11th March 1903:

Held, that the obligation to put the lessee in possession of the property was broken as regards the 109 acres in July 1896, that the breach, so far as concerned the land in dispute, was not a continuing one, but was complete and final at the date when possession was demanded and refused, and that the suit was, therefore, barred under Article 116, Schedule I of Limitation Act. [p. 258, cols. 1 & 2; p. 260, col. 2.]

Per *Coutts Trotter, J.*—The nature of the remedy available to a tenant under the covenant or contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous or not is this: If the plaintiff sues in damages, can he only sue for the damage actually accrued up to the date of suit, or may he sue for the whole of the damages accrued and prospective, that the breach will cause to him. In the former case the breach is continuing, in the latter it is single and final. [p. 258, col. 2.]

The failure on the part of the lessor to give possession of the demised lands to his lessee goes to the very root of the contract, and is so fundamental a breach of it as to entitle the lessee to treat that breach as final and bring an action forthwith for the whole of his prospective damages. [p. 258, col. 2.]

Holder v. *Taylor*, (1613) Hob. 12; 80 E. R. 163; *Coe* v. *Clay*, (1829) 5 Bing. 440; 30 R. R. 699; 3 Moo. & P. 57; 7 L. J. C. P. (o. s.) 162; 130 E. R. 1131; *Jinks* v. *Edwards*, (1856) 11 Ex. 775; 4 W. R. 303; 105 R. R. 787; *Mostyn* v. *West Mostyn Coal and Iron Co.*, (1876) 1 C. P. D. 145; 45 L. J. C. P. 401 34 L. T. 325; 24 W. R. 401; *Markham* v. *Paget*, (1908) 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605; 24 T. L. R. 426; *Bandy* v. *Cartwright*, (1853) 8 Ex. 913; 1 W. R. 415; 91 R. R. 836; 22 L. J. Exch. 285; *Wallis* v. *Hands*, (1893) 2 Ch. 75 at p. 85; 62 L. J. Ch. 585; 3 R. 351; 68 L. T. 428; 41 W. R. 471; *Cloake* v. *Hooper*, (1873) Freem. (K. B.) 122; 3 Keb. 162; 89 E. R. 90; *Baynes and Co.* v. *Lloyd and Sons*, (1895 2 Q. B. 610; 14 R. 678; 73 L.T. 250; 44 W.R. 328; 59 J. P. 710; 64 L. J. Q. B. 787. *Drury* v. *Macnamara*, (1855) 5 El. & Bl. 612; 25 L. J. Q. B. 5; 1 Jur. (N. S.) 1163; 4 W. R. 40; 119 E. R. 608; 26 L. T. (o. s.) 74; 103 R. R. 647; *Turner* v. *Moon*, (1901) 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237; *Ludwell* v. *Newnham*, (1795) 6 Term. Rep. 458; 3 R. R. 231; 101 E. R. 647; *Ardesir* v. *Vajesing*, 25 B. 593, 3 Bom. L. R. 190, followed.

Obiter.—A breach of a covenant for title is not a continuing breach. [p. 261, col. 1; p. 258, col. 2.]

Semble.—It is extremely doubtful if a Tahsildar or a Collector is competent to make admissions of legal liability on behalf of Government within the meaning of section 19 of the Limitation Act. [p. 259, col. 2.]

Appeal against the decree of the District Court of Godavari, in Original Suit No. 13 of 1903.

FACTS of the case are set forth in the judgment of Mr. Justice Coutts Trotter.

The judgment of the District Judge so far as is material ran thus:—

"The question for consideration is, whether the suit, instituted as it was on the 11th March 1903, is barred under Article 116 of the Indian Limitation Act. Under Article 116 the six years' period of limitation would

begin to run when the contract is broken or, where the breach is continuing, when it ceases. Under the lease, Exhibit A, the defendant was bound to have put plaintiff in possession of 109 acres and 30 cents in question. Section 108 of the Transfer of Property Act provides: 'The lessor shall be deemed to contract with the lessee, that if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.' And 'the lessor is bound on the lessee's request to put him in possession of the property.' The lessee may make request to be put in possession of the property any moment during the time limited by the lease. The breach of the covenant for quiet enjoyment is, in my opinion, a continuing breach, and such breach, in the present case, ceased only on the expiry of the term, that is, at the end of *Fasli* 1309. The suit having been instituted within six years from the expiry of the term, I find it is not barred by limitation. I may refer to the case reported as *Raju Balu* v. *Krishnarav Ramchandra* (1) as bearing on the point to a certain extent and also to the case of *Imdad Ali* v. *Nijabat Ali* (2). In *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (3) the question whether the breach could be deemed to be a continuing breach was not considered, as it was unnecessary to do so in the circumstances of that case."

Mr. *P. R. Grant*, Government Pleader, for the Appellant.—The Subordinate Judge is wrong in holding that the suit is not barred by limitation. The covenant embodied in section 108, clause (*b*), of the Transfer of Property Act does not at all throw a continuing obligation on the lessor and the breach of the covenant occurs once for all on the failure of the lessor to deliver possession. As regards clause (*c*) of the section, the suit cannot be regarded as having been based on it. For no suit can be brought on a covenant for quiet enjoyment unless the lessee has been let into possession [*Wallis* v. *Hands* (4), *Turner* v. *Moon* (5), *Ardesir* v. *Vajesing* (6), *Tulsiram* v. *Murlidhar* (7).] In my view the breach here is not a continuing one. *Vide* Shephard on Limitation, page 408, and Mitra on Limitation, page 304, for the nature of continuing breaches.

Mr. *T. Prakasam*, for the Respondents.—In this case there has not been complete failure to deliver possession. Failure is with regard to a portion only. Therefore, the cases quoted by the other side do not apply.

Failure to obtain possession of a part of land leased is equivalent to eviction from that part. *Imambandi Begum* v. *Kamleswari Pershad* (8).

Where a third party is in possession action on the covenant for quiet enjoyment lies. [*Vide Cloake* v. *Hooper* (9), *Ludwell* v. *Newman* (10), *Holder* v. *Taylor* (11). *Cf.* also *Hawkes* v. *Orton* (12) and *Lock* v. *Furze* (13).] The same doctrine is prevalent in America also. *Vide* Rawle on Covenants for Title, 5th Edition, sections 138, 139.

Even *interesse termini* gives a right of suit; *vide* Foa, pages 295 and 139, where he says that the decision in *Wallis* v. *Hands* (4) is wrong being not borne out by authorities. *Vide* also *Coe* v. *Clay* (14), *Jinks* v. *Edwards* (15), *Lock* v. *Furze* (13), *Smart* v. *Jones* (16), *Milch* v. *Coburn* (17); Halsbury's Laws of England, Vol. XVIII, page 529, paragraph 1034; Woodfall on Landlord and Tenant.

(1) 2 B. 273 at pp. 292, 293.
(2) 6 A. 457; A. W. N. (1884) 188.
(3) 25 M. 587; 12 M. L. J. 249.
(4) (1893) 2 Ch. 75 at p. 85; 62 L. J. Ch. 583; 3 R. 351; 68 L. T. 428; 41 W. R. 471.
(5) (1901) 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237.
(6) 25 B. 593; 3 Bom. L. R. 190.
(7) 26 B. 750 at p. 754; 4 Bom. L. R. 571.
(8) 21 C. 1005 at p. 1016 (P. C.); 21 I. A. 118.
(9) (1673) Freem. (K. B.) 122; 3 Keb. 162; 89 E. R. 90.
(10) (1795) 6 Term. Rep. 458; 3 R. R. 231; 101 E. R. 647.
(11) (1613) Hob. 12; 80 E. R. 163.
(12) (1836) 5 A. & El. 367; 6 N. & M. 842; 111 E. R. 1204; 44 R. R. 445.
(13) (1866) 1 C. P. 441; 1 H. & R. 397; 35 L. J. C. P. 141; 148 R. R. 724; 15 L. T. (N. S.) 161; 14 W. R. 403.
(14) (1829) 5 Bing. 440; 30 R. R. 699; 3 Moo. & P. 57; 7 L. J. C. P. (O. S.) 162; 130 E. R. 1131.
(15) (1856) 11 Ex. 775; 4 W. R. 303; 105 R. R. 787.
(16) (1864) 15 C. B. (N. S.) 717; 33 L. J. C. P. 154; 12 W. R. 430; 143 E. R. 966; 10 Jur. (N. S.) 678; 10 L. T. 271; 137 R. R. 733.
(17) (1911) 27 T. L. R. 372; 55 S. J. 441.

The covenant for quiet enjoyment gives rise to a continuing breach—*Leech* v. *Schweder* (18), *Spoor* v. *Green* (19), *Lever* v. *Koffler* (20), *Manchester Brewery Co.* v. *Coom's* (21), *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (3); section 105, Transfer of Property Act; Halsbury's Laws of England, Vol. XXVIII, page 379.

Covenant for quiet enjoyment includes covenant for possession. Section 105, Transfer of Property Act, section 108, clause (*c*), Halsbury's Laws of England, Volume XVIII, page 527, Note (*t*), *Leech* v. *Schweder* (18), *Potts* v. *Smith* (22), *Davis* v. *Town Properties Investment Coporation Ltd.* (23), etc., were relied upon.

Even under clause (*b*) the lessor is bound to deliver possession *at the request* of the lessee. Therefore, the breach does not occur by the mere failure as in the case of a covenant for title in a sale. There is a continuing obligation on the part of the lessor to put the lessee in possession at every moment during the subsistence of the lease. The test is whether the lessee is not entitled to sue for specific performance as regards the unexpired portion of the lease. So long as he has such a right there is an obligation and the breach must be continuing. *Spoor* v. *Green* (19).

Even if it is considered that the breach is not continuing and the suit must be brought within 6 years of the failure of the lessor to deliver possession, the letter of the Collector, dated 13th February 1898, operates as an acknowledgment of the liability for damages on the part of the Government and consequently the limitation is saved. As regards the question whether that letter operates as a valid acknowledgment—*vide Sukhamoni Chowdhrani* v. *Ishun Chunder Roy* (24), *Haji Ajam* v. *Bombay and Persia S. N. Co.* (25), *Kadri Pakirappa* v. *Manki Husan Saheb* (26), *Janga Venkatareddy* v. *Jamal Ahmed Saheb* (27), *Manirum Seth* v. *Seth Rupchand* (28), which lay down that acknowledgment need not specify every legal consequence of the thing acknowledged.

JUDGMENT.

COUTTS TROTTER, J.—This is an appeal by the Secretary of State for India in Council against a judgment of the District Judge of Godavari awarding to the plaintiff a sum of Rs. 14,000 by way of damages. The facts of the case are comparatively simple, though the questions for determination are complex and difficult. The plaintiff in March 1896 acquired from the Collector of the Godavari District, acting as agent for the Government, a *patta*, a lease of a piece of land called the Sidhantam *Lanka* at an annual *kist* of Rs. 6,010 for a period of five years. These *lankas* are islands formed in the bed of the river Godavari by the silting up of solid matters brought down by its waters. They are extremely fertile and valuable for the purpose of cultivation, but their configuration and consequently their size is constantly varying owing to the action of the river; and it is often extremely difficult to delineate the exact boundaries of a particular *lanka* at any given time. The *patta* purported to convey the Sidhantam *Lanka*, defining its "probable extent" as 777 acres 64 cents. The plaintiff entered into the possession of the *lanka*, but found that 109 acres out of the 777 covered by the *patta* were in the possession of the *Zamindar* of Gopalapuram, who contended that that portion of the land did not belong to the Sidhantam *Lanka* at all but to his own *lanka* of Gopalapuram. The plaintiff complained to the Government, and a prolonged dispute ensued between the Government and the *zamindar*

(18) (1874) 9 Ch. 463; 43 L. J. Ch. 487; 30 L. T. 586; 22 W. R. 633.
(19) (1874) 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.
(20) (1901) 1 Ch. 543; 70 L. J. Ch. 395; 84 L. T. 584; 49 W. R. 506.
(21) (1901) 2 Ch. 608; 70 L. J. Ch. 814.
(22) (1868) 6 Eq. 311 at p. 317; 38 L. J. Ch. 58; 18 L. T. 629; 16 W. R 891.
(23) (1903) 1 Ch. 797; 72 L. J. Ch. 389; 51 W. R. 417; 88 L. T. 665.
(24) 25 C. 844; 25 I. A. 95; 2 C. W. N. 402.
(25) 26 B. 562; 4 Bom. L. R. 447.
(26) 3 Ind. Cas. 19; 19 M. L. J. 650; 6 M. L. T. 155.
(27) 29 Ind. Cas. 394; 18 M. L. T. 364; (1915) M. W. N. 422; 29 M. L. J. 122.
(28) 33 C. 1047; 33 I. A. 165; 10 C. W. N. 874; 4 C. L. J. 94; 8 Bom. L. R. 501; 3 A. L. J. 525; 1 M. L. T. 199; 16 M. L. J. 300; 2 N. L. R. 130.

as to which of them really was entitled to the 109 acres. Into the merits of that dispute it is unnecessary to go. But so far as the plaintiff is concerned, the outcome to him was that he never at any time during the term of his *patta* got possession of any portion of the disputed area. In one *fasli*, corresponding to the year 1895, it appears that an order was passed by the Collector remitting a third of the rent for that *fasli* in respect of the 109 acres; and this becomes material in considering a subsidiary question raised in this appeal which will be dealt with in its place. The plaintiff instituted the suit claiming damages against the Government on the 11th March 1903, more than 6 years from the date of his *patta* and from the date, *viz.*, the 2nd July 1896, when he demanded possession from the Government and failed to obtain it.

The defence putforward by the Government in their written statement was that the area given in the *patta* was only an approximate and rough estimate, and that all that the plaintiff was entitled to was that which should prove in fact to be the Sidhantam *Lanka* theretofore owned by Government, that he took that which the Government had and no more, and that if part of the land which the parties supposed to constitute the Sidhantam *Lanka* should prove not to be part of it, he had no remedy.

At the first hearing in the District Court before the District Judge, Mr. Hamnett, this contention prevailed. But on appeal to this Court it was upset and it was held that what was leased to the plaintiff included the 109 acres claimed by the *Zemindar* of Gopalapuram, and that he was entitled in law to pursue any remedy in damages which that finding might entitle him to. At the same time Government was allowed by the learned Judges to take the point of limitation, which had not been raised by them at the first hearing. The case, accordingly, went back to the District Court, and the then District Judge, Mr. Parthasarathy Iyengar, dealt with the two issues of limitation and of the quantum of damages, and he decided both in favour of the plaintiff. The Government have appealed from that decision, and the only question that we are called upon to decide relates to their plea of limitation. Under that plea there are two questions for decision: *First*, whether the plaintiff's cause of action arose more than six years before the suit was brought; and *secondly*, whether if it did, there has been an acknowledgment sufficient to take the case out of the Statute. It was suggested by the learned Government Pleader that in order to have the benefit of the latter contention, the plaintiff should have set it up either by amending his plaint, or putting in a further statement in the nature of a reply, alleging the acknowledgment and specifying the document or documents containing it. Having regard to the circumstances in which Government was allowed to avail itself of the plea of limitation, we are not disposed to give effect to the suggestion and are prepared to treat the plaint as amended by the addition of the necessary averments. Indeed, on our intimation to that effect during the course of the argument, the learned Government Pleader very properly did not press the point.

To determine the *first* point as to whether the plaintiff's case is *prima facie* barred by limitation, it is necessary to see what is the exact nature of the plaintiff's cause of action. In the course of an interesting argument in which I received the greatest assistance from both the learned Counsel, a great many authorities were referred to, and the history of the various covenants suggested to be applicable to the case to some extent investigated. The Transfer of Property Act does not apply to Crown grants but section 108 of that Act sets out in a convenient form the implied contracts usually subsisting from lessor to lessee as follows:—"(*b*) The lessor is bound on the lessee's request to put him in possession of the property; (*c*) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption." The latter of these implied contracts corresponds to the familiar covenant for quiet enjoyment of English Law. Into the history of the former I will enquire presently. It is quite clear

that the obligation to put the lessee in possession of the property was broken *quoad* the 109 acres in dispute in July 1906, and that that cause of action which the plaintiff undoubtedly possessed is barred by limitation. But it is argued on his behalf that he has a separate remedy in respect of the same failure to put him in possession under the contract for quiet enjoyment: It is argued that the contract for quiet enjoyment subsists throughout the lease, and that its breach is a continuing one, the remedy for which was available to the plaintiff at any time during the continuance of his term. If this contention is sound, then the plaintiff's suit is not barred.

The covenant for quiet enjoyment of English Law was a covenant appropriate to feoffments and conveyances of the fee simple in land and was naturally expressed or implied when leases, historically a much later method of dealing with real estate, became usual. Another usual and necessary covenant in conveyances of the fee simple was the covenant for title, whereby the settlor or vendor warranted to his alienee that he had a good title to the land which he was purporting to convey. To leases which conveyed only a chattel interest in land the covenant was inappropriate. All that the lessee could get or demand was possession for the stipulated period, and so long as he got that, not merely was the exact nature of his lessor's title no concern of his, but it has always been a settled principle of English Law, that he was estopped from denying or questioning it in any way. At the same time it was essential that he should be able to enforce the right to possession which the instrument of lease purported to confer upon him, and, accordingly, it was held as early as *Holder* v. *Taylor* (11) that the operative word *demisi* in a lease imported a covenant to put the lessee in possession. The point was there taken that as the lessee had never had possession and, therefore, had only what the English Law called an *interesse termini*, he could not sue on the covenant. The Court overruled the objection and held that he could sue on this implied covenant to put him in possession involved in the word *demisi*, and the Court proceeds to make the observation: "But if it were an express covenant for quiet enjoying, then perhaps it were otherwise." The main doctrine of *Holder* v. *Taylor* (11) was re-affirmed in later cases. See (*e.g.*) *Coe* v. *Clay* (14) and *Jinks* v. *Edwards* (15). It is now a settled doctrine of English Law and appears in India as section 108 (*b*) of the Transfer of Property Act. Like its correlative, the covenant for title, it is broken once and for all on failure to comply with it at the inception of the term.

The covenant for quiet enjoyment, on the other hand, undoubtedly has a continuous operation throughout the tenancy and preserves to the tenant his right of possession. The question has been raised whether it is available to a tenant who has never had possession at all, and whose interest is a mere *interesse termini*. Chitty, J., in *Wallis* v. *Hands* (4) has held that such a person cannot sue on the covenant for quiet enjoyment. While not dissenting from that learned Judge's opinion, which was also the opinion of the Bombay High Court in *Ardesir* v. *Vajesing* (6), I do not think it desirable to base my judgment on grounds largely derived from the technicalities of the English Law of Real Property, and prefer to put it on more general considerations. In my opinion, the nature of the remedy available to a tenant under the covenant or contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous is this: if the plaintiff sues in damages, can he only sue for the damages actually accrued up to the date of suit, or may he sue for the whole of the damage accrued and prospective, that the breach will cause to him? In the former case the breach is continuing, in the latter it is single and final. I think that the failure of a lessor to give possession of the demised lands to his lessee goes to the very root of the contract, and is so fundamental a breach of it as to entitle the lessee to treat that breach as final, and bring an action forthwith for the whole of his prospective damages. The matter may be illustrated in this way. Suppose that a month after the date fixed for the commencement of the term, the lessor had, for the first time, tendered possession to the

lessee; could he then compel him to take possession and accept compensation, or reduction of rent, for the month he had been out of possession ? I think it manifest that he could not; and that can only be, because, the lessor's breach being final, it is not open to him to remedy it subsequently. I, therefore, hold that assuming the contract for quiet enjoyment to give a remedy to this plaintiff, there was a complete and final breach of that contract so far as concerns the disputed land at the inception of the term and that consequently limitation began to run against him then. On this view of the matter, it becomes unnecessary to discuss the argument urged at the Bar, *viz.*, that the plaintiff, having got possession of a substantial portion of the demised land, could not be regarded as having a mere *interesse termini* as to any other part of it. Whether he had an *interesse termini* or something more, the breach as to these lands was complete at the inception of the term, and by remaining in possession of the rest of the lands throughout the term, the plaintiff obviously showed his willingness to treat the breach as to the suit lands as a separate breach complete in itself. See also *Ardesir* v. *Vajesing* (6) on this point.

One *other* contention was urged by the respondent, *viz.*, that even assuming the period of limitation to run from the date alleged by the appellant, there is a subsequent acknowledgment sufficient to take the case out of the Statute. The acknowledgment is said to be contained in Exhibit H, which is a memorandum from the Tahsildar to the plaintiff and is in the following terms:—

"The Collector in his No. 301, Rev., of 1898, dated 13th February 1898, ordered that pending the disposal of the dispute regarding the Sidahantam *Lanka* obtained by you at an auction, the collection of one-third of the *kist* should be stopped and the remaining sum collected. Therefore, deducting one-third of the amount payable by you for this year, out of the balance of the demand amount of Rs. 4,403-2-0 excluding Rs. 2,317, the amount paid by you towards the sum of Rs. 2,935-6-8, the demand amount payable for the months of January and February, the balance of Rs. 618-6-0 is still due. You must send that money this day only. As the *Taluq Chitta* would be closed to-morrow, please send the money immediately."

The contention is that this is to be construed as an admission by Government that as they had failed to give possession of a portion of the demised property, they were under a liability at least to remit a portion of the rent. It seems to me extremely doubtful whether the Tahsildar or even the Collector would have any authority to make any such admission; their authority in all probability would be limited to communicating the decision to remit the rent, and would not extend to making admissions of legal liability. But it is unnecessary, in the view that I take of the true construction of Exhibit H, to decide this question. It is for the plaintiff to satisfy us that its language amounts to an unequivocal admission of liability and he has failed to do so. In my opinion, the language used is at least as consistent with a temporary suspension of a claim for the rent, or utmost with an *ex gratia* remission of that claim, as with an acknowledgment that it is legally irrecoverable. The document thus being at least ambiguous, I think that this contention of the plaintiff fails.

The appeal will accordingly be allowed and the suit dismissed; but having regard to the circumstances of the case we direct each party to pay their own costs.

SRINIVASA AIYANGAR, J.—The facts are fully set out in the judgment just delivered and it is unnecessary to repeat them.

This being a suit to recover damages for breach of a contract, and there being no other specific Article, the Article of limitation applicable to the case is either Article 115 or 116. The starting point is the same in both the cases though in the case of a contract in writing registered, the period of limitation is 6 years instead of 3 years. Although the obligation in this case is one which is implied from the relation of the parties, as that relation was constituted by an instrument in writing registered, the period of limitation is, according to the decision of this Court, 6 years, just as if the obligation had been expressed in words in the writing. But whether the period is 6 years under Article 116, or 3 years under Article 115 is immaterial in this case; for the suit was instituted more than 6 years from the date when the lessee should have got possession and less than 3 years

after the expiry of the term; and the starting point for limitation in both cases is that provided for by the third column of Article 115. Under that Article time begins to run from when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (*where the breach is continuing*) *when it ceases*. Unless the breach in this case was a 'continuing breach' the suit is barred by limitation. For the determination of this question, namely, whether the breach was a 'continuing breach', it is necessary to examine the precise nature of the obligation undertaken by the defendant. On principle and in common sense, every person who purports to transfer property for value, agrees to place the transferee in possession, if and when the transferee is entitled to it, and if he does not do so, it is clear that he is liable in damages for the breach of that obligation, though the transferee may be in a position to bring ejectment to recover possession of the land transferred either from the transferor or from others who may be in possession without a lawful title [*Coe* v. *Clay* (14); *Jinks* v. *Edwards* (15)]. Whether this obligation is incurred in the case of a gift, need not be considered. I do not think it useful or necessary to consider whether any and what covenants could be implied by the use of certain technical words as *dedi*, *concessi*, or *demisi*, nor to consider the exact nature or scope of such implied covenants, whether they ought to be called covenants for quiet enjoyment, or covenants for title, whether such covenants last after the termination of the estate of the grantor, or whether a person who has only an *interesse termini* can bring an action of covenant on breach of a covenant for quiet enjoyment [see *Markham* v. *Paget* (29); *Mostyn* v. *West Mostyn Coal and Iron Co.* (30); *Bandy* v. *Cartwright* (31); *Baynes & Co.* v. *Lloyd & Sons* (32); *Wallis* v. *Hands* (4); *Cloake* v. *Hooper* (9); and *Ludwell* v. *Newman*(10)], as I think it would be mischievous to introduce the technical rules of English Conveyancing or Real Property Law. The covenant or the contract (in India there is no difference between a contract and a covenant, or rather there is no such thing as a covenant, except probably in cases governed by the English Law) whether express or implied) to place the transferee in possession operates *in præsenti* and that obligation is broken, and broken once for all as soon as the transferor declines, or is unable to place the transferee in possession. In the case of a lease, the obligation is to place the lessee in possession in the beginning of the term. [See *Drury* v. *Macnamara* (33), per Wightman, J.; also Woodfall's Landlord and Tenant, page 719]. On the breach of this obligation, the lessee is entitled to institute an action and recover by way of damages the whole value of the term.

From the very nature of the obligation, it is clear that there cannot be a continuing breach; for the covenant or contract is not a continuing one. The Transfer of Property Act does not apply to Crown grants, and further the chapter relating to leases in that Act does not apply to agricultural leases; but the provisions of section 108, regulating the rights and liabilities of lessors and lessees, may usefully be referred to for the purpose of determining the nature of the ordinary covenants by which the lessor and lessee are bound. Under the heading 'Rights and Liabilities' of the lessor in section 108 of the Transfer of Property Act, by clause (*b*) it is provided that 'the lessor is bound on the lessee's request to put him in possession of the property,' and by clause (*c*) 'the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.' Clause (*c*) is the usual covenant for quiet enjoyment and this covenant is, by the concluding words of that paragraph, expressly made to run with the land, while there is no such provision as regards the obligation provided for in clause (*b*). Likewise, in the case of sales under section 55, clause (*f*), the obligation to give

(29) (1908) 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605; 24 T. L. R. 426.

(30) (1876) 1 C. P. D. 145; 45 L. J. C. P. 401; 34 L. T. 325; 24 W. R. 401.

(31) (1853) 8 Ex. 913; 22 L. J. Ex. 285; 1 W. R. 415 91 R. R. 836.

(32) (1895) 2 Q. B. 610; 14 R. 678; 73 L. T. 250; 44 W. R. 328; 59 J. P. 710; 64 L. J. Q. B. 787.

(33) (1855) 5 El. & Bl. 612 at p. 617; 25 L. J. Q. B. 5; 1 Jur. (N. S.) 1163; 4 W. R. 50; 119 E. R. 608; 26 L. T. (O. S.) 74; 103 R. R. 647.

possession by a vendor to his vendee is prescribed. It is clear that the obligation to give such possession is not one which runs with the land, as the breach, if any, of the obligation takes place immediately on the transfer of property becoming complete. See Rawle's Covenants for Title, Sections 204,205 and 207. The analogy, if any, is to a covenant for title and in fact Brett, J., in discussing the position of the lessee in a case similar to the present says: "There has clearly been a breach of the covenant for title, and we think that without any eviction the lessees, though there was a lease of the whole at one rent, would have a right to refuse to incur the risk of committing a trespass on the part to which there was no title, and to elect, instead of giving up the whole, to keep the part to which there was a good title, and have nothing to do with the other part, and sue for damages for the breach of the covenant for title; I do not think it necessary to determine whether there would, in such a case, be an apportionment of rent, because it seems to me that, whether there was an apportionment or not, the defendants would probably be entitled to some damages in respect of the breach of the covenant for title." See *Mostyn* v. *West Mostyn Coal and Iron Co.* (30).

The covenant for title here mentioned is obviously not the ordinary covenant for title, for the lessor does not generally warrant that he has title to grant the term which he purports to grant. See an interesting article in 39 Solicitor's Journal, page 444. It is now settled that a breach of a covenant for title is not a continuing breach. [*Turner* v. *Moon* (5).]

Assuming, however, that the obligation to place the lessee in possession is really part of the obligation undertaken by the covenant for quiet enjoyment, construing that covenant as importing an obligation to give possession in the beginning of the term and maintain it during the term, yet the breach of it does not necessarily constitute a 'continuing breach', though a covenant for quiet enjoyment is a 'continuing covenant' in the same way as a covenant to pay rent is. It is to be observed that in the case of a continuing breach, the starting point is the time when the breach *ceases* and under section 23 of the Limitation Act a fresh period of limitation begins to run at every moment of the time during which the breach continues. The object is obviously to prevent multiplicity of suits and to enable one action to be brought for all loss suffered during the whole period the breach continued. The Article implies the right of the person committing the breach to resume performance of the contract. As stated in Sedgwick on Damages, Article 89, it applies to cases where, "A single act of the defendant may be of such a nature as to give rise to a continuous breach of his contract with the plaintiff, which, however, the defendant may bring to a close by resuming performance. In such a case each moment during which the injury is allowed to continue is really a new breach; and if action is brought during the continuance of the injury, compensation can be recovered for such loss only as is caused before the beginning of the action." Well-known instances of a continuous breach are of covenants 'to repair and keep in repair', or 'to insure or keep insured.' During the continuance of the breach any number of actions can be brought for compensation for loss caused before the beginning of the action, but in many cases the recovery can only be nominal as the lessee may make the repairs, or insure the premises, before the end of the term. Even in cases where the loss caused may be substantial, as for instance in the case of a contract not to engage in competing business, the ascertainment of such loss may be difficult. In these cases the person damnified is not obliged to bring successive suits for damages, but can wait and bring an action once for all at the end of the term, when there is no possibility of future performance; or if during the continuance of the contract the obligor resumes performance, the obligee may bring his suit once for all for all the damages sustained by him till then. In *Jacob* v. *Down* (34), where there was a covenant to build within a particular time and also a covenant to repair and keep in repair, it was held that the covenant to build was broken once for all on the expiry of the time limited, but

(34) (1900) 2 Ch. 156; 69 L. J. Ch. 493; 83 L. T. 191; 48 W. R. 441; 64 J. P. 552.

it was also held, on the language of the particular covenant, that the covenant to repair also included a continuing covenant to build. It is to be observed that in that case the lessor was during the term entitled to the rent and at the end of the term to have back the land demised, together with the buildings which the lessee covenanted to build and keep in repair; the lessee might have performed his covenant by building before the expiry of the term, and although the lessor might have sued for a breach of the covenant, he could not possibly have recovered the whole value of the building, but only the loss sustained by him owing to the non-existence of the building at the particular time when he brings the suit (and that is likely to be merely nominal) and a recovery in such a suit would not prevent him from instituting another suit for subsequent loss arising from the non-existence of the building between the date of the first suit and the second. In cases of failure to deliver possession, the lessor, if he fails to deliver possession at the commencement of the term, cannot subsequently insist on performance, nor can the lessee after having instituted a suit for damages for non-delivery of possession, in which he is entitled to recover the whole value of the term, again institute a suit for non-delivery after the institution of the first suit. Even a subsequent eviction, by paramount title of the lessee, from the whole or a portion of the demised premises does not constitute a continuing breach of the covenant within the meaning of Article 115. The lessee so evicted can, on eviction, bring his action and recover as damages the whole value of the remainder of the term and would not be entitled to bring another action. Redman, Landlord and Tenant, page 244. No doubt, if the eviction was from a portion of the premises, and if there is a subsequent eviction from another portion and so on, the lessee may bring successive actions, in each of which he would be entitled to recover the value of the lands from which he was evicted for the remainder of the term, but that would not be a case of a continuing breach but that of successive breaches of the same covenant. The dictum of Green, J., in *Raju Balu* v. *Krishnarav Ramchandra* (1) does not apply to every case of a breach of the covenant for quiet enjoyment, irrespective of the fact as to whether the breach consists in mere disturbances in the enjoyment by the landlord or in a wrongful eviction of the landlord or by a third party by virtue of a paramount title. The period of limitation, therefore, began to run from the time when the lessee became entitled to possession, *i.e.*, from the time of the lease or at the latest from the 2nd July 1893 when he demanded possession from the Government and failed to obtain it.

On the question of acknowledgment I agree.

Appeal allowed; *Suit dismissed.*

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS CASE No. 395 OF 1915.

April 28, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

UMRAO SINGH—PETITIONER

versus

CHHEDA LAL—OPPOSITE PARTY.

Sale of proprietary rights with outbuildings—Ex-proprietary tenancy—Outbuildings, if appurtenance—Outbuildings, right in, if created.

The question whether or not certain buildings are appurtenances to the holding of a particular tenant, in the sense that the tenant cannot be ejected therefrom so long as his tenancy subsists, is a mixed question of fact and of law. [p. 263, col. 2.]

The defendants purported to transfer to the plaintiff the whole of their proprietary rights in a certain village and in the same deed of sale they expressly specified a *dera* and the buildings appertaining thereto as included in the property transferred to the plaintiff. The plaintiff got possession over the buildings through a suit. The defendants resisted plaintiff's possession over certain outbuildings. The plaintiff sued for possession. The defendants pleaded *inter alia* that these outbuildings were used by them for the storage of agricultural implements and for the shelter of their cattle and that they were, therefore, appurtenances to the tenant-holding which they still possessed in the village:

Held, that the transfer in respect of these buildings and of the land on which they stood was not limited in any way by the operation of the Statute which created the ex-proprietary holding and that the defendants had no right to treat them as appurtenances to their holding. [p. 264, col. 2; p. 265, col. 1.]

UMRAO SINGH *v.* CHHEDA LAL.

Order on reference submitted by the Local Government in the Judicial (Civil) Department as per its letter No. 1067/VII-367, dated the 24th September 1915.

Mr. *Gokal Prasada*, for the Petitioner.

Mr. *M. L. Agarwalla*, for the Opposite Party.

JUDGMENT.—This is a reference from the Local Government under the Kumaun rules. The defendants, who are residents of a village called Jaspur, were also proprietors in village Mandua Khera. In this village they owned a *dera*, or house of business, appertaining to which were certain outhouses, one of them a *rathkhana* or carriage-house, others certain buildings described as stables and godowns. By a deed of sale the defendants purported to transfer to the plaintiff the whole of their proprietary rights in village Mandua Khera, and in the same deed of sale they expressly specified the *dera* and buildings appertaining thereto as included in the property transferred to the plaintiff. It would seem that the plaintiff had considerable difficulty in obtaining actual possession over the buildings purported to be conveyed to him. He brought a suit in which he claimed possession of the buildings appertaining to the said *dera*, or at any rate some of them. In this suit he was successful on first appeal, and the defendants did not carry the matter further. Nevertheless the plaintiff, finding that although under this decree he has obtained possession of the carriage-house, the defendants are still refusing him actual possession of the remaining outbuildings, that is to say, the stables and godowns, has instituted the present suit. The case for the defendants is that these outbuildings are used by them for the storage of agricultural implements and for the shelter of their cattle, and that they are, therefore, appurtenances to the tenant-holding which the defendants still possess in Mandua Khera. Now this tenant-holding consists of the former *sir* lands of the defendants, of which they have become ex-proprietary tenants by Statute. In the Court of the Assistant Commissioner the substantial defence set up, on the merits, was that the outbuildings, now in suit, had never been sold to the plaintiff. There was, however, a further plea that, in any case, they are appurtenances to the defendants' holding. The Assistant Commissioner found that these buildings had undoubtedly been sold to the plaintiff. In the *second* place, he held that they had, as a matter of fact, been included in the subject-matter of the former suit, and that the plaintiff had been given formal possession over them by the Court at the same time when he was given possession of the carriage-house. He was, therefore, inclined to think that the defence now set up as to these outbuildings appertaining to the tenant-holding of the defendants was one which might and should have been pleaded in the former litigation, and was, therefore, barred in the present case by the rule of *res judicata*. He went on to consider whether it was established on the evidence in the present case that these buildings were appurtenances to the defendants' holding, and he held that they were not. There was an appeal to the Deputy Commissioner. In that Court the first question considered was, whether the outbuildings, now in suit, had or had not formed part of the subject-matter of the former litigation, and this was again decided in favour of the purchaser, that is to say, in favour of the present plaintiff. Then the Deputy Commissioner went on to hold that the buildings in suit were not necessary appurtenances to the defendants' holding. Their appeal was, therefore, dismissed.

They brought a second appeal to the Court of the Commissioner, the High Court for the Kumaun Division. Their appeal was dismissed by that Court, on the ground that the questions sought to be raised by the defendants in second appeal were questions of fact on which the decision of the Court of first appeal was in law final. The reference now before us has been made by the Local Government, petitioned to that effect by the defendants. The question whether or not certain buildings are appurtenances to the holding of a particular tenant, in the sense that the tenant cannot be ejected therefrom so long as his tenancy subsists, must be regarded as a mixed question of fact and of law. In so far the suggestion put forward in the Local Government's letter of reference appears to be correct. We think that the Commissioner, after accepting the facts as found by both the Courts below,

should have directed his attention to the question whether the defendants did or did not possess the right of residence claimed by them as against the plaintiff and should have decided the case from that point of view. The Local Government, however, does not ask us merely to criticise the decision of the Commissioner, but also to express an opinion as to what would be a suitable order for them to make on the case as it stands. It seems to us that, although the judgment of the Commissioner is open to question on the ground already suggested, it is not a decision with which the Local Government should interfere. There is *first* of all the question of *res judicata*, which the Commissioner has not dealt with at all. The decision of the Courts below on this point was challenged in the petition of appeal to the Commissioner; but it was challenged in very general terms. Now the finding of the first Court and of the lower Appellate Court on this point was that the buildings in suit in the present case had formed part of the subject-matter of the previous litigation between the same parties and that they formed part of the property over which the plaintiff was given possession as a result of that previous litigation. Unless this finding could be disturbed, the legal consequences deduced from it by the Assistant Commissioner and by the Deputy Commissioner would certainly follow, and the defendants would be debarred from setting up in the present case a claim to a right of residence which should have been put forward, if at all, as part of their answer to the plaintiff's claim in the former suit. Now the decision of the Deputy Commissioner on this point, being the finding of a Court of first appeal, could only be challenged in second appeal by showing that it was based upon a misinterpretation of documents. There was no plea to this effect, and it does not appear that any attempt was made to show that the Deputy Commissioner's finding had been arrived at on any misinterpretation of the pleadings, or the decree, or the *dakhalnama* issued in favour of the plaintiff in the former suit.

The *next* question is as to whether, on the facts stated and found, these buildings could possibly be treated as appurtenances to the tenant-holding of the defendants. The reasons given by the Assistant Commissioner and endorsed by the Deputy Commissioner for their findings on this point are certainly open to criticism. In all the cases in which tenants have been allowed possession of particular buildings on the ground that they are appurtenances to their tenant-holding, it will be found that the buildings in question had been occupied during the existence of the tenancy with the consent, express or implied, of the proprietor. The present case is quite a different one. The tenancy of the defendants came into existence on the execution of the sale-deed by which their proprietary rights in village Mandua Khera passed to the plaintiff, and on the execution of that very sale-deed the buildings, now in suit, ceased to be their property and became the property of the plaintiff. They have never occupied them as tenants with the consent of their proprietor; but on the contrary the plaintiff has been fighting hard to obtain actual and effective possession of these buildings ever since he became entitled to do so. The matter admits of being stated from yet another point of view. By the sale-deed, which is the basis of the plaintiff's title, the defendants conveyed to him the buildings, now in suit, along with the soil on which they stood. They did not purport to reserve to themselves a right of residence in any of the buildings so conveyed, or any right of user in respect of the same. If they intended to derogate from their own grant and reserve to themselves some sort of right in respect of the buildings purporting to be sold, they should have made this apparent in their sale-deed. They did, as it stands, create in favour of the plaintiff a right to actual physical possession over these buildings. That right is unqualified, unless it can be shown that it is limited or qualified by the operation of Statute Law. Now the law does create in favour of the defendants a statutory right in respect of their former *sir* lands, namely, the right to occupy the same as ex-proprietary tenants; but it is not suggested that the buildings, now in suit, are situated on land which was, at any time, part of the *sir* of the defendants. The transfer, therefore, in respect of these buildings, and of the land on which they stand, is not limited in any way by the operation of the Statute which created the

ex-proprietary holding. The defendants have no more right to occupy these out-buildings now, and to claim to treat them as appurtenances to their holding, than an ordinary tenant would have to seize upon a piece of land belonging to his landholder in defiance of the latter's objections to build a cattle shed on it, and then to claim a right to the use and occupation of that land on the ground that the cattle-shed was a necessary appurtenance to the enjoyment of his tenant-holding. The defendants appear to have suggested in the Courts below that they were entitled to special consideration in this matter because the plaintiff, in seeking to deprive them of the use of these buildings, was trying to make it impossible for them to continue to cultivate their ex-proprietary holding, and was virtually endeavouring to bring pressure to bear upon them with a view to compelling them to surrender the holding. It is worth while to point out in this connection that, if the defendants' case be that it is absolutely necessary for them to have certain huts or sheds in which to keep their cattle and store their agricultural implements within the boundaries of village Mandua Khera, they would be perfectly entitled to set apart some convenient plot of land appertaining to their *sir* holding for this purpose and to construct thereon the necessary buildings.

On the whole case, therefore, our answer to the Local Government's reference is that we would not recommend any interference with the order of the Commissioner. We think the plaintiff is entitled to his costs of the proceeding in this Court.

Reference answered.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 49 OF 1915.

July 13, 1915.

Present:—Mr. Justice Chamier.

JHUNNI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Railway Company – Consignment under risk-note form H—Loss—Wilful neglect – Company, liability of.

The plaintiffs delivered certain bags of potatoes to the B. B. and C. I. Railway to be carried to a station on the G. I. P. Railway under a risk-note form H. The bags were duly carried to the junction station of the two Railways and were put into an empty waggon belonging to the G. I. P. Railway. They should have been transhipped at another station, but it was not done and they were carried to some other station where they remained unnoticed for sometime. Thereafter they were sent to their destination and as they were found to be in a stinking condition, they were sold by public auction without any notice to the plaintiffs or their agents, etc. On a suit by the plaintiffs:

Held, that the Railway Authorities were not guilty of wilful neglect within the meaning of the risk-note. [p. 266, col. 2.]

Civil revision from an order of the Judge, Small Cause Court, Farrukhabad.

Mr. *Gulzari Lal*, for the Appellants.

Dr. *Sundar Lal*, for the Respondents.

JUDGMENT.—This is an application for revision of a decree passed by the Court of Small Causes at Farrukhabad. The facts found are that on March 26, 1913, the plaintiffs delivered 75 bags of potatoes to the Bombay, Baroda and Central India Railway at Farrukhabad, to be carried to Hinganghat on the Great Indian Peninsula Railway and there delivered to the consignors or to their order. The bags were duly carried to Khandwa Junction, where they were put into an empty waggon belonging to the Great Indian Peninsula Railway. They should have been taken out of this waggon or the waggon taken off the train at the Wardha Junction. But this was not done and the bags were carried on to Nagpur where they remained unnoticed by the Railway Authorities from April 8 to April 25. When the bags were discovered they were despatched from Nagpur and reached their destination at Hinganghat on April 28. On examination at Hinganghat they were found by the Railway Authorities to be in a stinking condition. They were sold by public auction on April 29 for Rs. 30. No previous notice was given to the plaintiffs or their agents or to any person in possession of the railway receipt by the Railway Authorities. The goods were carried under what is called risk-note form H, under which in consideration of the consignment being charged at a special reduced or owner's risk rate the consignors undertook to "hold the Bombay, Baroda and Central India Railway Administration, and all

other Railway Administrations working in connection therewith over whose Railways the goods might be carried in transit from Farrukhabad to Hinganghat, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the consignment from any cause whatever except for the *loss* of the complete consignment or of one or more complete packages forming part of the consignment due either to the wilful neglect of the Railway Administration or to theft by or due to the wilful neglect of its servants." The remainder of the risk-note is not material for our present purpose. The Judge of the Small Cause Court, as I read his judgment, was of opinion that there had been a loss of the complete consignment within the meaning of the risk-note; but that such loss was not shown to be due to the wilful neglect of the Railway Administration or its servants within the meaning of the risk-note, and that even if the damage to or deterioration of the goods could be held to have been due to their wilful neglect, the loss of the complete consignment was not due to such neglect but was due to the sale of the goods without notice to the plaintiffs. The learned Judge gave the plaintiffs a decree for Rs. 170-10-0, the amount paid by them to the railway on account of freight, being of opinion that there had been a total failure of consideration and he also gave them a decree for Rs. 30, the amount realized by the sale of the goods. In support of this application for revision it is contended that there was a loss of the complete consignment within the meaning of the risk-note and that that loss was due to the wilful neglect of the Railway Administration or its servants. On behalf of the Railway it is contended that the word *loss* in the passage underlined above means disappearance and not damage of any kind. If this contention is sound it is clear that the claim against the railway was rightly dismissed, for the goods did not disappear owing to the neglect, wilful or otherwise, of the Railway Administration or its servants.

Assuming, however, in favour of the plaintiffs that the word loss bears the meaning attributed to it by the Court below, I am still of opinion that the Railway Administration is protected by the risk-note. It has been found by the Court below, and I think rightly found, that the failure of the Railway Authorities to tranship the bags at the Wardha Junction was due to a mere mistake. There is nothing to show that the Railway Authorities intentionally or purposely omitted to tranship the bags and, therefore, it is impossible to hold that the Railway Authorities were guilty of wilful neglect within the meaning of the risk-note. It would be a misuse of language to describe the action of the Railway Authorities in selling the goods without notice as wilful neglect. They committed a wrong for which they might, no doubt, be held responsible, but it is impossible to hold that in selling the goods they were guilty of wilful neglect. I am, therefore, of opinion that the Railway Authorities are protected by the risk-note. This application is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1913.

March 2 , 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Phillips.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL - DEFENDANT—APPELLANT

versus

RAJAH OF VENKATAGIRI—PLAINTIFF—RESPONDENT.

Madras Regulation XXV of 1802, *ss.* 4, 12, 13, *scope and applicability of*—Sannad *granted to* zemindar *at time of Permanent Settlement—Liability to pay permanent* peishcush—Zemindar, *right of – Government, whether can resume* inams *or levy fresh assessment—Decision in previous suit proceeding on two grounds* – Res judicata—*Error in law, effect of.*

Section 4 of Regulation XXV of 1802 is not intended to restrict the full power of alienating all classes of land revenue which Government has obtained under various treaties. It is largely declaratory and explanatory of the position which *zemindars* were to occupy under the *sannads* that were to be granted to them. [p. 270, col. 2; p 271, col ; p. 274, col. 1.]

The provisions of sections 12 and 13 of the Regulation, prohibiting a *zemindar* from resuming or fixing a new assessment on certain classes of *inams* without the consent of Government and providing for the

imposition of a fresh assessment on the *zemindari* where such assent was granted, must be construed as confined to cases in which, pursuant to the policy enunciated in section 4, these *inams* had been reserved and not taken into account at the settlement of the land tax. [p. 271, col. 2; p. 274, col. 1.]

Vedanta v. *Kanniyappa*, 9 M. 14, distinguished. [p. 272, col. 2.]

When the matter in issue in a subsequent suit was directly and substantially in issue in a previous suit and was finally heard and decided between the parties, the subsequent suit is barred by *res judicata* notwithstanding the fact that the decision in the previous suit proceeded on two grounds. [p. 272, col. 2.]

Peary Mohun Mukerjee v. *Ambica Churn Bandopadhya*, 24 C. 900, followed.

The decision of a competent Court on a question of mixed law and fact cannot be ignored as *res judicata* on the ground that it is erroneous in law. [p. 273, col. 1; p. 274, col. 2.]

Mohamaya Prosad Singh v. *Ram Khelawan Singh Thakur*, 15 Ind. Cas. 911; 15 C. L. J. 684, followed.

The Permanent Settlement *sannad* granted to the *Zemindar* of Venkatagiri fixed the annual contribution of the *zemindar*, which was declared never to be liable to changes under any circumstances and to be "the permanent annual demand of Government on your *zemindari*" The permanent *peishcush* was declared to be "exclusive of all lands and *russums* heretofore appropriated to the cost of the Police establishment." Further, the grantee, his heirs, successors and assigns continuing to perform the requisite stipulations and to fulfil the duty of allegiance were authorised to hold the *zemindari* at the permanent assessment mentioned in the *sannad*. On the *zemindar* suing for a declaration that the Secretary of State for India in Council had no right to resume or assess to public revenue *inams* or *lakhiraj* lands situated within the *zemindari*:

Held, that subject to the rights of the *inamdars*, the *zemindar* was entitled to hold the *inam* lands under the terms of the grant subject to the payment of the permanent *peishcush* and that Government had no right to levy any fresh assessment in respect of them. [p. 269, col. 1.]

Appeal against the decree of the District Court of Nellore in Original Suit No. 10 of 1910.

The Government Pleader, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar* (with him Messrs. *A. Krishnaswami Aiyar* and *S. Varadachariar*), for the Respondent.

This appeal coming on for hearing on the 28th and 29th February and the 1st and 3rd March 1916, respectively, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—This is an appeal from a decree of the District Judge of Nellore declaring that the defendant, the Secretary of State for India in Council, is not entitled to resume or assess to public revenue *inams* or *lakhiraj* lands, other than village service *inams* enfranchised under Madras Act II of 1894, within the Venkatagiri *Zemindari*, or to any reversionary right in such *inams*, and restraining the defendant and his officers from holding any investigation into such *inams* and dealing with them under the Inam Rules or resuming and assessing them to public revenue. The main questions in the case were, whether these *inams* were included in the grant to the plaintiff's predecessor by the *sannad* Exhibit C, dated 24th August 1802, whether, if so, the grant was invalid as opposed to the provisions of Regulation XXV of 1802, and lastly, whether in any case the question was not *res judicata* in favour of the plaintiff. The circumstances which led up to the grant of the *sannad* Exhibit C are clearly stated in the judgment of the District Judge and appear more fully from the report of Mr. Stratton, Collector of the Western Poligars Peishcush, dated 14th July 1801, (Exhibit B5) and the proceedings of the Special Commission (Exhibit B22) of the 12th August 1802. The proposals of the Special Commission were accepted by Government and *sannads* were issued to the plaintiff's predecessor and three other *zemindars* on 24th August 1802.

Briefly the facts were that the *zemindars* of Venkatagiri, Kalahasti, Bommarazupolliem (as the Karvetnagar Estate was then called) and Sidapore had held their estates under the Nawabs subject to the payment of a light *peishcush* which, however, was liable to enhancement by the exaction of *nuzzers* and subject to the further obligation of maintaining a large military force. The treaty with the Nawab of 1792, by which the management of the revenues of the Carnatic was assigned to the Company, contained a provision restraining the Company from raising the *peishcush* of these Poligars.

In Exhibit I, dated 4th September 1799, the Government of Madras addressed a letter to the Board of Revenue in which they announced their intention of introducing a Permanent Settlement with the *zemindars* whom it was intended to constitute proprietors of their estates as far as practicable

on the same principles as had been adopted in the Permanent Settlement of Bengal in 1793, and directed the Board to prepare the necessary materials for effecting such settlements. On this, Mr. Stratton, then Collector of the Western Poligars Peishcush, presented to the Board of Revenue a report, dated 14th July 1801, which supplied all the materials asked for the purpose of introducing the Permanent Settlement into these four *zemindaris* and contained full information as to the various classes of *inams* to be found therein. These *inams* he divided into six classes, two of which, the *amaram* and *kattubadi*, he stated were mostly held on conditions of military service and were resumable by the *zemindar* at pleasure, while the others, which include those with which we are now concerned, were resumable only for sufficient reason (paragraph 13). It is important to note that in paragraphs 94 and 95 he distinctly raised the question how such *inams* were to be dealt with. This report was considered, not by the Board of Revenue, but by a Special Commission presided over by a member of the Government, which in Exhibit B22, dated 12th August 1802, submitted proposals to the Governor-in-Council for the settlement of these *zemindaris*. They began by showing that the existence of the military dependants of the *zemindars* was incompatible with the introduction of order and civil Government (paragraph 16) and proceeded to submit a proposal for the commutation of the military service on lines laid down in paragraph 31 and the following paragraphs. In the case of Venkatagiri the addition of the military expenses of the *zemindar* would have increased the *peishcush* from *pagodas* 21,673 to *pagodas* 1,48,996; but as the *zemindar* would not be able at once to avail himself of the revenues from the *amaram* and *kattubadi* lands which had been granted on military service, it was proposed to fix the total payment in respect of *peishcush* and military contribution at *pagodas* 1,20,000 and to reduce this still further to *pagodas* 1,11,508 as compensation for the revenue arising from *sayer*, spirits and salt which it was the intention to retain under the administration of the Company. The future *peishcush* was thus arrived at by taking the old *peishcush*, *pagodas* 21,673, and adding a contribution for the abolition of military service. This, as pointed out in paragraph 37, was very different from the system generally adopted of fixing the *peishcush* at two-thirds of the gross revenues of the *zemindari*, which would have increased the future *peishcush* to *pagodas* 1,62,840. The proposals of the Special Commission thus covered the case of the *amaram* and *kattubadi inams*, but said nothing as to the other classes of *inams* to which Mr. Stratton had called attention. It may, however, be taken that if the Special Commission had considered that these *inams* ought to be reserved they would have said so. The Government of Madras in Exhibit E, dated 24th August 1802, adopting in full the proposals of the Special Commission resolved that the military services of the Western Poligars should be commuted for an equivalent in money and that the amount of the equivalent should be as proposed by the Special Commission. Effect was given to the decision of Government in the four *sannads* which were drawn up bearing the same date, and it is on the construction of these *sannads* that the question before us very largely turns.

The *sannad* in paragraph 3 fixed the annual contribution of the *zemindar*, including the equivalent for the military service and the established *peishcush*, at *pagodas* 1,11,058, which was declared never to be liable to changes under any circumstances and to be "the permanent annual demand of Government on your *zemindari*." The permanent *peishcush* was declared to be exclusive of the revenue for salt, *sayer* and *abkari*, "exclusive of all lands and *russums* heretofore appropriated to the cost of the Police establishment." In paragraph 14 it was stated that the foregoing conditions contained an abstract of the obligations and duties of the grantee and the rights which he had acquired; and in paragraph 15 the grantee, his heirs, successors and assigns continuing to perform the above stipulations and to fulfil the duty of allegiance were authorised to hold the *zemindari* of Venkatagiri at the permanent assessment mentioned in the *sannad*. The *inam* lands in question in this suit form part of the *zemindari*, and not having been excluded, as were the Police lands, appear to me as a matter of construction to have passed under the grant, and I think that,

subject to the rights of the *inamdars*, the *zemindar* is entitled to hold them under the terms of the grant, subject to the payment of the permanent *peishcush*, and that Government has no right to levy any fresh assessment in respect of them. I may mention that in the judgment, Exhibit U2, of Sir Charles Turner, C. J., and Muthusawmi Aiyar, J., in Second Appeal No. 974 of 1881 it was held with reference to one of the other *sannads* issued on the same day and in identical terms that *inams* of this nature are resumable by the *zemindar*.

There is also every reason to believe that the omission to reserve these *inams* in the *sannad* was deliberate. Mr. Stratton's proposals must have been under consideration of the Special Commission presided over by a member of the Madras Government at the same time that the provisions of the Permanent Settlement Regulation, Regulation XXV of 1802, were under the consideration of the Madras Government, which passed it on July 13th, some six weeks before the issue of the *sannad*. As regards the reserved articles of revenue, section 4 followed closely the provisions of the Bengal Regulation of 1793, but whereas section 8, Article VII (3), of the Bengal Regulation, printed in Exhibit 1, only reserved "lands at present alienated and paying no public revenue which have been or may be proved to be held under illegal and invalid titles," in Madras Regulation XXV of 1802, section 4, the reservation is made, not only as regards these lands under the name of "*lakhiraj* lands or lands exempt from the payment of public revenue", but also as regards "all other lands paying only favourable quit-rents", words which cover the *inams* now in question. Though the *sannad* does not in terms allude to Regulation XXV of 1802, yet the similarity of the provisions of the *sannad* and of the Regulation and the close correspondence between the language of section 5 of the *sannad* relating to reservations with that part of the Regulation, section 4, which deals with the reservations in question, make it clear to my mind that the framers of the *sannad* had the provisions of the Regulation before them; and this is made even clearer by reference to Exhibit SS1, the *sannad* issued to the *zemindar* of Bangarupalayam, on the same day, in which, though Regulation XXV of 1802 is not expressly referred to, the language of the reservation clause closely follows the language of section 4 of the Regulation and expressly reserves *lakhiraj* lands and lands held on favourable quit-rent, the quit-rent of which is alone included in the settlement.

The correspondence which passed at the time of the grant, Exhibits D, E, F and B1, suggest that this exceptional method of dealing with these four *zemindaris* was dictated by reasons of policy, as the Government were anxious to secure by peaceable means the disbandment of the military forces of the *zemindars* at the earliest opportunity, and Exhibit B1, the report of the Special Commission in the following month, shows the great satisfaction which was felt when this was accomplished.

It is then said that supposing this to be the effect of the *sannad*, it was opposed to the provisions of Regulation XXV and so invalid. In answer to this it was contended that it is not shown that Regulation XXV of 1802 was in force when the *sannad* was issued. In Clarke's Regulations it is stated to have been passed on the 13th July 1802, but it is contended that that only means that it was passed by the Madras Government on that day, and that it did not come into force until it was promulgated, which I suppose means published. The Regulation was made by the Governor-in-Council under the powers conferred upon him by 40 Geo. III, C. 79, section 11, to make regulations for the Provincial Courts and Councils in the same manner as had been provided by 37 Geo. III, C. 142, section 8, for Bengal. This power must be distinguished from the power to make regulations for the Presidency Towns affecting the law administered in the Supreme Court, which was conferred in Bengal by 13 Geo. III, C. 63, section 36, and in Madras by 47 Geo. III, Sess. 2, C. 68, section 1, both of which required the Regulations to be approved by the Supreme Court. Power to make Regulations for the Provincial Courts and Councils without the approval of the Supreme Court was expressly conferred in Bengal by 21 Geo. III, C. 70, section 23, and recognized in 33 Geo. III, C. 52, and in the exercise of these powers a body of Regulations was framed in Bengal, one of which, Regulation XLI of 1793, prescribed the method in which Regulations should be made

and passed. The main provisions of this Regulation were embodied in the Act of 37 Geo. III, C. 142, section 8, the provisions of which were made applicable to Madras by 40 Geo. III, C. 79, section 11, and under the powers so conferred the first thing the Madras Government did was to reproduce Bengal Regulation XLI of 1793 as Regulation I of 1802. Under section 8 of the Act of 37 Geo. III, C. 142, the Regulations were to be registered in the judicial department and formed into a regular Code and printed with translations, and all Provincial Courts were required to regulate their decisions by such Regulations.

By Regulation I of 1802 passed under these powers, the Regulations were to be recorded in the judicial department and then framed into a Regulation and printed and published as thereafter directed. I do not think the conditions imposed by the Act of 1797 were intended to be conditions precedent to the coming into force of the Regulation, as, if that had been the case, Parliament would have said so explicitly as in the Acts of 1773 (13 Geo. III, C. 63, section 36) and 1807 (47 IGeo. II, section 2, C. 68, section 1).

As regards Regulation XXV of 1802, it seems to me to be the proper inference that the provisions of Regulation I of 1802 as to recording it in the judicial department and framing it into a Regulation were complied with before it was passed, because I take it that it was passed as recorded on July 13th, 1802, in its present form, which is that of a Regulation. As regards the other provisions as to printing and distribution, I do not find anything in Regulation I which postpones the coming into force of a Regulation until they have been complied with. A reference to the Bengal and Madras Regulations passed under the Acts already mentioned shows that the date on which the Regulation was passed is set out in each case in the heading, and that ordinarily there is no provision in the body of the Regulation as to when it was to come into force; and, whereas the date of passing is given in each case, the authorised editions of the Regulations do not assign any date of promulgation as distinct from passing. The inference appears clear to my mind that the Regulations were intended to come into force, unless it was otherwise provided, as from the date of passing. The case of *D'Souza* v. *Wroughton* (1) did not decide that a Regulation only came into force when promulgated, but that the provisions of a particular Act of Parliament limiting the jurisdiction of the Court of Requests as regards military officers did not apply to cases before the *passing* of Bengal Regulation XX of 1825 which promulgated those provisions. It must, therefore, be taken that Regulation XXV of 1802 was in force on the 24th August 1802 when the *sannads* were issued.

Here I may observe that both the District Judge of Nellore and the Subordinate Judge of Chittoor, in the case which is the subject of another appeal (Appeal No. 138 of 1913), have held that the provisions of Regulation XXV of 1802 do not apply as the *sannad* was not issued under that Regulation. It is quite true that the Regulation is not mentioned, but if it had come into force, as I have held, at the date when the *sannad* was granted, it seems to me that its provisions as far as applicable were binding on Government and that it had no power to disregard them and this, though it was the same body, the Governor-in-Council, that passed the Regulation and issued the *sannad*, as Regulation made by Government under statutory authority in its legislative capacity, would be binding on it in its executive capacity.

This brings us to the most important question in the case whether, supposing the terms of the *sannad* to be clear, Government is at liberty to disregard them on the ground that they are in contravention of the provisions of Regulation XXV of 1802, sections 4, 12 and 13. In view of the recognition for nearly a century of the rights which are now challenged I think this objection should be very clearly made out. It is said in the first place that section 4 restricts Government from alienating any of the reserved articles of revenue therein mentioned. The section, however, merely recites that Government had reserved these articles of revenue, and provides that the permanent assessment of the land tax should be made exclusively of them. I do not think that it was intended by this section in any way to restrict the full

(1) (1827) 4 Beng. S. D. A. 225.

power of alienating all classes of land revenue which Government had under the treaty of cession with the Nawab and the provisions of the Act of 1793, by which the government and administration of the Presidency were vested in the Governor-in-Council. The section appears to me to have been enacted *alio intuitu* and like some other parts of the Regulation to be largely declaratory and explanatory of the position which the *zemindars* were to occupy under the *sannads* that were to be granted to them. In paragraph 14 of the present *sannad* it is stated that it contains an abstract of the obligations and duties of the grantee and of the rights he had acquired, and this, I think, correctly describes the object with which the Regulation was framed and the *sannads* issued. This accounts for the express reservation in section 4 and in the *sannads* of salt and saltpetre, *sayer*, *abkari* and profession taxes. These reservations were not legally necessary, as a right to levy these taxes would not pass under the *sannads* granted in this or other cases, as held with regard to one of these *sannads* in *Vedanta* v. *Kanniyappa* (2), where it was held by the Full Bench that the settlement effected under the Regulation was a settlement of land revenue and not of taxes such as *moturfa*, etc.

As, however, *zemindars* had been accustomed to levy them it was thought right to make it plain that they had been reserved, and it was considered necessary to do the same with regard to particular articles of land revenue which it was proposed to reserve, and to enact as to all of them that the permanent assessment of the land tax should be made exclusively of them. This seems to me to amount to a provision that the reserved articles of revenue should not be taken into account in arriving at the amount of the land tax which the *zemindar* was to pay, and not to mean that these articles were not to be taken into account when they were not reserved but granted to the *zemindars*. In the case of the present *sannads* it is admitted that the *amaram* and *kattubadi inams*, which come within the provisions of section 4 equally with the *inams* now in question, were granted to the *zemindar*, and it is also clear that they were taken into account in the permanent assessment of the land tax, but it has not been suggested that this involved any contravention of the provisions of section 4. Full effect may, I think, be given to section 4 by holding that it was not intended to affect the power of Government to alienate the reserved articles, if so minded, but only to secure that the *zemindar* should not be assessed on what was not granted to him. It may, no doubt, be said that this follows from the reservation, but it must be remembered that the main object of passing the Regulation in this form and issuing the *sannad* was to make things plain to the *zemindar* and to guard against any sort of misunderstanding, however unreasonable. In this view the effect of section 4 was to obviate misunderstandings and to enable the *zemindar* to object to the reserved articles being taken account of in fixing his *peishcush*. It cannot, I think, have been the intention of the Governor-in-Council in his legislative capacity to pass a self-denying ordinance depriving himself of the power which he possessed to deal with the reserved articles of revenue in such a manner as might be necessary in the public interest. At the time the Regulation was passed, Government, one of whose members was on the Special Commission, must have been aware of Mr. Stratton's proposal that *amaram* and *kattubadi inams* should not be reserved in the case of these *zemindaris*. I cannot think that in enacting section 4 Government intended to debar itself from giving effect to this proposal, or that when it did so shortly after the passing of the Regulation it considered that it was infringing the law which it had just enacted.

Similarly I think that the provisions of sections 12 and 13 prohibiting the *zemindar* from resuming, or fixing a new assessment on certain classes of *inams* without the consent of Government, and providing for the imposition of a fresh assessment on the *zemindar* where such assent was granted, must be construed as confined to cases in which, pursuant to the policy enunciated in section 4, these *inams* had been reserved and not taken into account at the settlement of the land tax. These sections provided a procedure by which these reserved *inams* could be resumed by the *zemindar* and included in the *zemindari* in consideration of an addition to the *peishcush* payable by

(2) 9 M. 14.

the *zemindar* and are, I think, inapplicable to cases where Government had not reserved but parted with its right to these items of land revenue in favour of the *zemindar*. They proceed, in my opinion, on the footing that the land revenue in question had been reserved and was at the disposal of Government, and were not intended to apply to cases where Government had parted with the right, so as to enable it to derogate from its grant. The question of the effect of sections 12 and 13 has an important bearing on the case, as it is in respect of *inams* of the nature mentioned in the sections that a declaration is sought. The result of holding them applicable would be not to entitle Government to resume the *inams* but to prevent the *zemindar* from resuming them without the consent of Government, and to make him liable to be assessed on them when resumed.

The next question is whether the case is *res judicata* by virtue of the decree of the Provincial Court of Nellore in Original Suit No. 13 of 1818, Exhibit G. That suit was brought by the Collector on behalf of Government against the *Zemindar* of Venkatagiri for the recovery of two villages in the *zemindari* which the defendant had "sequestered", which the context shows means resumed. The *inams* in question appear to have been of the character specified in section 12 of the Regulation. It was averred in the plaint that the accounts showed that these villages were excluded when the *kist*, that is to say, the permanent assessment was fixed; that there were *sannads* to prove that they were regularly exempted lands not included in the *jumma* of the Venkatagiri *Zemindari*; and that the *zemindar* had consequently no right to sequester them. For the defence it was alleged that the claim was contrary to the Regulation and the permanent *sannad* and that the lands had been properly resumed by the *zemindar*.

The Court were of opinion that the cause of action was not distinctly laid, as the terms under which the villages had been granted by the defendant's father were not set out, nor had the *sannad* granting them been produced in Court. In the absence of this *sannad* they considered that there was not sufficient evidence to prove that the villages sued for were granted under an invalid title or that they were illegally resumed by the defendant.

They proceeded to observe that the defendant had filed his *sannad* from Government, the one now in question, and other documents which were more than sufficient to invalidate the plaintiff's claim and after considering these documents concluded as follows:—"In the opinion of the Provincial Court the reservation to Government of the right of resuming *lahkiraj* lands having been also specially omitted in the permanent *cowle* (the *sannad*) granted to the defendant, the plaintiff has no right whatever to the two villages sued for, and the Court accordingly disallow his claim, dismiss his suit and award that he shall pay all costs as follows." Thus the suit was expressly dismissed on the ground that Government had no right whatever to the two villages by reason of their being *lakhiraj* once. The question clearly raised by the suit was whether *lakhiraj* villages were reserved to Government, and the decree was that they were not and that Government had no right whatever to the villages sued for. This appears to me to be a decision that the revenue of *lakhiraj* villages generally was not reserved to Government under the *sannad* and that Government had no right to resume them.

The objections have been taken in the lower Court and here as to this issue being to any extent *res judicata*. It is said that the suit was dismissed on two grounds and that, therefore, neither of these grounds is *res judicata*. I agree with the District Judge that the substantial ground on which the suit was dismissed was that Government had no right to the lands; and that even if the suit was decided on two grounds that would not dispose of the plea of *res judicata*. This is in accordance with the decision in *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (3), which was followed in *Mallisheri Ileath Vasudevan Nambudin* v. *Kovoor Chathath Kannan Nambiar* (4). Lastly, it is said that the decision was not *res judicata* because it was erroneous in law, and *Parthasaradi Ayyangar* v. *Chinnakrishna*

(3) 24 C. 900.
(4) 4 M. L. T. 90.

Ayyangar (5), *Venku* v. *Mahalinga* (6), *Mangalathammal* v. *Narayanswami Aiyar* (7), *Natesan Chetty* v. *Vengu Nachiar* (8) and *Baij Nath Goenka* v. *Pudmanand Singh* (9) were cited. On the other side we were referred to *Aghore Nath Mukerjee* v. *Kamini Debi* (10), where the question is elaborately discussed by Mookerjee, J., and to *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur* (11) and *Badar Bee* v. *Habib Merican Noordin* (12), where it was held that where a Will had been construed in a suit between the parties, that construction, even if erroneous, was binding on them in a subsequent suit relating to property not involved in the original suit. Following this decision, I do not think that the decision of a competent Court on such a question as the right of Government to resume *inams* in *zemindaris*, which involves so many considerations, can be said not to be *res judicata* on the ground that it is erroneous in law. In *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur* (11) the question was as to the effect of a *parwana* or *sannad* in the light of the Bengal Regulations and it was held that a decision on this point in a previous suit, even if erroneous, would be *res judicata* between the parties.

The appeal is dismissed with costs payable in three months.

PHILLIPS, J.—I agree with the learned Chief Justice in the conclusions at which he has arrived and need add but little to what he has said. From the correspondence that took place before the issue of the *sannad* (Exhibit C) to the plaintiff's predecessor-in-title, I think it is quite clear that Government was not effecting a mere Permanent Settlement of land revenue, but was acting with an eye to the political situation. The *zemindar* of Venkatagiri was a powerful neighbour, who commanded the services of a considerable number of military retainers, and when it became necessary to abolish this military service Government had to consider carefully the action to be taken. As a result of careful enquiries, it was decided to enhance the *zemindar's peishcush*, because in future he would be relieved of his obligation to furnish troops and the consequent expense, but the enhancement ordered was considerably less than the whole cost of the military establishment. A further deduction was made on account of the reservation by Government of the revenue arising from "*sayer*, spirituous liquors and salt." This reservation is clearly set out in the *sannad*, but *inams* are not reserved. Admittedly two classes of *inams*, *amaram* and *kattubadi*, were granted to the *zemindar* and his right to resume these has not been disputed.

Mr. Stratton in his report (paragraph 94 of Exhibit B5) distinctly raises the question of reserving the other *inams*, and consequently the omission to reserve them in the *sannad* must have been deliberate. From the calculation adopted in fixing the final *peishcush* it is clear that the *peishcush* was not fixed with reference merely to the assessment. The former fixed *peishcush*, which was very small, was merely enhanced by a portion of the military expenses of which the *zemindar* would in the future be relieved. This, I think, shows that the settlement partook somewhat of a political character and was not merely based on a consideration of revenue.

The only question that raises any difficulty in this case is whether Government, in issuing a *sannad* which included the grant of the *inams*, acted *ultra vires* by reason of the provisions of Regulation XXV of 1802. In section 4 of that Regulation it is recited that Government had reserved to itself the entire exercise of its discretion in continuing or abolishing, among other things, the revenue included under the head of *lakhiraj* lands and all other lands paying only favourable quit-rents, and that consequently this source of revenue and others should be excluded in making the permanent assessment of land tax. This appears to me to be a provision protecting the interest of the *zemindar*, in that it

(5) 5 M. 304.
(6) 11 M. 393.
(7) 20 M. 461; 17 M. L. J. 250.
(8) 3 Ind. Cas. 701 33 M. 102; 20 M. L. J. 20; 6 M. L. T. 313.
(9) 14 Ind. Cas. 124; 39 C. 848; 16 C. W. N. 621; 16 C. L. J. 154.
(10) 6 Ind. Cas. 554; 11 C. L. J. 461.
(11) 15 Ind. Cas. 911; 15 C. L. J. 684.
(12) (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161.

debars the Government from calculating land-tax on certain articles of revenue. I can see nothing in the section which debars Government from exercising its sovereign right to make a grant of *lakhiraj* lands. Government by the Regulation reserved to itself the right of abolishing or continuing such a source of revenue, but it did not debar itself from making a grant of such revenue. It was obviously the intention of Government to grant the *inams* to plaintiff, for otherwise the reservation would have been made, as was done in the case of other *sannads* issued at the same time. There is yet a further question whether under sections 12 and 13 of the Regulation plaintiff is precluded from resuming *inams* except with the consent of Government, and under certain conditions. These sections are more definite than section 4 and I have some doubt as to whether they are applicable here, but on careful consideration I agree with the learned Chief Justice's conclusion that these sections are only applicable when *inams* have been reserved by Government in accordance with section 4. This appears to be the only reasonable interpretation, for otherwise the *zemindar* would be unable to resume them without the sanction of Government, and would thus be in much the same position as regards these *inams*, whether they had been granted to him or not. The provisions of these two sections are not, therefore, applicable to plaintiff's grants. I am strengthened in this opinion by the admitted rights of the *zemindar* in regard to the *amaram* and *katttubadi inams*. Plaintiff's contention that the *inams* had been granted to him was upheld by the Provincial Court in 1882, and no appeal was filed by Government, apparently because it was then realised that such a grant had been intended to be made, as appears from Exhibit K, a letter from the Board of Revenue to Government in 1823.

Government having acquiesced in this interpretation of plaintiff's rights for over 80 years, I should like to be very clearly satisfied that the grant was *ultra vires* before accepting such a conclusion. In the view, however, that I take of section 4 of Regulation XXV of 1802, I am not at all satisfied that the grant is *ultra vires*. The decision in *Vedanta* v. *Kanniyappa* (2) that the *zemindar* could not levy *muhtarafa*, although it was not specially excluded in his *sannad*, does not help us much in this case, for the Judges who decided that case were very careful to distinguish *muhtarafa* (which is a tax) from land revenue.

As regards the question of *res judicata* it appears from the judgment of the Provincial Court that Government's suit to set aside the resumption by the *zemindar* of the villages of Poodi and Periavattam was dismissed on the ground that "the reservation to Government of the right of resuming *lakhiraj* lands having been also specially omitted in the permanent *cowle* granted to defendant (*i. e.*, the *zemindar*) the plaintiff (*i. e.*, Government) has no right whatever to the two villages sued for". This is a distinct finding as between the two parties that Government had no right to two specific *lakhiaj* villages in plaintiff's *zemindari* on the ground that they had been granted to the *zemindar*. These two villages are included in the present plaint schedule A, and it is not suggested that they stand on a different footing to the other suit *inams*. The right of Government to resume the plaint *inam* lands is, therefore, *res judicata* between the parties. The question of whether a prior decision can be ignored as *res judicata*, because it is erroneous in law, has been elaborately discussed by Mookerjee, J., in *Aghore Nath Mukerjee* v. *Kamini Debi* (10) and I agree with his conclusion that it is only decisions on questions of pure law that can be so treated [*vide* also *Mohamaya Prosad Singh* v. *Ram Khelawan Singh Thakur* (11)]. In this case the question is one of mixed law and fact and consequently I hold that it is *res judicata*.

I accordingly concur in the order proposed

Appeal dismissed.

V. R. P.

NIHAL SINGH *v.* SEWA RAM.

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN SECOND APPEAL No. 1266 OF 1914.

February 12, 1916.

Present:—Mr. Justice Tudball.

NIHAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SEWA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. x (a)—Specific performance—Possession of property claimed in addition to execution and registration of sale-deed—Court-fee.

A suit for the specific performance of a contract to sell in which the plaintiff seeks to force the vendor to execute and register a sale-deed and also to hand-over possession of the property should be stamped only under clause x (*a*) of section 7 of the Court Fees Act. [p. 277, col. 1.]

Stamp Reference made on the report of the Taxing Officer.

FACTS of the case appear from the following report of the Stamp Officer:—

Stamp Officer's report:—

"This appeal arises out of the following circumstances:—Defendant No. 2 owned a certain share out of *zemindari* property in *Mauza* Barauli, *pargana* and district Mainpuri. He collusively executed a sale-deed in favour of his wife defendant No. 3. Defendants Nos. 2 and 3 entered into a contract with the plaintiffs to sell the aforesaid property and for the completion thereof took Rs. 100 from plaintiff No. 2 and, having purchased a stamp paper, executed a sale-deed on the 9th of February 1910. But as a sale-deed had been obtained by defendant No. 1, of which the plaintiffs came to know afterwards, defendant No. 2 neither signed nor made his wife, defendant No. 3, sign the sale-deed. The plaintiff No. 2 sent a notice to defendant No. 2 on the 24th of May 1910, asking him to complete the sale-deed within 15 days. Defendant No. 1 who had full knowledge of the said contract induced defendant No. 2 and obtained from him a sale-deed on the 8th of June 1910. Although the plaintiffs tried their best to stop the completion and registration of the sale-deed, yet the sale-deed was eventually executed by defendant No. 2 in favour of defendant No. 1 in order to cause loss to the plaintiffs in spite of the knowledge and information of the aforesaid contract between the plaintiffs and defendants Nos. 2 and 3. On the facts briefly stated above the plaintiffs asked for the following relief:—

After completion of a sale-deed by defendants Nos. 2 and 3 possession over the property in suit be awarded to the plaintiffs as against the defendants and Rs. 2,800, out of Rs. 2,900, the amount of consideration which is still in the plaintiffs' possession, be awarded to the right person, Rs. 100 having been paid already.

The suit was valued for purposes of jurisdiction at Rs. 2,900, and for payment of Court-fee at Rs. 350, five times the Government revenue, and a Court-fee of Rs. 26-4 was paid on the latter valuation.

The plaintiffs' suit having been dismissed by both the Courts below, they have come up to this Court in second appeal putting the same valuation and paying the same Court-fee as in the Courts below.

It appears to me that this suit embraces two reliefs, one for specific performance of the contract of sale governed by section 7, clause x (*a*), of the Court Fees Act, and the other for possession of the property governed by section 7, clause *v* (*b*), of the Act and if the above view is correct, separate Court-fee must be paid on both the reliefs on the authority of the ruling in *Krishnasami* v. *Sundarappayya* (1). This being so, a Court-fee of Rs. 170 is payable on the relief for specific performance of the contract of sale on the amount of sale consideration, *i. e.*, Rs. 2,900, and a Court-fee of Rs. 26-4 is payable in respect of the relief for possession of the property on Rs. 350, five times the Government revenue. In all a Court-fee of Rs. 196-4 0 is payable on the plaint. A Court fee of Rs. 26-4 having been paid, there is, therefore, a deficiency of Rs. 170 on the plaint, and the same amount is due in the lower Appellate Court and this Court.

Total deficiency due from the plaintiffs-appellants for all the three Courts is Rs. 510."

Appellants' Vakils' objection:—

"I do not accept the report of the Stamp Reporter. The Court-fee has been rightly paid. See *Madan Mohan Singh* v. *Gaja Prosad Singh* (2). The case in *Krishnasami* v. *Sundarappayya* (1) has no application. The suit is in substance one for possession."

Taxing Officer's report:—

"The plaintiffs-appellants in the Court of

(1) 18 M. 415; 5 M. L. J. 164.

(2) 11 Ind. Cas. 228; 14 C. L. J. 159.

first instance sought to compel the defendants Nos. 2 and 3 to complete a sale-deed with them and thereafter they sought to be put in possession of the property in suit on payment of the sum of Rs. 2,800 after deducting Rs. 100 already paid. The suit was valued for purposes of jurisdiction at Rs. 2,900, and for payment of Court-fee at Rs. 350, being five times the Government revenue, and a Court-fee of Rs. 26-4 was paid on the latter valuation.

The plaintiffs' suit having been dismissed both by the Court of first instance and by the lower Appellate Court, they have come up to this Court in second appeal asking that the decree of the lower Courts be set aside and their suit decreed. They have put the same valuation on the appeal and are paying the same Court-fee as in the two Courts below.

It is quite clear from a perusal of the plaint in the Court of first instance that the plaintiffs desire (*a*) specific performance of the contract of sale, *viz.*, the completion of a certain sale-deed and (*b*) possession of the property in suit.

The proper Court-fee on (*a*) according to section 7, clause x (*a*) of the Court Fees Act is an *ad valorem* Court-fee on the amount of the consideration; the Court-fee on (*b*) is governed by section 7, clause v (*b*), and is payable on five times the Government revenue.

It would appear quite clear that this suit embraces these two reliefs, and separate Court-fees must be paid on both. The stamp reporter quotes a ruling in *Krishnasami* v. *Sundarappayya* (1).

This is not of great help as the case cited only shows that in a somewhat similar case the vendee sued (1) for the specific performance of the contract of sale and (2) for possession. On the other hand, the learned Counsel for the appellants, who disputes the stamp reporter's report, refers to a ruling in *Madan Mohan Singh* v. *Gaja Prosad Singh* (2), where the Calcutta High Court has held that where the plaintiff not only seeks for specific performance of a contract of sale but also asks that the defendant may be compelled to execute a conveyance and to deliver possession of the property to him, the suit is in substance one for possession of the property and should be valued under section 7, clause v, of the Court Fees Act, according to the value of the subject-matter.

This Court has not published any ruling on the subject and I am in some doubt as to whether this Court will follow the ruling of the Calcutta High Court. As Taxing Officer I am of opinion that two separate Court-fees are payable on the claim for specific performance of the contract of sale as well as on the claim to be put in possession of the property in dispute.

If the Court holds this view to be correct there is a total deficiency due from the plaintiffs-appellants for all the three Courts of Rs. 510.

The learned Counsel will have an opportunity of arguing his case before the Bench hearing the appeal. Lay before that Bench for orders."

Dr. *Tej Bahadur Sapru* and Pandit *Kailas Nath Katju*, for the Appellants.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

JUDGMENT.—This matter comes up before me on the report of the Stamp Officer. The facts are simple. The plaintiffs brought a suit on the following allegations:—Defendants Nos. 2 and 3 contracted to sell to them certain *zamindari* property for the sum of Rs. 2,900. Of this sum Rs. 100 was paid as earnest money. The defendants Nos. 2 and 3, however, failed to carry out their contract, but instead, they executed a sale-deed in favour of defendant No. 1. The defendant No. 1 had full knowledge of the contract between plaintiffs and the defendants Nos. 2 and 3. The plaintiffs, therefore, ask for specific performance of the contract including possession of the property. The Court-fee paid in the Courts below was that calculated under section 7, clause v, of the Court Fees Act, *i.e.*, as in a suit for possession of land. A second appeal having been preferred by the plaintiffs in this Court the Stamp Officer is of opinion that the plaintiffs should pay Court-fees not only under section 7, clause v, but also under section 7, clause x. This is contested by the plaintiffs-appellants. As stated by a Bench of this Court in *Muhi-ud-din Ahmad Khan* v. *Majlis Rai* (3), the suit is in substance one for specific performance of a contract and falls *prima facie* under section 7, clause x, of the Court Fees Act. I have no hesitation

(3) 6 A. 231; A. W. N. (1884) 42.

in accepting this as the true solution of the case, for one simple reason *viz.*, when a vendor contracts to sell, he contracts, as laid down in section 55 of the Transfer of Property Act, to execute a proper conveyance of the property to the buyer, tender it to him for execution at a proper time and place on payment of the amount due in respect of the price. He also contracts to give to the buyer or such person as he directs such possession of the property as its nature admits. The plaintiffs in the present case are clearly seeking to enforce the contract of sale and they also seek to force the vendor to do that which he is bound to do under that contract, *i.e.*, to execute and register a sale-deed and to hand over possession of the property. The subsequent transferee is also made a party under the terms of section 27 of the Specific Relief Act and the two reliefs can be enforced as against him by the plaintiffs. The suit, in my opinion, is in substance and in form a suit for specific performance of a contract and the Court-fees must be paid in accordance with clause x of section 7 of the Court Fees Act.

In the present case the Court-fees calculated under that section amount to Rs. 170. The Court-fee already paid is Rs. 26-4. The memorandum of appeal in this Court is, therefore, deficient by the difference between the two sums. There is also an equal deficiency due from the same plaintiffs for each of the Courts below. They will, therefore, have to make good the deficiency for all three Courts. I allow six weeks within which to make good the deficiency for all the Courts.

Order accordingly.

LOWER BURMA CHIEF COURT.

SPECIAL CIVIL SECOND APPEAL NO. 220 OF 1915.

March 23, 1916.

Present:—Mr. Justice Twomey.

MAUNG PO KYAING—APPELLANT

versus

MAUNG PYI—RESPONDENT.

Lower Burma Land and Revenue Act (II of 1876), ss. 56, 55B—'Claims', 'disputes', meaning of—Dispute between cultivators regarding land occupied for purposes of cultivation—Jurisdiction of Civil Court.

The word 'claims' in section 55B of the Lower Burma Land and Revenue Act relates only to claims against Government and the word 'disputes' in the said section does not include disputes between one cultivator and another in regard to land occupied for purposes of cultivation. With regard to such suits, therefore, the jurisdiction of the Civil Court is not ousted by section 56 of the Act.

Maung Naw v. *Ma Shwe Hmat*, 30 Ind. Cas. 772; 8 Bur. L. T. 191; 8 L. B. R. 227, referred to.

Mr. *Robertson*, for the Appellant.

JUDGMENT.—This was a suit for possession of a piece of paddy land, the plaintiff alleging that the land belonged to him and that the defendant had wrongfully dispossessed him. The District Court has held that the suit was barred as the jurisdiction of the Civil Court was ousted by section 56, Lower Burma Land and Revenue Act. This decision is clearly erroneous according to the ruling in the Full Bench case *Maung Naw* v. *Ma Shwe Hmat* (1). It was explained in that case that the word "claims" in section 55B relates only to claims against Government and that the word "disputes" in section 55B does not include disputes between one cultivator and another in regard to land occupied for purposes of cultivation, as in the present case.

There has been no appearance for respondent and the appeal has been heard *ex parte*.

The appeal is allowed. The decree of the District Court is set aside and the case is remanded to that Court for a fresh decision on the merits. The costs of this appeal will follow the final result. A certificate will be granted to the appellant for the recovery of the amount of the Court-fee on the memorandum of appeal under section 13, Court Fees Act, 1870.

Appeal allowed; Case remanded.

(1) 30 Ind. Cas. 772; 8 Bur. L. T. 191; 8 L. B. R. 227.

GANGA RAM *v.* SARDARA.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3346 OF 1915.

April 1, 1916.

Present:—Mr. Justice Rattigan.

GANGA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARDARA, SON OF NIHAL—PLAINTIFF, SADRA, SON OF GHURBA—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 10—Suit for pre-emption—Deed of sale wrongly describing property sold—Subsequent rectification—Starting point of limitation.

A sale-deed wrongly described the land sold, but at mutation the parties admitted the mistake and agreed that other *khasra* numbers had been intended to be sold and mutation was accordingly granted as regards the land comprised in these numbers. Plaintiff then sued to pre-empt the sale alleged by him to have taken place on the date when the order sanctioning mutation was passed:

Held, (1) that the mere fact that the subject-matter of the sale was by an error of the *patwari* stated differently in the deed could not alter the true nature of the transaction; [p. 279, col. 1.]

(2) that limitation began to run from the date of the sale-deed itself and not from the date of the mutation. [p. 279, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Hissar, dated the 25th of August 1915, reversing that of the Subordinate Judge of the 2nd Class, Hissar, dated the 23rd of January 1915.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Habibullah Khan*, for the Respondents.

JUDGMENT.—On the 22nd of September 1913, Sadra purported to sell 73 *bighas* 5 *biswas* of land, *khatauni* Nos. 3159 and 3166, by registered-deed to Ganga Ram and Sheo Ram. On the 28th October 1913, the vendor and vendees appeared before the Tahsildar in order to have mutation effected in favour of the vendees and the Tahsildar, on a comparison of the sale-deed with the *shajra kishtwar*, found that the parties had entered wrong field numbers in the deed, and according to the orders sanctioning mutation both parties at once admitted that a mistake had been made and that the numbers which the vendor agreed to sell and the vendees agreed to purchase were 4108, 4109 and 4110. Thereupon the Tahsildar made a note to this effect on the back of the sale-deed and granted mutation as regards the land comprised in the three numbers last mentioned. According to the Tahsildar's order Sardara the present plaintiff, who is a *zaildar*, was present at the mutation proceedings and identified Sadra, the vendor.

On the 27th of October 1914, Sardara instituted the present suit in which he claims to pre-empt in respect of a sale alleged by him to have taken place on the 28th of October 1913, when the order sanctioning mutation was passed.

According to the plaintiff a fresh sale of Nos. 4108, 4109 and 4110 took place on that date and is evidenced by the mutation order. The vendees plead that the suit is barred by limitation, inasmuch as the sale actually took place on the 22nd of September 1913 when the deed of sale was executed and registered, and that the mere fact that the subject-matter of the sale was incorrectly described, cannot be regarded as annulling that sale, and that the rectification of the mistake on the 28th of October did not amount to a new or fresh sale. It is admitted on both sides that the land is in possession of tenants and is incapable of physical possession and consequently limitation runs, according to the vendees, from the 22nd September 1913, and according to the plaintiff from the 28th October 1913. In the former case the suit would be barred and in the latter it would be within time. The Subordinate Judge found against the plaintiff and dismissed his suit, leaving the parties to bear their own costs. On appeal the District Judge held that there was an oral sale on the 28th October 1913 and that plaintiff's claim to pre-empt the three numbers in respect of which mutation was granted on that date to the vendees, was within time. Vendees have appealed to this Court and I have heard arguments at considerable length on the question involved.

It appears to me that there was, in point of fact, only one sale and that on the 22nd of September 1913. When the sale-deed was executed both parties were under the impression that what was being sold and obtained were the numbers 4108 to 4110. That is undoubtedly what the vendor meant to sell and if the mutation proceedings

correctly represent what occurred, that is also what the vendees meant to purchase. The mere fact that the subject-matter of the sale was by an error of the *patwari* stated differently in the deed, cannot affect the true nature of the transaction, for, as pointed out in Cunningham and Shephard's Commentary on the Contract Act, at page 89 (9th Edition), "a distinction must be made between mistake in the intention or purpose of the parties and a mistake in rendering their intention into words." In the present case the parties were both at one as to the subject-matter of the sale and the mistake that was made was one in rendering their intention into words. It is true that Khair Din *patwari* and other witnesses state that the vendees, when they appeared before the Tahsildar at first, insisted on having mutation effected as regards the numbers entered in the deed and that it was only subsequently that they were induced to give up that claim. The order of the Tahsildar, however, makes no mention of any such claim by the vendees. On the contrary it suggests that both parties immediately admitted the mistake. I prefer myself to accept the order as more correctly representing the facts, especially as I notice that the District Judge does not base his conclusion upon the fact that vendees did not at first admit that any mistake had been made.

The result then is that, in my opinion, there was only one sale of the property and that this took place when the sale-deed was executed on the 22nd of September 1913. Upon this finding the plaintiff's suit is clearly barred, and I, accordingly, accept this appeal and dismiss the plaintiff's suit. Plaintiff must pay costs of this hearing.

Appeal accepted.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 121 OF 1915.

February 12, 19 6.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

PARBHU NARAIN SINGH, KASHI NARESHI—PLAINTIFF—APPLICANT

versus

HARBANS LAL—DEFENDANT—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), ss. 4, 167, 180—Suit for rent—Denial of tenancy—Appeal, second, to District Judge—Revision—Application to High Court, maintainability of—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115.

The plaintiff sued the defendant for rent under section 102 of the Agra Tenancy Act in the Court of the Assistant Collector of the 2nd class describing the defendant as a tenant at fixed rates of the land in suit. The defendant pleaded *inter alia* that the relationship between the parties was not of landlord and tenant within the meaning of the Tenancy Act. The Collector, on appeal, held that the land in dispute was not land let or held for agricultural purposes within the meaning of the words in the Tenancy Act and that the suit as brought was not maintainable. The District Judge, on second appeal, agreeing with the Collector dismissed the suit. On an application for revision to the High Court:

Held, per *Piggott, J.*—(1) That the application could not be brought within the four corners of section 115 of the Civil Procedure Code, 1908: [p. 281, col. 2.]

(2) that the High Court had no jurisdiction to entertain the application in view of the last clause of section 167 of the Agra Tenancy Act. [p. 282, col. 1.]

Per *Walsh, J.*—The decision of a District Judge given by way of an appeal from a Revenue Court is a decision of a Civil Court and is, therefore, subject to revision. [p. 282, col. 2.]

Civil revision from an order of the District Judge, Benares.

Mr. *Gokul Prasad* (with him Dr. *Sundar Lal*), for the Applicant.

Mr. *Peary Lal Banerji*, for the Opposite Party.

JUDGMENT.

PIGGOTT, J.—This was a suit for arrears of rent. The defendant was described as a tenant at fixed rates of the land in suit and was sued for rent of the same under section 102 of the Agra Tenancy Act (Local Act II of 1901), the suit being of the description referred to in Serial No. 2, Group (A), of the Fourth Schedule to the said Act. The amount claimed being a small one, the suit was instituted in the Court of an Assistant Collector of the Second Class. The defendant pleaded that the relationship between

the parties was not that of landlord and tenant within the meaning of the Tenancy Act, that he did not owe the plaintiff rent for the land in question, and he also put the plaintiff to proof of the amount of the rent claimed. The Assistant Collector found in favour of the plaintiff on all the issues raised and decreed the claim. There was an appeal to the Court of the Collector, and there the Collector came to the conclusion that the land referred to in the plaint was not land which is let or held for agricultural purposes, within the meaning of the definition contained in section 4, clause (*ii*), of the Tenancy Act. From this he concluded that any money which might or might not be due from the defendant to the plaintiff on account of the use or occupation of this land could not fall within the definition of "rent" contained in the next succeeding clause of the same section. He held, therefore, that the suit as brought was not maintainable, and he dismissed it. A second appeal lay under the law to the Court of the District Judge, and the plaintiff appealed to that Court accordingly. The District Judge took substantially the same view of the questions involved as the Collector had done, and dismissed the appeal. The plaintiff has brought the matter to this Court in revision, and a number of questions of considerable interest and importance have been fully argued before us. In so far as it is apparently desired by the plaintiff to make of the present a sort of test case for the determination of the various points of law which have been argued before us, I can only say that it is unfortunate that what it is desired to make a test case should be laid before this Court in the exercise of its revisional jurisdiction. The result is that the questions of law upon which our decision is invited are necessarily complicated and overshadowed by the further question, whether the application is really one which can fairly be brought within the narrow compass of the provisions of section 115 of the Code of Civil Procedure.

A point not expressly taken in the application to this Court, but about which something was said in the course of argument, must, I think, be at once cleared out of the way. It was said that the decision of the learned District Judge amounts to a decision that the plaintiff has no cause of action maintainable against the defendant, either in a Revenue or in a Civil Court. It would seem that, before the District Judge disposed of the appeal, it was suggested to him that in the event of his agreeing with the Collector on the point of law raised, the proper course for him to adopt would be, not to affirm the order dismissing the suit, but to substitute for it an order returning the plaint to be presented to the Court in which the suit should have been instituted, reference being made to the provisions of Order VII, rule 10, of the Code of Civil Procedure. I do not wish to express myself too strongly on this point, lest my words should be quoted as authority for any general proposition as to the impossibility of returning for presentation to a Civil Court a plaint filed in the Revenue Court; but I certainly agree with the District Judge in the present case that an order under Order VII, rule 10, of the Code of Civil Procedure could not with propriety have been passed. The plaint as drafted was instituted in the proper Court, namely, in the Court of an Assistant Collector. If that particular plaint had been presented to any Civil Court, it would at once have been held that it disclosed no cause of action maintainable in a Civil Court. The question whether the plaintiff has or has not a cause of action against the defendant maintainable in a Civil Court, as for instance, by way of a suit for rent payable by a lessee to a lessor, or a claim for damages for the use and occupation of the plaintiff's land, is a matter which has not been determined one way or the other by the litigation now before us.

If this point be put on one side, it seems to me that we have not before us a case in which this Court can be called upon to exercise its revisional jurisdiction. The learned District Judge did not refuse to entertain the plaintiff's appeal to his Court. He took that appeal into his consideration and he decided the question of law on which the Collector had differed from the Assistant Collector. He came to the conclusion that whatever money might or might not be due from the defendant to the plaintiff on account of the former's occupation of the land in suit, it was not *rent* within the meaning of that term as defined in Act II of 1901.

That was a question of law which the District Judge was bound to determine on the pleadings before him, and which he has determined with reference to the evidence on the record and to the pleadings of the parties. The propriety or otherwise of his decision seems to me to depend very largely upon a question of evidence. The decision turns on a remark in the judgment of the District Judge to the effect that there is no reliable evidence to prove that this land was originally let for agricultural purposes. What the District Judge, no doubt, meant to say was that there seemed to him no reliable or satisfactory evidence with regard to what passed between the parties to the suit, or their predecessors-in-title, at the time when this land was originally leased by one party to the other. There is, however, certain evidence on the record which perhaps deserved to be considered by the learned District Judge as bearing on this point. The plaintiff has brought on the record copies of extracts from village papers, some of which at any rate are alleged in argument before us to be taken from the last revision of records of the Benares district prior to the commencement of the present Tenancy Act (Local Act II of 1901). It is contended that in these records the defendant is shown as holding the land in suit as a fixed-rate tenant. There has been considerable argument before us as to the legal effect of the presumption laid down by section 9 of the Tenancy Act; but it was conceded that the effect of that section, stated at its lowest, is that the entries made regarding such tenures at the time of the last revision of records must be presumed to have been correctly made at the time. It seems to me, therefore, that the District Judge had before him a piece of evidence to the effect that the defendant was at one time a tenant at fixed rates in respect of the land in suit. Apparently, to the mind of the learned District Judge, this does not suggest any inference that the land must have been let to the defendant, or to his predecessor-in-title, for agricultural purposes. The difficulty which seems to me to lie in wait for Courts, if they refuse to draw such a presumption, is that they may find that they have to deal with a suit against a defendant who is a fixed-rate tenant of certain land by reason of the unrebuttable presumption laid down in section 9 of the Tenancy Act, but who is nevertheless not liable to pay "rent" within the meaning of the definition in section 4, and who cannot be sued for rent under section 182 of the same Act. This anomaly could certainly be avoided if the Courts are prepared to accept the fact of the defendant's being recorded as a fixed-rate tenant as raising at least a presumption that the land had been let for agricultural purposes. On this ground the decision of the learned District Judge seems to me open to criticism, and I have thought it right to express this view as the point was very fully and ably argued out before us. I remain, however, of the opinion that the present application cannot fairly be brought within the four corners of section 115 of the Code of Civil Procedure. From my point of view the utmost that can be said is that the District Judge has declined to draw from a piece of documentary evidence on the record an inference which might perhaps have been drawn from the same. Nevertheless the question whether the land in suit in the present case was or was not agricultural land within the meaning of the definition in section 4, clause 2, of the Tenancy Act was one which the learned District Judge had jurisdiction to determine, and in this particular case he had jurisdiction to determine it without a right of appeal being allowed to the dissatisfied party. There was no appeal against his decision even on the ground of an error of law such as would justify a second appeal in cases where such appeal is permissible. I do not think it can fairly be held that the District Judge declined to exercise jurisdiction in the present case, or acted with material irregularity in the exercise of his jurisdiction. On this ground alone I would dismiss the present application.

Having said this much, it seems to me at least doubtful whether I ought to refer at all to another question which was argued at length and with much ability, namely, the question whether an application for revision from an order passed by the District Judge in a second appeal determined by him under section 180 of the Tenancy Act is entertainable at all by this Court. I desire, however, to place it on record that, after fully considering the arguments which have been addressed to us, and admitting that the point is one of considerable difficulty, I am, as at present advised, of opinion that it would be

doing violence to the words of the last clause of section 167 of the Tenancy Act for this Court to entertain the present application at all. In my view this Court is a Court other than a Revenue Court within the meaning of the section above referred to. Further, if this Court were to take up the present application for revision and interfere with the orders passed by the Courts below, it would be taking cognizance of the dispute or matter in respect of which the present suit was brought. The present suit was one which was brought, and rightly brought in view of the allegations made in the plaint, in a Court of Revenue in accordance with Serial No. 2, Group (A), of the Fourth Schedule of the Tenancy Act. I am of opinion, therefore, that the Legislature has excluded the revisional jurisdiction of this Court from a matter of this nature, in spite of the fact that section 115 of the Code of Civil Procedure gives this Court a general power of revision over cases decided by a District Judge. I have not overlooked the reference which was made in argument to the provisions of section 193 of the Tenancy Act, but I do not think that this section meets my objection. In the *first* place, the section on the face of it only refers to the procedure in all suits and proceedings under this Act, and it does not seem to me that it can be quoted as an authority on the question whether a revision by this Court would be admissible at all. In the *second* place, section 193 only applies to the provisions of the Code of Civil Procedure so far as they are not inconsistent with the Tenancy Act itself, and these words bring us back to the main question I have already been discussing. The question is:—Does section 167 bar the revisional jurisdiction of this Court under the circumstances stated? It either does, or does not, but if it does bar the revisional jurisdiction of this Court, that jurisdiction cannot be brought in again under section 193, because reference would then have to be made to a provision of the Code of Civil Procedure inconsistent with the provisions of the Tenancy Act. I would, therefore, dismiss this application with costs.

WALSH, J.—I agree in the order proposed in this case, feeling that circumstances prevent the Court from coming to a decision and finally setting at rest one very important question argued on both sides, as to which it is generally felt that some decision by this Court must inevitably at some time or another be obtained, and that it is desirable to obtain it. The inclination of my mind, after hearing the point exhaustively argued, is to hold that the decision of a District Judge given by way of an appeal from a Revenue Court is a decision of a Civil Court and is, therefore, subject to revision. I think on the whole that in such a case a revision by the Court cannot be said to be "taking cognisance of a dispute or matter in respect of which a suit or application may be brought in the Revenue Court." It is merely revising the judgment of a Civil Court.

I think there is a danger of confusing two distinct things. The *first* is whether the complaint which is made to this Court of the proceedings of an inferior Court is within the revision section; in other words, whether revision lies. The *second* is whether under all the circumstances of the case the complaint is justified or, in other words, whether the revision should be granted. To my mind those are two distinct, independent questions and unless they are so treated, it would be obviously impossible for this Court to entertain an application for revision at all without being satisfied that it must succeed.

Now, on the merits in this case the complaint was two-fold. It was said, and rightly said, that the District Judge had held that no action lay. It was also, and in my view rightly, said that upon a matter where the evidence was in writing and uncontradicted, he had decided in disobedience to section 9 of the Tenancy Act. Where two complaints of that kind occur, I think there is sufficient ground as a general rule for this Court to interfere in revision, upon the ground that the inferior Court although exercising its jurisdiction has acted with material irregularity. I find it difficult to say what would be a material irregularity apart from a question of form, if it does not include a decision on uncontradicted evidence in the teeth of an Act of Parliament.

As in this case it is necessary for the applicant to obtain a unanimous judgment on all points in his favour, nothing is to be gained by my dissenting, even if I were disposed to

do so, from the order proposed. We are merely declining on the facts of this case to grant the revision application which has been pressed upon us. I feel less compunction in agreeing to the order proposed, inasmuch as I think that our decision only means that there has been no decision by the Court below or by this Court on any question except that specifically raised by the form of the plaint as brought by the plaintiff in the Revenue Court, and that, in our opinion, it is still open to the plaintiff, if so advised, to prosecute his claim in the Civil Court.

BY THE COURT.—The application is dismissed with costs.

Application dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 277 OF 1913.

January 7, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Beadon.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT - APPELLANT

versus

NANAK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 11—Compensation—Principles on which awarded—Probable future use.

An owner is entitled to have the price of his land fixed in reference to its situation and the probable use to which it is likely to be put in the near future. [p. 284, col. 1.]

Hira Nand v. *Secretary of State*, 21 P. R. 1905; 132 P. L. R. 1905, followed.

Where, therefore, the land in suit was situated near a junction of 3 roads at convenient distances from the city and the Railway station and the advent of the Railway made it a very suitable site for building purposes:

Held, that in view of the likelihood of its being used in the near future for building purposes its price must be assessed according to the rate of building sites. [p. 284, col. 1]

First appeal from the order of the Divisional Judge, Hoshiarpur Division, dated the 12th November 1912.

The Government Advocate, for the Appellant.

Bakhshi *Sohan Lal*, R. B, for the Respondents.

JUDGMENT.—A return has now been made to this Court's order of remand, dated 12th May 1913, and it appears that the land owned by Nanak and Bhana, present respondents, comprises 16 *kanals* 18 *marlas* and is *banjar kadim*. It has been leased for 10 years from 1904 to Lala Parshotam Lal at a rental of Rs. 40 per annum and has been used by the latter for purposes of brick-making. The learned Government Advocate contends that a fair valuation of this land will be arrived at if we allow the owners a sum representing the said rent for 20 years, that is to say, Rs. 800, *plus* the 15 per cent. thereon prescribed by the Act. We are unable to accept this contention. A reference to the plans "A" and "B" filed by the appellant shows that this plot is situate just on the road which leads from the Railway Station to Hoshiarpur city. It is about $\frac{1}{4}$ of a mile from the station and about 600 yards from the city and as pointed out by the Divisional Judge, who personally inspected the locality, it is excellently situated near a junction of 3 roads, while the very fact that it has been selected by Government as the site for the school is a very strong piece of evidence in favour of its convenient position. No doubt, it has for years past been of no use for agricultural purposes and until the arrival of the Railway, the owners would probably have not been able to *let* it for purposes other than that of brick-making. But even so, its situation next to a main road and in the immediate vicinity of a thriving town would make it a valuable piece of property which might, at any time, be sold for building purposes, and the advent of the Railway has unquestionably altered the state of affairs and enhanced its value. In cases of this kind it is a matter of some difficulty to arrive at a proper valuation of the land, but in the present case we have a very valuable piece of evidence to assist us in assessing its market value. It appears that plots Nos. 15—21 of the land taken by the Government in conjunction with the land with which we are now dealing (*viz.*, plots Nos. 4, 5, 6, 7, and 8) were sold separately in 1909 to certain *Chamars* by the *Jat* proprietors; and that the prices then paid by the purchasers varied

from Rs. 70 to Rs. 90 for 10 or 11 *marlas*. Labhu, respondent in First Appeal No. 278 of 1910, gave Rs. 90 for the 10 *marlas* (plot No. 21) purchased by him in 1909; at the same time Dhara purchased plot No. 16 (11 *marlas*) for Rs. 70. Thakur purchased plot No. 17 (10 *marlas*) for Rs. 70, Puran purchased plot No. 18 (10 *marlas*) for Rs. 80; Gobind purchased 10 *marlas* for Rs. 80; and Ruldu purchased 10 *marlas* for Rs. 90. In other, words, these plots were bought at the rates of Rs. 140 to 180 per *kanal*, and it is obvious from a glance at the plans above referred to, that their situation is much inferior to that of the plots with which we are at present concerned. We see no reason whatever to question the correctness of the facts as stated in the list drawn up by the Tahsildar from the entries in the mutation registers, and the sales to the *Chamars* took place before the advent of the Railway and some $2\frac{1}{2}$ years before the publication of the Notification under which the lands now in question were acquired. In view of these facts it would be inequitable and unjust to assess the value of the respondents' land at anything less than Rs. 180 per *kanal*—the value at which land less favourably situated was selling in 1909, and we are, therefore, not prepared to say that the Divisional Judge erred in assessing its value in 1913 at Rs. 250 per *kanal*.

We do not lose sight of the fact that this land has been used for purposes of brick-making, and we may take it that it has been considerably dug up during the 10 years that Lala Parshotam Lal has had possession of it for that purpose. But conceding this, we are still of opinon that the advent of the Railway will make it a very valuable site for building purposes, situated as it is on the main road between the Railway station and the city, and we have little doubt that had it not been acquired by Government, its probable use in the near future would have been for building purposes [see *Hira Nand* v. *Secretary of State* (1)].

For these reasons we must dismiss this appeal with costs.

Appeal dismissed.

(1) 21 P. R. 1905; 132 P. L. R. 1905.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 64 OF 1911.

June 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BANSIRAM—DEFENDANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

Fraud, pleading and proof of—Vendor and purchaser—Limitation—Sale, consideration for—Vendor's remedy, when part of consideration not paid—Hindu widow's suit for cancellation of sale on ground of fraud dismissed—Effect of dismissal on reversioners—Pardanashin *lady—Burden of proof.*

A plaintiff impeaching a transaction on the ground of fraud should distinctly, accurately and specifically set forth in the plaint the facts constituting the alleged fraud. [p. 286, col. 2.]

Gunga Narain Gupta v. *Tiluckram*, 15 C. 533; 15 I. A. 119; *Gilbert* v. *Lewis*, (1862) 1 De G. J. & S. 38 at p. 49; 32 L. J. Ch. 347; 7 L. T. 541; 11 W. R. 223; 9 Jur. (N. S.) 187; 2 J. & H. 452; 46 E. R. 15; 137 R. R. 138; *Clydsdale Bank* v. *Paton*, (1896) A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738 and *Lawrance* v. *Norreys*, (1890) 15 A. C. 210 at p. 221; 59 L. J. Ch. 681; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708, referred to.

The proof of fraud must be consistent with the case set out in the pleadings. When one kind of fraud is charged, another kind of fraud cannot, on failure of proof, be substituted for it. [p. 287, col. 1.]

Abdool Hoossein v. *Turner*, 11 B. 620; 14 I. A. 111; *Wilde* v. *Gibson*, (1848) 1 H. L. C. 605; 12 Jur. 527; 9 E. R. 897; 73 R. R. 191 and *Hickson* v. *Lombard*, (1866) L. R. 1 H. L. 324, referred to.

Non-payment of any part of the consideration for a conveyance will not, by itself, invalidate the sale. The vendor's right, in such a case, is to recover the unpaid balance of purchase-money. [p. 286, col. 2.]

A plaintiff seeking to avoid the Statute of Limitation on the ground of fraud must, besides setting forth the facts constituting the fraud, state the time when the fraud was discovered, to enable the defendant to meet it and the Court to see whether the discovery might not have been made earlier. [p. 287, col's. 1 & 2.]

Gibbs v. *Guild*, (1882) 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; 30 W. R. 591 and *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Bakshi Mahapatrulu Garu*, 3 Bom. L. R. 303; 28 I. A. 81; 24 M. 387; 5 C. W. N. 545, referred to.

Where the plaintiff has once established fraud the defendant is bound to show that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud earlier than the date of the alleged discovery and for more than the period prescribed for the suit. [p. 287, col. 2.]

Rahimbhoy Habibbhoy v. *Charles Agnew Turner*, 20 I. A. 1; 17 B. 341, referred to.

The dismissal of a suit for cancellation of a conveyance by a Hindu widow on the ground that it was fraudulently brought about will not affect the rever-

BANSIRAM *v.* SECRETARY OF STATE.

sioners, who are entitled to impeach it as not binding on the inheritance in their hands. [p 287, col. 2.]

The plaintiff, a Hindu widow, sued for cancellation of a conveyance executed by her to the defendant, on the allegation that the document was not read out and explained to her. There was, however, a distinct acknowledgment by her in the document that the recitals were correct. At trial, she said that her signature was taken on blank sheets which were subsequently filled in without her knowledge and that no part of the consideration was paid to her:

Held, (1) that the burden of proving that the recitals in the document were untrue lay on plaintiff; [p. 287, col. 1.]

(2) that as two distinct theories of fraud were set up in the plaint and at trial, plaintiff was not entitled to the relief prayed. [p. 287, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Patna, dated the 30th November 1910.

Babu *Karunamoy Bose*, for the Appellant.

Babus *Ram Charan Mitter* and *Sris Chandra Chowdhury*, for the Secretary of State for India.

JUDGMENT.—The plaintiff instituted the suit, which has culminated in this appeal, for cancellation of a conveyance executed by her in favour of the defendant on the 20th April 1900, for recovery of possession of the property covered thereby, and for incidental reliefs. The suit was decreed by the Subordinate Judge on the 30th November 1910. The present appeal was lodged in this Court by the defendant on the 7th March 1911. The plaintiff, who was the sole respondent, died on the 10th April 1911. As the property in suit originally belonged to the husband of the plaintiff, an application was made by the appellant to bring on the record her daughter, who, upon her death, had succeeded to the estate as the reversionary heir. The daughter, who was an infant, was brought on the record, but died before a guardian *ad litem* could be appointed. An application was then made to bring on the record one Mukund Lal, who claimed to be an agnate of the husband of the original plaintiff, and the order for substitution was made in due course. It subsequently transpired that the title of Mukund Lal as reversionary heir had been repudiated in a proceeding in the Court below between him and one Moni Lal, the husband of the daughter of the original plaintiff, in the course of which the opinion had been expressed that neither of the claimants was entitled to the estate. The appellant, by way of caution, next applied that the Secretary of State for India in Council might be brought on the record, on the allegation that the property had probably vested in the Crown by escheat. This Court thereupon directed that the Secretary of State be added as a party respondent. We have thus at the present moment two respondents in this appeal, namely, Mukand Lal who has not entered appearance, though he claimed to be the reversionary heir of the husband of the original plaintiff, and the Secretary of State, who is represented by the Government Pleader. In our opinion, the Secretary of State should be discharged from this appeal. We do not know whether the property has actually passed by escheat to the Crown. The appellant has invited our attention to portions of the evidence which, if reliable, would indicate that he himself is one of the possible heirs of the husband of the plaintiff. There has also been no final adjudication upon the question, whether the claim put forward by Mukand Lal is well founded. Besides this if the Secretary of State has taken the property by escheat, he may possibly be entitled to impeach the transaction on grounds not available to the original plaintiff. In these circumstances, it would not be right to draw the Secretary of State into this litigation and he is accordingly discharged from this appeal. He will in no way be bound by our decision in this appeal, which will now proceed as an appeal with Mukand Lal as the sole respondent on the record.

The property in dispute belonged admittedly to Gopinath Das who died on the 6th July 1895, leaving a widow, Panchami Dasi, the plaintiff in this suit, and a daughter by her, Mrigasira, who died on the 4th August 1911. It is alleged that he also left a son, Jadunath Das, who died in 1896. He had a maternal uncle, Balgobind, whose son Mukandram is the second defendant in this litigation and whose grandson Bansi by another son Kanhai is the first defendant. On the 20th April 1900 the plaintiff executed a conveyance in favour of the first defendant; the consideration consisted of the money due on a mortgage-bond given by her to the purchaser on the 25th February 1897 and an additional sum paid at the time of the sale; she instituted this suit on the 11th October 1909 for cancellation of the conveyance on the ground of

fraud. Her case may be stated in the words used by her in the fourteenth paragraph of the plaint: "Both the defendants were agents of the plaintiff, and as such they used to do her work and as such they got the bond, dated the 25th February 1897, and the deed of sale, dated the 28th April 1900, signed by her, without making her aware of the contents thereof. The contents of the said deed of sale were not read out and explained to the plaintiff. As the plaintiff did not get any independent legal advice in connection therewith and as she did not get any consideration or execute the bond mentioned in the deed of sale, so the same is not binding on her, nor have the defendants acquired any right thereunder." The plaintiff was subsequently examined in support of her claim and she made statements which not only do not bear out her allegation but are self-contradictory and cannot be reconciled. She alleged in one part of her deposition that she had put her signature on blank sheets, which had subsequently been filled up without her knowledge or consent by the defendants and turned on one occasion into a mortgage-deed, and, on another occasion, into a conveyance. This is plainly inconsistent with the case made in the plaint, which undoubtedly implies that she had executed a conveyance though the document was not read over or explained to her and though she had no independent advice in the transaction [*Mahomed Buksh Khan* v. *Hosseini Bibi* (1)]. But this theory is weakened, if not negatived, by her signatures on the mortgage-bond and the conveyance, which show that she must have been acquainted with their nature and contents. On the mortgage-bond she wrote with her own hand "this bond for Rs. 1,975 executed by me is correct," and then signed her name; similarly, on the conveyance she wrote "this deed of sale which I have executed for Rs. 5,000 is true and correct and is admitted and ratified by me," and then affixed her signature. As there is no doubt whatever about the genuineness of these signatures, the position of the plaintiff was clearly one of grave embarrassment. She was consequently constrained to have recourse to the theory that the defendants were in possession of blank sheets which bore her signature, and which they fraudulently filled up as a mortgage-deed and as a conveyance. But the obvious answer is that this was not the specific fraud she alleged in the plaint. In another part of her deposition she asserted that she had not received any part of the consideration mentioned in the mortgage-deed or conveyance, but this by itself would not invalidate the sale; for if her allegation was true, she might sue to recover the unpaid balance on purchase-money. The plaintiff, it seems, was not able to make up her mind as to the precise ground for cancellation of the conveyance. It is obvious that relief might have been sought on one of three hypotheses, namely, *first*, that she had signed blank papers, relying on the representation of the defendants, who subsequently filled them up and turned them into a mortgage-deed and a conveyance respectively; *secondly*, that she had put her signatures after the documents had been engrossed but had acted in reliance on a misrepresentation of their true nature by the defendants; *thirdly*, that though the documents were genuine, no consideration was ever paid for either of them. It is unfortunate for the plaintiff that she does not make a consistent case in the plaint, much less does she adhere to the case of fraud indicated therein; her case does not thus fulfil the conditions essential for success. Two principles, it is well settled, are applicable in these circumstances. In the *first* place, as pointed out by the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram* (2), where reliance was placed upon the observations of Selborne, L. C., in *Wallingford* v. *Mutual Society* (3), when a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated; *Gilbert* v. *Lewis* (4); for, in the language of Fry, J., in *Redgrave* v. *Hurd* (5), it is only fair-play between man and man that the defendant should know what is charged against

(1) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175.

(2) 15 I. A. 119; 15 C. 533; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168.

(3) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

(4) (1862) 1 De G. J. & S. 38 at p. 49; 32 L. J. Ch. 347; 7 L. T. 541; 11 W. R. 223; 9 Jur. (N. S.) 187; 2 J. & H. 452 46 E. R. 15; 137 R R. 138.

(5) (1881) 20 Ch. D. 1; 51 L. J. Ch. 113; 45 L. T. 483; 30 W. R. 251.

him [*Clydsdale Bank* v. *Paton* (6), *Lawrance* v. *Norreys* (7).] In the *second* place, a charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it [*Abdool Hoossein* v. *Turner* (8)]; the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings, is strictly enforced when the plaintiff relies upon fraud [*Wilde* v. *Gibson* (9), *Hickson* v. *Lombard* (10)]. Tested in the light of these principles, the case presents grave difficulties. The plaint does not specify with clearness and certainty the grounds on which the plaintiff seeks to cancel her own deed; and matters are not improved by any means by her deposition. It cannot be disputed that as the documents bear her signature, the burden is upon her to establish that the recitals contained therein are untrue [*Fulli Bibi* v. *Bassirudi Midha* (11); *Ali Khan Bahadur* v. *Indar Parshad* (12)]. But before the plaintiff can succeed, she is bound to make out a consistent case for cancellation of the documents; this she has not done. We may add that her omission to give details has created a serious difficulty in connection with the question of limitation. If the conveyance is not her deed, it does not require to be cancelled and she is entitled to sue for recovery of possession of the land within 12 years from the date of dispossession. If, on the other hand, the conveyance was executed under circumstances which made it not void but only voidable, she must avoid it within the period prescribed by Article 91 of the First Schedule to the Indian Limitation Act, that is, within three years from the date of discovery of the alleged fraud. The plaintiff must consequently specify the facts in connection with not merely the commission but also the discovery of the fraud. When a party seeks to avoid the Statute of Limitation on the ground of fraud, the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered, in order to enable the defendant to meet the fraud and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before [*Gibbs* v. *Guild* (13); *Vasudeva Padhi Khadanga Garu* v. *Maguni Devan Baksh Mahapatrulu Garu* (14)]. This is all the more necessary for protection of the defendant who, according to the rule laid down by the Judicial Committee in *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (15), is bound to show that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud earlier than the date of the alleged discovery and for more than the period prescribed for the suit. In the case before us, the plaintiff stated in the plaint that she became aware of the fraud on the 1st May 1909; but no details are furnished as to the circumstances which led to the discovery of the fraud. On the other hand, the facts make it plain that she must have been aware of the fraud, if there was any fraud, at least as early as 1904. Consequently, if the deed is taken to be not void but voidable, this suit brought in 1909 is obviously barred by limitation. It is thus plain that the original plaintiff could not possibly obtain any relief in the suit as framed.

It may be added that although the conveyance is not set aside in this suit, the reversionary heirs, if any, to the estate of Gopinath Das would not be necessarily bound thereby, for if we assume that conveyance was genuine and for consideration and consequently not liable to be set aside at the instance of the executant, the reversioners would be entitled to contend that it was granted under circumstances which did not make it binding on the inheritance in their hands. This is a question which could not be raised by the executant in the present litigation and it must be left open for consideration in a suit properly framed for

(6) (1896) A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738.
(7) (1890) 15 A. C. 210 at p. 221; 59 L. J. Ch. 681; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708.
(8) 14 I. A. 111; 11 B. 620.
(9) (1848) 1 H. L. C. 605; 12 Jur. 527; 9 E. R. 897; 73 R. R. 191.
(10) (1866) L. R. 1 H. L. 324.
(11) 4 B. L. R. 54 (F. B.)
(12) 23 C. 950; 23 I. A 92.
(13) (1882) 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; 30 W. R. 591.
(14) 28 I. A. 81; 24 M. 387; 5 C. W. N. 545; 3 Bom. L. R. 303.
(15) 20 I. A. 1; 17 B. 341.

the purpose, if the occasion should ever arise.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The suit will stand dismissed, but there will be no order for costs in either Court.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 149 OF 1910.

March 6, 1916.

Present:—Sir Charles Fox, KT., Chief Judge.

BADIER RAHMAN CHOWDRY—

JUDGMENT-DEBTOR—APPLICANT

versus

M. A. R. R. M. R. M. CHETTY FIRM—

DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage—Final decree making defendant personally liable—Order made ex parte—Practice—Equitable mortgage—Deposit of title-deeds, effect of.

When there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage and, therefore, as carrying with it all the remedies incident to such a mortgage. In a suit based on such a mortgage, the appropriate remedy is a decree for sale. [p. 288, col. 2.]

Carter v. *Wake*, (1877) 4 Ch. D. 605; 46 L. J. Ch. 841; *Oo Noung* v. *Moung Htoon Oo*, 13 C. 322; *Rajah Sree Nath Roy* v. *Gadadhar Das*, 1 C. W. N. 225; 24 C. 348, referred to.

In view of Order XXXIV, rule 6, Civil Procedure Code, permitting a Court to pass a final personal decree only when the balance due after sale of the mortgage property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rules, except possibly in cases in which the judgment and preliminary decree have expressly made him liable personally. [p 289, col. 1.]

Where the final decree is passed *ex parte*, the judgment-debtor should apply to the original Court which made it to set it aside, and not to the Appellate Court which confirmed the decree. [p. 289, col. 1.]

Mr. *J. R. Das*, for the Applicant.

Mr. *Connell*, for the Respondents.

JUDGMENT.—This application presented on the 20th January 1916 is to amend the Appellate Court's decree, which is dated the 8th July 1912, so as to bring it into accordance with the judgment.

The part of the decree objected to is that which orders that if the net proceeds of sale of the mortgaged property should be insufficient to pay the amount due on the mortgage, and subsequent interest and costs, the plaintiff should be at liberty to apply for a personal decree for the amount of the balance.

It is argued that the judgments did not authorize or contemplate this clause, because they held the defendant not liable on the promissory note sued on, and only held him liable on the equitable mortgage.

According to the practice of the Court the defendant's Advocates must have had an opportunity for examining the draft of the decree before it was signed, but they did not avail themselves of it.

The judgments gave the plaintiff a mortgage-decree for Rs. 10,000 with interest calculated according to the practice of the Court. The plaintiff had asked for sale of the mortgaged property in default of payment of the amount due. The decree was drawn in a form which complies with rule 4 of Order XXXIV, and the part objected to merely indicates what rule 6 states would be open to the decree-holder in case the sale-proceeds should turn out to be insufficient to meet the amount of the decree.

Although the defendant was not liable on the promissory note, he was liable for the money borrowed by his agent on the mortgage.

As stated by Jessel, M. R., in *Carter* v. *Wake* (1), when there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage, and, therefore, as carrying with it all the remedies incident to such a mortgage. The appropriate remedy in this Province is a decree for sale,—see *Oo Noung* v. *Moung Htoon Oo* (2), as it is in Bengal,—see *Rajah Sree Nath Roy* v. *Gadadhar Das* (3). There is, in my opinion, no error in the decree, and consequently nothing in it to amend or rectify.

I accordingly dismiss the application with costs, two gold *mohurs* being allowed as Advocate's fee.

(1) (1877) 4 Ch. D. 605; 46 L. J. Ch. 841

(2) 13 C. 322.

(3) 1 C. W. N. 225; 24 C. 348.

GUR DAYAL SINGH *v.* KARAM SINGH.

The applicant's Advocate stated that the applicant only became aware that a final decree ordering payment by him personally had been passed when about four weeks before the application the respondents attempted to execute that decree. The record shows that the plaintiffs filed an application for it on the 6th or 7th October 1913. No notice of the application was issued to the judgment-debtor before the application was granted on the 19th November 1913. In view of rule 6 of Order XXXIV permitting a Court to pass a final personal decree only when the balance due after sale of the mortgage property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rule, except possibly in cases in which the judgment and preliminary decree have expressly made him liable personally.

If the applicant in this case is aggrieved at the final decree having been made against him *ex parte*, the Original Court which made it is the Court for him to apply to if he wishes it set aside.

Application dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 534 OF 1914.

February 19, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

GUR DAYAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KARAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (4)—Charge, vendor's—Transferees for value without notice, if affected.

The vendor's charge mentioned in section 55 (4) of the Transfer of Property Act cannot be enforced against subsequent transferees for value without notice. [p. 290, col. 2.]

Second appeal from a decree of the Subordinate Judge, Saharanpur, dated the 27th of January 1914, modifying that of the Munsif, Saharanpur, dated the 20th of January 1912.

Mr. *Nihal Chand*, for the Appellants.

Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs seek to recover a sum of Rs. 476 principal and Rs. 83 interest, in all Rs. 559, against all the defendants and in default that certain property should be sold. The facts of the case were somewhat complicated, but for the purpose of the questions of law which we have to decide it is not necessary to go with great detail into them. On the 28th of August 1903, the plaintiffs sold certain property to Gur Dayal. This property was sold in consideration of Rs. 250. In the detail of consideration it is stated that the vendor has received Rs. 90 in cash and that he has left Rs. 160 for payment to certain creditors of the vendor. We may mention that the nature of the debt which was to be paid was a simple contract debt and not a mortgage-debt. As a matter of fact the purchaser did not pay the creditors of the vendor. His alleged reason for not doing so was that he did not get possession of part of the property sold, and there certainly was a dispute about the matter. The vendor's title was by no means perfect. On the 1st of April 1909, Gur Dayal sold the property (together with other property) to one Kundan. Kundan on the 27th April 1909 re-sold the property to Jiwan Singh and Kapur Singh, the defendants Nos. 5 and 6. It will thus appear that neither Gur Dayal nor Kundan have any longer any interest in the property. The plaintiffs allege that in consequence of the failure of Gur Dayal to pay Rs. 160 left in his hand, a suit was brought against them by the creditors and a decree was obtained against them and they had to pay Rs. 390. Their present claim is made up of this sum together with interest and costs. The contention in favour of the plaintiffs is, that under section 55, clause (4), of the Transfer of Property Act, they have a charge against the property and that the property in the hands of defendants Nos. 5 and 6 is liable to be sold. The Court of first instance gave the plaintiffs a decree, but only for Rs. 160 together with interest at 6 per cent. The lower Appellate Court thought that the plaintiffs were entitled to the full amount which they had to pay to

satisfy the decree and made its decree accordingly. It seems difficult to understand how, under any circumstances, the property in the hands of defendants Nos. 5 and 6 could have been made liable for anything more than the amount of the Rs. 160 together with interest thereon. Section 55, clause (4), of the Transfer of Property Act, provides that the seller is entitled, where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property *in the hands of the buyer* for the amount of the purchase-money or any part thereof remaining unpaid and for interest on such amount or part. Apart from authority, it seems difficult to treat the words "in the hands of the buyer" as mere surplusage. A vendor's charge for unpaid purchase-money is obviously one which in all cases ought to (and in most cases would) be promptly enforced. The broad contention of the plaintiffs is that the charge can be enforced against all subsequent transferees quite irrespective of notice. If this contention be correct every purchaser of immoveable property buys with the possibility of there being a charge on the property in respect of every previous transfer: which would mean that no purchaser is safe and the door would be opened to any amount of fraudulent claims. The respondents rely on the case of *Webb* v. *Macpherson* (1). The facts in that case were very peculiar and very different from the facts in the present case. By an indenture, dated July 17th, 1892, one Lloyd conveyed certain property to one Tucker. The consideration was Rs. 81,210, of which Rs. 30,000 was paid in cash and the balance of Rs. 51,210 was to be *secured* by the formal undertaking of the purchaser. The indenture recited that this "formal undertaking" had been executed by the purchaser. The money was not paid, and Lloyd was allowed to re-take possession. Macpherson subsequently purchased three-fourths of the property and it was from Lloyd that Macpherson got possession. Macpherson thus purchased the property with express notice that Lloyd had not been paid. Their Lordships, no doubt, held that Lloyd's executors had a charge on the whole property including the portion sold to Macpherson. In this connection it must be borne in mind that the meaning of the words "in the hands of the buyer" in section 55, sub-section 4, of the Transfer of Property Act was not considered. The case may fairly be said to be an authority for the proposition that, notwithstanding the words "in the hands of the buyer", the seller can enforce the charge mentioned in section 55, sub-section 4, against the property in the hands of a subsequent purchaser who has notice of the fact that the purchase-money in the first transfer, or some part of it, has not been paid. This would be in accordance with the general principles of equity, though it is going outside the provisions of section 55, clause 4, where their Lordships say we are to look to see the nature of the right. To hold, however, that the charge can be enforced against subsequent purchasers without notice would mean that the Court should treat the words "in the hands of the buyer" as superfluous and meaningless and would, in our opinion, be extending the decision in *Webb* v. *Macpherson* (1) in a manner never intended by their Lordships. In our opinion the charge mentioned in section 55 (4) cannot be enforced against subsequent transferees for value without notice.

It is next contended that the subsequent purchasers in the present case had "notice." This contention is based on the following line of argument. In the sale-deed of 1903 it is mentioned that Rs. 160 had been left in the hands of the purchaser for payment to the creditors of the vendor, therefore it was the duty of Kundan who made the purchase on the 1st of April 1909 to enquire if his vendor had fulfilled his contract and paid the creditor. Again, it was equally the duty of defendants Nos. 5 and 6 when the third transfer was made to examine the transfer to his vendor and having done so to ascertain if the Rs. 160 had been paid. It is said that not having made these enquiries the defendants had *constructive* notice [see section 3, clause (*c*), Transfer of Property Act]. In our opinion it cannot be said, in the circumstances of the present case, that the transferees in 1909 'wilfully abstained from an enquiry or search which they ought to have made." In our opinion de-

(1) 30 I. A. 238; 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389 (P. C.).

fendants Nos. 5 and 6 did not have notice of the alleged charge. We have already mentioned that in the present case the plaintiffs' contention is based on the fact that it appears from the deed of transfer that Rs. 160 was left with the buyer for payment to a creditor of the seller. In *Webb* v. *Macpherson* (1) at page 246* of the report their Lordships say:—"There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction may seem fine, but it is a real distinction, and it is one which, if made out, might have had the effect which the High Court have given to it." Their Lordships then go on to deal with the particular terms of the conveyance in the case before them. There is a marked distinction between the terms of that conveyance and the present. It would appear in this case that the agreement was to pay, not the vendor, but the creditor of the vendor. In *Webb* v. *Macpherson* (1) the agreement was to pay Lloyd (the vendor) himself. In this case it was only when the buyer neglected to pay the creditor and the creditor got a decree against the seller that the latter brought, or was entitled to bring, the present suit. In *Abdulla Beary* v. *Mammali Beary* (2), which was a case very like the present, and in which *Webb* v. *Macpherson* (1) was cited, the Madras High Court held that the vendor had no charge on the ground that the consideration undischarged by the buyer was an agreement to pay the creditor and not unpaid purchase-money.

In the case of *Megh Raj Vaish* v. *Abdullah Khan* (3) Mr. Justice Sundar Lal considered that the case of *Webb* v. *Macpherson* (1) applied and he further considered that there had been a finding of fact by the lower Courts (binding on him in second appeal) that the subsequent transferee had notice.

In the case of *Tehilram Girdharidas* v. *Kashibai* (4) the sale-deed recited that the consideration had been paid, and the Court held that the vendor could not enforce a charge against a subsequent mortgagee without notice. It is true the Court held the vendor estopped and decided the case on that ground. At page 61,* Jenkins, C. J., says:—"I will assume that the defendant, under section 55 (4)...has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb* v. *Macpherson* (1) did not turn on the special circumstances of that case." Batchelor, J., says at page 67:* "The section gives the charge over the property 'in the hands of the buyer', but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb* v. *Macpherson* (1) it was intended to decide that the charge was extended to persons claiming through the buyer." These remarks by the learned Judges seem to indicate that they thought it doubtful whether their Lordships of the Privy Council intended to decide in *Webb* v. *Macpherson* (1) any principle outside the facts and circumstances of that particular case.

In our opinion the Rs. 160 was not "unpaid purchase-money." The consideration was Rs. 90 in cash and the agreement of the vendee to pay the creditor.

We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

Appeal allowed.

(2) 5 Ind. Cas. 87; 33 M. 446; 7 M. L. T. 376.
(3) 25 Ind. Cas. 208; 12 A. L. J. 1034.
(4) 1 Ind. Cas. 614; 33 B. 53; 10 Bom. L. R. 403.

*Page of I. A.—*Ed.*

*Page of 33 B.—*Ed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 3337 OF 1915.

March 29, 1916.

Present:—Mr. Justice Leslie Jones.

KALA AND OTHERS—DEFENDANTS—APPELLANTS

versus

HASHAM—PLAINTIFF—RESPONDENT.

Custom—Abadi—*Succession to non-proprietor—Right of collaterals—Burden of proof—Occupation by common ancestor, proof of, if material.*

Where a non-proprietor in possession of a house in the village *abadi* dies, his near collaterals are, in the absence of a special custom to the contrary, entitled to possession as against the proprietors. It is not necessary to prove that a common ancestor occupied the house originally. [p. 292, cols. 1 & 2.]

MAKUND RAM v. RAMRAJ.

Kalu v. *Pir Bakhsh*, 9 Ind. Cas. 735; 33 P. L. R. 1911; 34 P. W. R. 1911, *Wali Muhammad* v. *Surji*, 76 P. R. 1888, followed.

Second appeal from the decree of the District Judge, Jhelum, dated the 9th August 1915, reversing that of the Munsif, 1st class, Gujrat, dated the 21st March 1914, dismissing the claim.

Mr. *Sham Lal*, for the Appellants.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—One Ilma obtained a site in a village from a proprietor for residential purposes and built a house thereon. On Ilma's death his nephews, the present defendants, took possession. Hasham the proprietor sued for possession against Ilma's nephews.

The Munsif dismissed the suit on the authority of 33 P. L. R. 1911 [*Kalu* v. *Pir Bakhsh* (1)], which was misquoted in his judgment as 34 P. L. R. 1911.

The plaintiff appealed to the District Judge, who remarked that the ruling in question had not been shown to him and that so far as he was acquainted with the law on the subject such a house ordinarily reverts to the proprietor on the death of a non-proprietor without immediate issue. For this proposition the District Judge cited no authority.

The question whether, where a non-proprietor in possession of a house in the village *abadi* dies, his near collaterals are entitled to possession as against the proprietor was fully discussed in *Kalu* v. *Pir Bakhsh* (1) and decided in the affirmative. Reference was made to the rulings cited under Article 238-A of Rattigan's Digest.

In *Wali Muhammad Khan* v. *Surji* (2) it was distinctly held that in the absence of any special custom the ordinary rule of succession would apply and that near collaterals (in that case a first cousin) would be entitled to succeed. In this case no special custom has been pleaded.

The District Judge remarked again that no instances have been cited in which the collaterals have succeeded in the absence of proof that a common ancestor occupied the house originally. But as was pointed out in *Kalu* v. *Pir Bakhsh* (1), occupation by the common ancestor is immaterial according to the authorities.

As the present case has been decided in ignorance of the authorities and on a misplacement of the onus of proof, I accept the appeal and setting aside the decree of the lower Appellate Court restore that of the Munsif. The defendants will get costs throughout.

Appeal accepted.

(1) 9 Ind. Cas. 735; 33 P. L. R. 1911; 34 P. W. R. 1911.

(2) 76 P. R. 1888.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 112 OF 1915.

February 12, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

MAKUND RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAMRAJ—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), ss. 4, 14—Suit filed in wrong Court—Computation of time.

The last day of limitation for a suit on a promissory note being a Sunday (1st June 1913) the suit was filed on 2nd June in the Court of the Subordinate Judge at Agra. On 21st January 1914, the plaint was returned to be filed in the Court of the Subordinate Judge at Aligarh, as the Agra Court had no jurisdiction. The suit was dismissed as barred by limitation:

Held, that, even allowing the days during which the suit was pending in the wrong Court, the suit was barred by time as the plaintiffs were not entitled to exclusion of the extra day from 1st June 1913 to 2nd June 1913. [p. 293, col. 1.]

Second appeal against the decree of the District Judge, Aligarh, confirming that of the Subordinate Judge, Aligarh.

FACTS appear from the following judgment of the District Judge:—

"This was a suit on a promissory note alleged to have been executed in the Agra district. The plaint was filed in the Court of the Subordinate Judge of Agra on the 2nd June 1913, and the proceedings in that Court lasted until the 21st January 1914. The plaint was re-presented in the Court of the Subordinate Judge of Aligarh on the 22nd January 1914. The suit has been dismissed as time-barred, on the ground that the period of limitation originally expired on 1st and not on 2nd June 1913, and therefore, even excluding the time from 2nd June 1913 to 22nd January 1914, both days inclusive, plaintiffs' suit in this Court

was beyond time. The point for determination in this appeal is whether the plaintiffs' suit is time-barred. I decide this in the affirmative. In the first place, I am not sure that section 14 of the Limitation Act applies to this case, for the plaintiffs still persist in maintaining that their promissory note was executed in the Agra district, from which it would follow that the Agra Court was not 'from defect of jurisdiction or other cause of like nature unable to entertain' the plaintiffs' suit. Disregarding this point, however, the period of limitation, 'computed' as laid down in section 14 of the Limitation Act, did not expire on a day when the Court (of the Subordinate Judge of Aligarh) was closed. Therefore the extra day (1st June 1913 to 2nd June 1913) cannot be allowed. The provisions of section 3 of the Limitation Act are imperative. I dismiss this appeal with costs throughout."

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *Jang Bahadur Lal*, for the Respondent.

JUDGMENT.—We think the view taken by the Court below was correct. It may be said that the plaintiffs were unfortunate. It is their own fault for sleeping on their rights until the very last day of limitation.

We dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 26 OF 1914.

February 2, 1915.

Present:—Mr. Justice Chevis.

In re SARDAR SHER SINGH—PLAINTIFF—APPELLANT

versus

MAZRULLA—DEFENDANT—RESPONDENT.

Jurisdiction—Land given on mustajri*—Lessee entitled to recover rents—Suit by mortgagee to recover income from lessee, whether cognizable by Civil Courts.*

A suit by the mortgagee of a revenue paying land to recover its income on the ground that he gave the defendant, a representative of the mortgagor, a lease (*mustajri*) of the land leaving him to recover the rents, is not a suit between landlord and tenant and is cognizable by a Civil Court. [p. 293, col. 2.]

Where, therefore, such a suit was first lodged and decreed in a Civil Court, but on appeal the District Judge reversed the decree, and, holding that the Civil Court had no jurisdiction, ordered the plaint to be returned for presentation in a Revenue Court, whereupon the Assistant Collector gave the plaintiff a decree, which was reversed by the Collector, and a reference was then made by the Commissioner to the Chief Court:

Held, that the decree of the Munsif could not be restored but that the proceedings should be set aside and the plaint returned for presentation to a Civil Court. [p. 293, col. 2.]

Appeal from the order of the Collector of the Jhelum District, dated the 11th August 1913, setting aside the decree of the Assistant Collector, 2nd Grade, at Chakwal, dated the 21st May 1913.

Mr. *N. C. Mehra*, for the Petitioner.

JUDGMENT.—The plaintiff sues as mortgagee. The defendant is one of the representatives of the original mortgagor. Plaintiff's case is that as he could not realize his rents he gave the defendant a lease (*mustajri*) of the land, leaving defendant to recover the rents. The mere fact that defendant himself is one of the tenants seems to me to make no difference, and I agree with the Commissioner who has referred the case to this Court that the suit is not one between landlord and tenant, but that defendant is being sued as a lessee. It is the form of the mortgagee's rights which is the basis of the claim.

The suit was first lodged and decreed in a Civil Court, but on appeal the District Judge reversed the decree, holding that the Civil Courts had no jurisdiction and the plaint was returned to the plaintiff for presentation in a Revenue Court. The Assistant Collector then gave plaintiff a decree which the Collector has reversed on appeal. The Commissioner suggests that I should restore the Munsif's decree. But the decree which is at present in existence is that of the Collector and that decree I have no jurisdiction to set aside. I might, of course, order it to be registered as the decree of an Appellate Civil Court, but that would, I think, be inadvisable, as it would leave the dissatisfied party no further remedy except a second appeal to this Court in which the decision of the Collector could not be challenged on questions of fact.

I hold the case to be cognizable by the Civil Courts, and I return the case to the Commissioner who should set aside the proceedings of the Revenue Courts and return the plaint to the plaintiff for presentation to a Civil Court.

It seems a pity to drive the plaintiff back to the beginning of the case once more, but this seems to me the best solution of the difficulty.

Reference disposed of.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3486 OF 1912.

June 2, 1915.

Present:—Justice Sir Ashutosh Mookerjee, KT., and Mr. Justice Roe.

GIRIJA KANTA CHAKRABUTTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHIM CHANDRA ACHARJYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Res judicata—*Symbolical possession—Suit by purchaser for actual possession, maintainability of*—Ex parte *decree—Plea of fraud in suit for possession—Hindu Law—Joint family—Mortgage by only some of the brothers—Suit to enforce security—Joinder of non-executant brother as representative of deceased executant—Decree and sale in execution—Partition—Suit by purchaser for possession—Enquiry into validity of mortgage as regards non-executant—Joint dwelling-house—Purchaser's right to joint possession—Transfer of Property Act (IV of 1882), s. 44.*

Section 47, Civil Procedure Code, is no bar to a suit for actual possession by a purchaser who obtained only symbolical delivery after confirmation of the execution sale. [p. 295, col. 1.]

Sasibhushan Mookerjee v. Radhanath Bose, 25 Ind. 267; 19 C. W. N. 835; 20 C. L. J. 433, followed.

Sadashiv Mahadu v. *Narayan Vithal*, 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661; and *Kattayat Pathumayi* v. *Raman Menon*, 13 M. L. J. 237; 26 M. 749, dissented from.

An *ex parte* decree may in a subsequent claim of the plaintiff be impeached on the ground of fraud by the persons against whom it was obtained. [p. 295, col. 2.]

Rajib Panda v. *Lakhan Sendh Mahapatra*, 27 C. 11; 3 C. W. N. 660, followed.

The validity of a mortgage as against a person not a party thereto cannot properly be raised and determined in a suit to enforce the security, though such person is impleaded as representative of a deceased executant. [p. 295, col. 2.]

Jaggeswar Dutt v. *Bhuban Mohan Mitra*, 33 C. 425; 3 C. L. J. 205 and *Bhaja Chowdhury* v. *Chuni Lal Marwari*, 11 C. W. N. 284; 5 C. L. J. 95, relied on.

But the question can be raised in a subsequent suit for recovery of the mortgaged property and an enquiry into the same is not barred by the doctrine of constructive *res judicata* on the ground that it was not pressed at the trial of the mortgage suit. [p. 295, col. 2.]

Where some of the brothers, members of an undivided Hindu family, execute a mortgage of the whole property, the decree obtained in a suit to enforce the mortgage, and the sale in execution thereof, will only pass the interest of the mortgagor brothers and not of those who did not join in the mortgage. [p. 296, col. 1.]

A stranger purchaser of the share of an undivided Hindu co-parcener cannot claim to be put in joint possession of the family dwelling-house. He can either ask for delivery of possession of what he acquired by purchase by partition in execution proceedings, or resort to a separate suit for partition. [p. 296, col. 1.]

Kesabnath v. *Hur Gobind*, (1853) Beng. S. D. A., 768, *Ramtono* v. *Gobind*, (1857) Beng. S. D. A. 1585, *Koonwur Bijoy Keshab Roy* v. *Shama Soonduree Dossee*, B. L. R., Sup. Vol. 172; 2 W. R., Mis. 30; *Eshan Chunder* v. *Nund Coomar*, 8 W. R. 239; *Futteh Bahadoor* v. *Jankee Bibee*, 4 B. L. R. App. 55; 13 W. R. 74, *Rajanikanth Biswas* v. *Ram Nath Neogy*, 10 C. 244, *Kalee Pudo Banerjee* v. *Choitun Pandah*, 22 W. R. 214, *Kallapa* v. *Venkatesh Vinayak*, 2 B. 676 and *Balaji Anant Rajadiksha* v. *Ganesh Janardan Kamati*, 5 B. 499 at p. 504, referred to.

Appeal against the decree of the Subordinate Judge, Faridpur, dated the 12th of July 1912, modifying that of the Munsif of Chikandi, dated the 30th of March 1911.

Babu *Prokash Chandra Majumdar*, for the Appellants.

Babus *Mukund Nath Roy* and *Satish Chandra Bhattacharjee*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for possession of land and huts on declaration of title by purchase at a sale in execution of a mortgage-decree. The facts essential for the decision of the questions of law raised before us may be briefly stated. Three brothers *A*, *B* and *C*, were owners of the disputed property, and their interest may be regarded as the unit for our present purpose. On the 18th December 1887, *A* and *B* executed a mortgage in favour of the plaintiff; they dealt with the entire property and apparently ignored the interest of their brother *C*. *A* died in 1892 and left his two brothers *B* and *C* as his representatives. On the 30th November 1895 the mortgagee sued *B* and *C* to enforce his security. *B* was made a party in his character as one of the original mortgagors, and also as one of the representatives of *A*; *C* was described only as the representative of his deceased brother *A*. There was no allegation in the plaint that the mortgage, though executed by *A* and *B*, was operative against *C*, either because the debt had been incurred for family purposes

or because *A* and *B* had implied authority to bind their brother *C*. Neither *B* nor *C* entered appearance and an *ex parte* decree was made on the 19th December 1895. The decree was executed in due course, the property was brought to sale and passed into the hands of the plaintiff. The plaintiff as execution purchaser obtained symbolical delivery of the property, but not actual possession. He accordingly instituted the present suit on the 6th August 1907 to eject the defendants who are the representatives of *B* and *C*, as *C* had died in 1898 and *B* in 1901. The Court of first instance decreed the suit in part. Upon appeal the Subordinate Judge has decreed the claim in full. On the present appeal, four points have been urged on behalf of the defendants, *first*, that the suit was barred under section 47, Civil Procedure Code, and that the remedy of the plaintiff was by way of an application to the execution Court to be placed in actual possession of the purchased property; *secondly*, that the defendants are at liberty to impeach the *ex parte* decree as fraudulently obtained and consequently inoperative; *thirdly*, that the defendants are not bound by the doctrine of *res judicata* and are entitled to establish that the plaintiff has acquired title, if at all, to only two-thirds share of the property, that is, only to the interest of the two mortgagors *A* and *B*; and *fourthly*, that there should be no decree for joint possession of the huts, which are used for residential purposes by the family of the mortgagors and of their deceased brother.

As regards the *first* ground, there is plainly no substance in it. The plaintiff obtained symbolical delivery after the sale had been confirmed. That delivery was operative against the judgment-debtors, who from the date thereof became trespassers. The plaintiff can consequently sue to recover actual possession from them. This view is in accord with the decision in *Sasibhushan Mookerjee* v. *Radhanath Bose* (1), where this Court dissented from the contrary opinion expressed by the Bombay High Court in *Sadashiv Mahadu* v. *Narayan Vithal* (2) and by the Madras High Court in *Kattayat Pathumayi* v. *Raman Menon* (3). We are accordingly of opinion that the suit as framed is maintainable.

As regards the *second* ground, it need not be disputed that, as was ruled by this Court in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (4) and *Nistarini Dassi* v. *Nundo Lall Bose* (5), *Nistarini Dassi* v. *Nundo Lal Bose* (6) the defendants are competent to impeach the *ex parte* decree on the ground of fraud by way of defence to the claim of the plaintiff. But the answer to the contention of the appellants is that no issue was raised on this point and they cannot be permitted to attack the decree as fraudulent, when the question is not covered by any of the issues and the evidence has not been directed to the elucidation of this matter.

As regards the *third* ground, we are of opinion that the appellants have a legitimate grievance. They contend that *C* was made a party to the mortgage suit as a representative of his deceased brother *A* and that consequently the question whether the mortgage was operative against him in his personal capacity was not and could not have been raised in that litigation. There is no answer to this argument. It is besides clear from the decisions in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (7); and *Bhaja Chowdhury* v. *Chuni Lal Marwari* (8) that the question of the validity of the mortgage as against *C*, who was not a party thereto, could not have been properly raised and determined in a suit to enforce the security. The position was not altered by the circumstance that one of the mortgagors was dead at the commencement of the suit and one of his representatives was a person interested in his own right in the hypothecated property, adversely, to the mortgage. We hold accordingly that the question now in controversy, namely, was *C* bound by the mortgage, was not only not raised but could not have been raised in the mortgage suit as framed. The decision of this matter is thus not barred by the doctrine of constructive *res judicata*.

(1) 25 Ind. Cas. 267; 20 C. L. J. 433; 19 C. W. N. 5.

(2) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661.

(3) 26 M. 740; 13 M. L. J. 237.
(4) 27 C. 11; 3 C. W. N. 660.
(5) 26 C. 891; 3 C. W. N. 670.
(6) 30 C. 369; 7 C. W. N. 353.
(7) 33 C. 425; 3 C. L. J. 105.
(8) 5 C. L. J. 95; 11 C. W. N. 284.

On the merits, it is plain that no circumstances have been established which would justify the conclusion that the mortgage, though executed by *A* and *B*, also bound the interest of *C*. The inference follows that the plaintiff has acquired the interest of *A* and *B* alone and not that of *C*. Consequently, the plaintiff is entitled to a declaration of title to the extent of a two-thirds share exclusive of the share of *C*.

As regards the *fourth* ground, we are of opinion that the plaintiff, a stranger to the family, should not be placed in actual joint possession of the huts in which the defendants reside, whatever the strict rights of the plaintiff may be as purchaser of a two-thirds share of the disputed property. Section 44 of the Transfer of Property Act provides that where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. [*Kesabnath* v. *Har Gobind* (9); *Ramtonoo* v. *Gobind* (10); *Koonwur Bijoy Keshub Roy* v. *Shama Soonduree Dossee* (11); *Eshan Chunder* v. *Nund Coomar* (12); *Futteh Bahadoor* v. *Jankee Bibee* (13) and *Rajanikanth Biswas* v. *Ram Nath Neogy* (14)]. This applies with much greater force to cases under the Mitakshara Law [*Kalee Pudo Banerjee* v. *Choitun Pandah* (15) and *Kallapa* v. *Venkatesh Vinayak* (16)]. If the contrary view were maintained, results would follow which are best described in the weighty words of Westropp, C. J., in *Balaji Anant Rajadiksha* v. *Ganesh Janardan Kamati* (17), "it is a far safer practice, and less likely to lead to serious breaches of the peace, to leave a purchaser to a suit for partition than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, but also different in race and religion." We are of opinion that in the circumstances of this case the plaintiff should not be placed in actual joint possession of all the huts, but should be left to his remedy by a suit for partition.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The plaintiff will have a decree declaring his title to the extent of the two-thirds share of the disputed land and huts which belonged to *A* and *B*, the original mortgagors, exclusive of the one-third share of their brother *C* who did not join in the mortgage transaction. The decree will also declare that the plaintiff is entitled to institute a suit for partition of the property covered by the decree. Each party will pay his own costs throughout the litigation.

Appeal allowed.

(9) (1853) Beng. S. D. A. 768.
(10) (1857) Beng. S. D. A. 1585.
(11) B. L. R. Sup. Vol. 172; 2 W. R. Mis. 30.
(12) 8 W. R. 239.
(13) 13 W. R. 74; 4 B. L. R. App. 55.
(14) 10 C. 244.
(15) 22 W. R. 214.
(16) 2 B. 676.
(17) 5 B. 499 at p. 504.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 105 OF 1915.

February 7, 1916.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

YAMARTI VENKATACHALLAM—PETITIONER—APPELLANT

versus

YAMARTI SITHAYAMMA—COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 24, 150, scope of—Transfer of case to temporary Court without definite local jurisdiction—Decree—Property sought to be attached situated in places not assigned to temporary Court's jurisdiction—Execution, whether can be effected by temporary Court—Decree-holder, remedy of.

A suit for partition of immoveable properties, for recovery of a half share therein and for mesne profits, having been brought in the District Court of Kistna at Masulipatam, was transferred for disposal to the Temporary Subordinate Judge's Court established in that place. This Court was established in 1910, but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge to fix such local jurisdiction as he thought fit to do under section 10 of the Madras Civil Courts Act, 1873. The suit having been decreed, an execution petition was put in for the attachment of certain immoveable properties of the defendant for recovery of the mesne profits so decreed, but the places where the properties sought to be attached were situated had not yet been assigned to the local limits of the Subordinate Judge's jurisdiction:

VENKATACHALLAM *v.* SITHAYAMMA.

Held, that the Subordinate Judge had no jurisdiction to execute the decree and that the proper course for the decree-holder was to have applied under section 39, Civil Procedure Code, to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached. [p. 298, cols. 1 & 2.]

Subbiah Naicker v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 26 M. L. J. 189; (1914) M W. N. 205; 1 L. W. 251; 37 M. 462 at p. 473, followed.

Per *Sadasiva Aiyar*, J.—Section 150, of the Civil Procedure Code, relates to the business generally of a Court arising over the whole area or in defined particular areas within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notifications of the Local Governments, while section 24 contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court. [p. 297, col. 2; p. 298, col. 1.]

Per *Moore*, J.—Territorial jurisdiction is a condition precedent to the execution of a decree. [p. 298, cols. 1 & 2.]

Prem Chand Dey v. *Mokhoda Debi*, 17 C. 699, followed.

Appeal against the order of the Court of the Temporary Subordinate Judge, Masulipatam, in Execution Appeal No. 39 of 1914, in Original Suit No. 4 of 1910, on the file of the District Court of Kistna.

Mr. *P. M. Srinivasa Aiyangar*, for the Appellant.

Mr. *A Narayana Sarma*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The decree-holder is the appellant. He brought Original Suit No. 4 of 1910 on the file of the District Court of Kistna at Masulipatam. The District Court transferred it to the Temporary Subordinate Judge's Court established in that place for disposal. The suit was for partition of immoveable properties, for recovery of a half share therein and for mesne profits. The Temporary Subordinate Judge's Court was established in 1910 at Masulipatam, but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge to fix such local jurisdiction as he thought fit to do under section 10, of the Madras Civil Courts Act, III of 1873. When the suit was transferred by the District Court, the District Judge had not fixed any such local limits for the Temporary Subordinate Judge's jurisdiction. The Subordinate Judge decreed the suit including the relief of mesne profits on the 16th August 1912, and that decree was confirmed on appeal by the High Court.

The plaintiff put in an execution petition for the attachment of certain immoveable properties of the defendant for recovery of the mesne profits so decreed. This application was made on the 5th October 1914. The places where the immoveable properties sought to be attached are situated have not been assigned to the local limits of the Subordinate Judge's jurisdiction even now. The question is whether the Subordinate Judge had jurisdiction to entertain such an application, and to effect attachment of the immoveable properties mentioned in that application.

The Subordinate Judge held that he had no jurisdiction to so attach and on the judgment-debtor's application, set aside the attachment which had been effected on an order issued *ex parte* at the instance of the decree-holder. Hence this appeal.

The learned Vakil who argued the appellant's case relied upon section 150 of the new Civil Procedure Code, for his contention that the transfer of the suit by the District Court for disposal to the Temporary Subordinate Judge's Court, gave the latter Court jurisdiction to execute the decree just as if it had been given jurisdiction over the whole territory within the District Court's jurisdiction for the purpose of executing the decree passed in the suit. Section 150 was newly enacted in the present Civil Procedure Code. It is as follows:—"Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred." The learned Vakil's argument was that when a particular suit is transferred from the District Court to a Sub-Court under section 24, Civil Procedure Code, the business of the District Court is thereby transferred to the Sub-Court and the Sub-Court gets all the powers of the District Court in respect of such business. We are clear that this argument is fallacious. As said in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), section 150 relates to the

(1) 22 Ind. Cas. 899; 37 M. 462 at p. 473; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

business generally of a Court arising over the whole area or in defined particular areas within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notifications of the Local Governments, while section 24 contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court. Reading sections 37, 38, 39 and 46 of the Code and Order XXI, rule 10, together, and having regard to the observations in *Subbiah Naicker* v. *Ramanathan Chettiar* (1), we think that the learned Subordinate Judge came to the right conclusion that he had no jurisdiction to execute the decree and that the proper course for the decree-holder was to have applied under section 39 to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached. As far as we know, the practice, in cases where temporary Courts are established without the assignment of any definite local jurisdiction, has been that execution against immoveable properties in respect of the decrees passed by such Courts is effected in the Courts to which have been assigned local jurisdictions over the suits of such property, the decrees being transferred to those Courts for the said purpose. Such transfers may become unnecessary when the temporary Courts cease to exist and their business is again taken up by the permanent Courts. (See section 37, clause 6.) No doubt every Court has local jurisdiction within the area of its house and the compounds attached to it and can arrest persons found within those limits in execution of its own decrees. [See also Order XXI, rule 11 (1).] But a temporary Court without assigned local limits outside its Court house has, in our opinion, no further power in execution even of its own decrees.

The appeal is, therefore, dismissed with costs.

MOORE, J.—I agree. It is clear, I think, that the Temporary Subordinate Court, Masulipatam, had no power to order the attachment and sale of the properties as it has no territorial jurisdiction over the areas in which the properties are situate. Territorial jurisdiction is a condition precedent to the execution of a decree. [See *Prem Chand Dey* v. *Mokhoda Debi* (2).] It appears that the local jurisdiction assigned to the Temporary Subordinate Court, under section 10, of the Madras Civil Courts Act, III of 1873, by the District Judge is confined to one village in the Nandigama *Taluq*. The learned Vakil for the appellant relies on section 150 of the Civil Procedure Code, but that section merely provides for the whole business of one Court being transferred to another Court, as for instance where owing to a change of venue being made by a Local Government it loses jurisdiction over a certain area, and has no applicability to a case like the present one. See *Subbiah Naicker* v. *Ramanathan Chettiar* (1).

The Temporary Subordinate Court has, it appears to me, the power under section 39, clause (*b*), of the Code of Civil Procedure on the application of the decree-holder to send the decree for execution to the Court which has territorial jurisdiction over the place in which the properties sought to be attached are situated.

The Subordinate Judge instead of dismissing the petition ought, I think, to have directed the decree-holder to apply to have the decree sent for execution to the proper Court.

Appeal dismissed.

V.R.P.

(2) 17 C. 699.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3198 OF 1912.

June 2, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

BASI NATH PAL AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Raja JAGAT KISORE ACHARJEE CHOWDHURY AND OTHERS—DEFENDANTS — RESPONDENTS.

Evidence Act (I of 1872), ss. 13, 42, 43, 90—Judgments not inter partes, *recitals in, whether admissible —Scope of s. 90.*

BASI NATH PAL *v.* JAGAT KISORE ACHARJEE.

A judgment, not *inter partes*, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, but the recitals in the judgment cannot be used as evidence in a litigation between the parties. [p. 300, col. 1.]

Ram Ranjan Chakerbati v. *Ram Narain Singh*, 22 C. 533; 22 I. A. 60; *Bitto Kunwar* v. *Kesho Prasad Misr*, 19 A. 277; 7 Sar. P. C. J. 131; 1 C. W. N 265; 24 I. A. 10; *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani*, 29 I. A. 24; 6 C. W. N. 386; 29 C. 187; *Tepu Khan* v. *Rajani Mohun Das*, 25 C. 522; 2 C. W. N. 501; *Malcomson* v. *O'Dea*, (1864) 10 H. L. C. 593; 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178; 11 E. R. 1155; 13 R. R. 317 and *Bristow* v. *Cormican*, (1878) 3 A. C. 641 at p. 668, referred to.

All judgments are conclusive of their existence as distinguished from their truth, so every judgment is conclusive evidence, for or against all persons, whether parties, privies, or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. The law attributes unerring verity to the substantive as opposed to the judicial portions of the record. [p. 300, col. 1.]

The authority of the person making a grant, the genuineness whereof is presumed by the Court under the provisions of section 90 of the Evidence Act, is not proved by that section. [p. 300, col. 2.]

Thakoor Pershad v. *Musammat Bashmutty Kooer*, 24 W. R. 428; *Ubilack Rai* v. *Dallial Rai*, 3 C. 557; *Uggrakant Chowdhry* v. *Hurro Chandra Shickdar*, 6 C. 203, referred to.

Appeal against the decree of the District Judge, Mymensingh, dated the 13th of August 1912, reversing that of the Subordinate Judge, 2nd Court, of that place, dated the 21st of September 1911.

Babus *Nil Madhab Bose*, *Basanta Kumar Bose* and *Bepin Chandra Bose*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty*, *Gobinda Chandra Dey Roy* and *Satish Chandra Bhattacharjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession of a share of land on declaration of *shikmi taluki* right thereto. The subject-matter of the litigation is waste land in *Mauza* Gurai included in estates Nos. 51 and 80 of the Collectorate of the District of Mymensingh. The estates were sold in 1833 for arrears of revenue and passed into the hands of one Bhawani Kishore Acharyya Choudhury, the predecessor-in-interest of the first defendant. According to the plaintiff the defaulting proprietor, or his predecessor, had created six *shikmi taluks*, which comprised the whole village, excluding 2 *kanis* of private land held in the possession of the proprietor and some specific lands comprised in two other *taluks* Chand Ram and Soya Ram. The plaintiffs set out their title by transfer and succession from the tenure-holders and allege that they have been wrongfully kept out of possession by the first defendant. The first defendant defended the suit mainly on the ground that the six *shikmi taluks* did not cover all the lands of the village to the exclusion of 2 *kanis* of the proprietor's private lands and the specific lands of the two other *taluks* already mentioned; he also contended that the six *taluks* did not exist from before the Permanent Settlement and that the plaintiffs had no right to the specific lands claimed by them. The Subordinate Judge in a careful judgment decided all the points in favour of the plaintiffs and made a decree in their favour. Upon appeal the District Judge, in an elaborate judgment, has differed from the conclusions of the Subordinate Judge and has dismissed the suit. On the present appeal, the decision of the District Judge has been assailed substantially upon two grounds of law; *first*, that reliance should not have been placed upon the facts stated in the report of the decision of the Judicial Committee in the case of *Wise* v. *Bhooban Moyee Debia Chowdrainee* (1), which related to the same estate although not to the lands now in controversy; and *secondly*, that the District Judge has allowed the defendant to succeed on a case not specifically made in the Court of first instance.

As regards the *first* ground, it is plain that, in the Court of first instance, reference was made to the judgment of the Judicial Committee in *Wise* v. *Bhooban Moyee Debia Chowdrainee* (1) in order to meet the objection that the *shikmi taluks* were not mentioned in the quinquennial papers of 1302. What happened in the lower Appellate Court was that the defendant relied upon facts in the history of the title to this property stated in the judgment of the Judicial Committee, and the District Judge has made such facts the basis of his judgment. The result has been that he has come to the conclusion that the plaintiffs had failed to explain how two of their predecessors Ibrahim and Mosan could grant a valid *sanad* in 1807 and Asan Bibi another valid *sanad* in 1809. In our opinion the judgment of the Judicial Committee in a suit not *inter partes* could not be used

(1) 10 M. I. A. 165 at p. 174; 3 W. R. 5 (P. C.); 1 Suth. P. C. J. 563; 2 Sar. P. C. J. 91; 19 E. R. 934.

for the purpose for which it was used by the defendant in the Court below. It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances as a fact in issue, or as a relevant fact, or possibly as a transaction [*Ram Ranjan Chakerbati* v. *Ram Narain Singh* (2), *Bitto Kunwar* v. *Kesho Prasad Misr* (3), *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (4), *Tepu Khan* v. *Rajani Mohun Das* (5), *Malcomson* v. *O'Dea* (6), *Bristow* v. *Cormican* (7)], the recitals in the judgment cannot be used as evidence in a litigation between the parties. The principle is that all judgments are conclusive of their existence as distinguished from their truth; judgments as public transactions of a solemn nature are presumed to be faithfully recorded. Every judgment is, therefore, conclusive evidence, for or against all persons, whether parties, privies, or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered; in other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. We hold accordingly that the judgment of the Judicial Committee could not be used in proof of the facts stated therein, and the *first* ground must prevail.

As regards the *second* ground, namely, that the plaintiffs were taken by surprise by the argument which was advanced on behalf of the defendants in the lower Appellate Court, we may observe that it is in a sense closely connected with the *first* objection. The plaintiffs relied upon three old *sanads* whose genuineness was questioned by the defendant in both the Courts below. The Subordinate Judge as also the District Judge, however, have concurrently found in favour of the plaintiffs. This, no doubt, did not necessarily show that the grantors of the *sanads* were competent to carve out the interest which they really intended to create. It is well settled that section 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. If it were necessary to rely upon authority in support of this position, reference may be made to the decisions in *Thakoor Pershad* v. *Musammat Bashmutty Kooer* (8) and *Ubilack Rai* v. *Dallial Rai* (9) and *Uggrakant Chowdhry* v. *Huro Chunder Shickdar* (10). A similar view has been taken in respect of ancient documents under the English Law [*Airey, In re, Airey* v. *Stapleton* (11)]. But the point here is that this objection to the validity of the *sanads* was not specifically raised in the Trial Court; when taken, and for the first time, in the Court of Appeal below, it was rested on facts recited in the judgment of the Judicial Committee already mentioned, but not proved in this suit. The plaintiffs were taken by surprise and have, we think, a legitimate grievance; if the objection had been taken, as it might have been, in the Primary Court, the plaintiffs might have adduced evidence to explain away the circumstances apparently adverse to their case. Indeed, this is more than probable, for they have, in this Court, actually referred to two ancient documents, namely, applications in Court dated 16th December 1804 and 1st February 1805, which, as alleged in a petition presented to us, they have discovered since the date of the decision of the District Judge, and which, they contend, fully explain how the predecessors of the plaintiffs were competent to carve out the interest which they actually created by the *sanads* mentioned. The appellants have invited us to receive these documents in evidence; we are of opinion that the application should be granted in the interests of justice. But in view of the course we intend to adopt, we must decline to accede to the prayer of the appellants that we should discuss in detail the legal effect of the facts found by the District Judge.

(2) 22 C. 533; 22 I. A. 60.
(3) 24 I. A. 10; 19 A. 277; 7 Sar. P. C. J. 131; 1 C. W. N. 265.
(4) 29 I. A. 24; 6 C. W. N. 386; 29 C. 187.
(5) 25 C. 522; 2 C. W. N. 501.
(6) (1864) 10 H. L. C. 593; 9 Jur. (N. S.) 1135; 9 L. T. 93; 12 W. R. 178; 11 E. R. 1155; 138 R. R. 317.
(7) (1878) 3 App. Cas. 641 at p. 668.
(8) 24 W. R. 428.
(9) 3 C. 557.
(10) 6 C. 209.
(11) (1897) 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286.

If we were to adopt that course, we might influence the decision of the District Judge after remand, which would be obviously unfair, as the facts must be re-investigated by him in the light of the documents now produced by the appellants. But we desire to add that a perusal of the judgment of the Subordinate Judge shows that the arguments which he adduced in support of his view, require serious consideration, and that till those reasons have been successfully met, his decision should not be reversed.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case remanded to him in order that the appeal may be re-heard. The documents which have been produced before us will be sent down to the District Judge to be considered along with the other evidence in the case. The parties will be at liberty to adduce evidence to elucidate the question of the competence of the grantors of the *sanads* to create the interest actually created by those instruments. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 750 OF 1915.

April 14, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

NARA REDDIAR—DEFENDANT—PETITIONER

versus

DORAISWAMI REDDI—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92 (1) - Promissory note —Recital as to consideration—Proof of payment of a different kind, whether admissible.

Under section 92 (1) of the Evidence Act, it is open to the parties to an instrument to show that the special consideration mentioned in the document is not really what passed between them. [p. 301, col. 2; p. 302, col. 1.]

Adityam Iyer v. *Ramakrishna Iyer*, 21 Ind. Cas. 458; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602; 38 M. 514, distinguished.

Achal Ram v. *Kazim Husain Khan*, 32 I. A. 113; 9 C. W. N. 477; 27 A. 271; 15 M. L. J. 197; 8 O. C. 155; *Hanif-un-nisa* v. *Faiz-un-nisa*, 11 Ind. Cas. 398; 33 A. 340; 8 A. L. J. 373 (P. C.); 15 C. W. N. 521; 13 C. L. J. 510; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L. J. 1126; 13 Bom. L. R. 391; 38 I. A. 85 and *Chuni Bibi* v. *Basanti Bibi*, 24 Ind. Cas. 661; 12 A. L. J. 969; 36 A. 537, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif of Villupuram, in Small Cause Suit No. 1083 of 1913.

Mr. *K. G. Sarangaraja Aiyangar*, for the Petitioner.

Mr. *R. Subramania Aiyar*, for the Respondent.

JUDGMENT.—The argument in this revision petition is that as the promissory note recites that money was received for the execution of the note, it is not open to the plaintiff to prove that the consideration was different from what was recited in the document. Reliance was placed for this purpose upon a decision of this Court reported as *Adityam Iyer* v. *Ramakrishna Iyer* (1). All that was decided in that case was that by oral evidence it is not open to the parties to add to the amount of the consideration mentioned in a document. The question as to whether the actual nature of the consideration that passed between the parties can be proved by oral evidence was not considered in the case. It is settled law that the recital in a document reciting that consideration was paid in a particular way can be proved to have been untruly or incorrectly made. It is enough to mention in this connection the decision of the Judicial Committee reported as *Achal Ram* v. *Kazim Husain Khan* (2). There it was pointed out by Lord Macnaghten that an untrue recital in a deed should not preclude evidence being given of the real consideration. In a later case, *Hanif-un-nisa* v. *Faiz-un-nisa* (3), the Judicial Committee held that the nature of the consideration can be proved by oral evidence. This is the view taken also by Mr. Justice Banerji in *Chuni Bibi* v. *Basanti Bibi* (4). Speaking for myself, I have no hesitation in holding that it is open to the parties to an instrument

(1) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N. 847; 14 M. L. T. 382; 25 M. L. J. 602.

(2) 32 I. A. 113; 9 C. W. N. 477; 27 A. 271; 15 M. L. J. 197; 8 O. C. 155.

(3) 11 Ind. Cas. 398; 33 A. 340; 8 A. L. J. 373; (P. C.); 15 C. W. N. 521; 13 C. L. J. 510; 10 M. L. T. 23; (1911) 2 M. W. N. 370; 21 M. L. J. 1126; 13 Bom. L. R. 391; 38 I. A. 85.

(4) 24 Ind. Cas. 661; 12 A. L. J. 969; 36 A. 537.

show that the special consideration mentioned in the document is not really what passed between them. That seems to follow from clause 1, of section 92, of the Evidence Act. I think the District Munsif was right in this case in allowing evidence to be gone into regarding consideration: he has found that there was good consideration for the note. This petition must be dismissed with costs.

Petition dismissed.

V.R.P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 29 OF 1916.

May 16, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

TURSI—DEFENDANT—APPELLANT

versus

MOHAN—PLAINTIFF—RESPONDENT.

Jurisdiction—Decision of Revenue Court between rival tenants—Suit for ejectment as trespasser—Civil Court, jurisdiction of.

Where in a previous suit for ejectment, the parties came to terms and a decree was passed whereby the defendant became entitled to hold the land for five years and subsequently in another suit for ejectment it was held by the Board of Revenue that the defendant was not the plaintiff's sub-tenant:

Held, in a suit by the plaintiff for ejectment of the defendant as trespasser, that the suit was cognizable by the Civil Court. [p. 302, col. 2.]

Where a dispute is between a tenant and another person who alleges himself to be a co-tenant, the Revenue Court has no jurisdiction to decide the matter finally. It can only do so in a suit between landlord and tenant. [p. 303, col. 1.]

First appeal from the order of the Subordinate Judge, Badaun, dated the 20th December 1915.

Mr. *Benod Bihari*, for the Appellant.

Mr. *Ibn Ahmad*, for the Respondent.

JUDGMENT.

WALSH, J.—I agree with the judgment of the Court below and with the reason given therein. The contention of the appellant seems to me subversive of the whole legislation on this point and none of the authorities cited to us apply to this case. I would dismiss the appeal with costs.

SUNDAR LAL, J.—The only question in this case is, whether the suit as framed lies in a Civil Court and whether the judgment of the Board of Revenue, dated 6th March 1915, is conclusive of the question whether the defendant is or is not a lessee of the plaintiff. The facts of the case as they appear are as follows:—One Harkishen had three sons, Khanjan, Dale and Fateh. Khanjan died and the names of Dugar and Hulasi, sons of Dale, were recorded in his place. We finally find the name of Mohan, son of Fateh, plaintiff-respondent in the present case, recorded in respect of the holding. In 1907, the plaintiff sued for the ejectment of the defendant. The matter in controversy between them was settled by a compromise of 30th September 1907. That compromise was embodied in a decree of 3rd October 1907. Under that compromise the plaintiff paid a sum of Rs. 81 to the defendant and the latter became entitled to hold the cultivatory holding for five years. On the expiration of five years the plaintiff brought a suit for ejectment, alleging that on the facts stated the relationship of tenant and sub-tenant existed between him and the defendant. The Commissioner decided in favour of the plaintiff; but the Board of Revenue on the 6th of March 1915 decided that the defendant was not the plaintiff's sub-tenant. The plaintiff has brought a suit now in a Civil Court on the allegation that the defendant is a trespasser. The *first* point in controversy is whether a suit so framed lies in a Civil Court. There is no section in the Tenancy Act which enables a suit so framed being brought in a Revenue Court, and I think the Court below has rightly decided that on the plaint so drawn up the suit lies in the Civil Court.

The *next* question is whether the observation of the Board of Revenue, that the relationship between the parties was that of co-lessees is conclusive. It is urged on behalf of the appellant that this observation is conclusive of that point. The plaintiff had sued for ejectment of the defendant on the ground that he was his sub-tenant. The only point directly and substantially in issue in that suit was whether the relationship of landlord and tenant existed between the parties. The only point on which that

decision is *res judicata* is that there in no such relationship between them. As to what else the relationship was, was a matter not directly in issue. It was a subsidiary side issue. Any observation on the subsidiary side issue cannot be *res judicata*. The only point which the Revenue Court could decide was whether the relationship of landlord and tenant existed between the parties. Where a dispute is between a tenant and another person who alleges himself to be a co-tenant, the Revenue Court has no jurisdiction to decide the matter finally. It can only do so in a suit between landlord and tenant. I think the decision of the Court below was right, and I agree in dismissing the appeal with costs.

BY THE COURT.—This appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 801 OF 1914.

February 1, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

CHIRAGH DIN—DEFENDANT—APPELLANT

versus

ALLAH DIN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Colourable transaction—Sale in guise of gift—Right to pre-empt.

By a deed which was in terms one of gift, *N* made a gift of the land in suit to defendant as some return for the services rendered to him at various times by the latter, who was described as a near kinsman and a very good friend. The deed also stated that the value of the land was Rs. 1,000. The plaintiff sued for pre-emption and it was found that defendant was not related to *N* nor had rendered him any service:

Held, that the transaction was really one of sale though disguised as a gift and the plaintiff was entitled to pre-empt the land in suit. [p. 305, col. 1.]

Tara Chand v. *Baldeo*, 117 P. R. 1890, referred to.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 24th March 1914.

Mr. *Fazl-i-Hussain*, for the Appellant.

Lala *Moti Lal*, for the Respondents.

JUDGMENT.—It is unnecessary for us to re-state the facts which are set forth in the judgment of the Subordinate Judge. The sole question before us on this second appeal is, whether the deed of conveyance executed by Nathu on the 10th August 1910 is (as in terms it purports to be) a deed of gift in favour of defendant, Chiragh Din, or (as plaintiff pre-emptor alleges) in reality a deed of sale in the guise of a gift.

Admittedly, the deed is in terms one of gift, and according to these terms the gift (which comprised 12 *kanals* 2 *marlas* of land in *Mauza* Baghanwala) was made by Nathu as some return for the services rendered to him at various times by his near kinsman and very good friend, Chiragh Din. The deed, somewhat naively and ingenuously, states incidentally that the value of the property is Rs. 1,000.

The Subordinate Judge and Divisional Judge have concurrently found that the alienation was not a gift but a sale disguised as a gift in order to evade claims by pre-emptors and to enable the alienee to qualify as a candidate for the post of *lambardar*, and they are also agreed that the alleged relationship of the alienee with the alienor and the alleged services rendered by the former to the latter are mythical and unproved.

At the hearing before us Mr. Fazl-i-Hussain made no attempt to support the gift upon the grounds urged by his client in the Courts below, but opened up an entirely new case. The gift, he urged, was not intended to be a permanent transfer to the alienee, but was made, not out of gratitude to a near relation and dear friend, who had rendered invaluable services to the alienor, but with the object of enabling the alienee to qualify for the post of *lambardar*, it being well understood between the parties that the transfer was to be of a temporary character and that the land was to be given back, immediately after the determination of the *lambardari* case, to the alienor. It is not for us to say whether a transaction of this kind should or should not be recognised as an honest, *bona fide* compliance with the rules relating to the appointment of *lambardars*, but that a practice of the kind exists is apparent

from the ruling of the Financial Commissioner to which Mr. Fazl-i-Hussain has referred us [see *Atar Singh* v. *Ganga Singh* (1)]. This practice may exist and it may be that the Revenue Authorities do not regard it unfavourably, but in the case before us we have no hesitation in saying that the plea now advanced in support of the so-called "gift" is a mere afterthought, devised to meet the obvious objection that after two Courts had concurred in holding that there was no foundation for the grounds upon which the "gift" was originally based, it would be idle for the alienee to ask us in second appeal to come to a different conclusion. Both Courts had found that there was no reason whatever why Nathu should have made a gift of a valuable part of his land to Chiragh Din, inasmuch as the latter was not related to him and had not rendered him any services. It was obviously necessary, therefore, to explain the gift in some other way, and as there was no reason why Nathu should have permanently given away part of his land to an ordinary friend, it is now urged that he did so merely for a temporary purpose, and seemingly out of pure good nature and kindness of heart.

But during the trial of the suit the alienee's witnesses insisted that the gift was made as a grateful return for valuable services and that it had no connection whatever with Chiragh Din's application to be appointed *lambardar* (see evidence of Miran Bakhsh, Mehr Bakhsh, Chaudhri Mhanda, Mian Khuda Bakhsh, Haji Ahmad Bakhsh, and Khair Din). Indeed some of these witnesses went so far as to assert that even before the gift was made Nathu had been speaking most gratefully of Chiragh Din's invaluable services and had openly expressed his intention of rewarding him handsomely (see evidence of Mian Khuda Bakhsh and Haji Ahmad Bakhsh).

Mr. Fazl-i-Hussain tries to explain all this by urging that at the time when the suit was pending in the Court of the Subordinate Judge, it would have been impolitic for Chiragh Din to state the real facts as his claim to the *lambardari* was still under consideration and no decision had been given thereon by the Revenue Authorities. This is not quite accurate. The claim of Chiragh Din had been finally rejected by the Commissioner on the 4th November 1911 and defendant's witnesses were examined in April and May 1912. Moreover, not a word was said to the Divisional Judge as to this being the real reason for the gift, and by the time that the appeal was heard by that learned Judge it must have been evident to Chiragh Din that he had no possible chance of obtaining the post for which he was a candidate.

It is true that both in the Court of the Subordinate Judge and in that of the Divisional Judge reference was made to this land being acquired by Chiragh Din in order to qualify himself as a candidate for the post, but it is clear from the judgments of the learned Judges that it was plaintiff who gave this as an explanation for the acquisition of land by Chiragh Din. It is only in this Court and for the reason given above that Chiragh Din has changed his ground and now asserts that the transfer was merely temporary.

As a matter of fact Chiragh Din has made use of the alienation in his favour not only to qualify for the *lambardari* but also to acquire other land in the village, and he has by means of his ownership of this plot of land succeeded in defeating at least one suit for pre-emption. In these circumstances we cannot listen to this entirely new case which is set up by him and we must keep him to the pleas urged by him in the lower Courts. We must take it, therefore, that his defence is that the land was given to him, and given to him (as the deed states) permanently.

The *next* question that arises is whether we can believe this story? Two Courts have disbelieved it and have found that there was no conceivable reason why Nathu, who has six sons of his own and is on good terms with them, should go out of his way to make a gift of this kind to one who is not related to him and to whom he is in no way proved to be beholden. It is not as if Nathu was a man of unbounded wealth, for here again the Subordinate Judge and Divisional Judge are agreed that he is far indeed from being a

(1) 18 Ind. Cas. 594; 1 P. R. 1913 Rev.; 1 P. W. R. 1913 Rev.; 146 P. L. R. 1913.

man of means. Such being the facts, and keeping in mind the very significant reference in the deed to the value of the property (*viz.*, Rs. 1,000), we think the Courts were fully justified in accepting, as a guiding precedent, the decision of the Division Bench in the case reported as *Tura Chand* v. *Baldeo* (2) and in holding upon that authority and upon the facts which are very similar to those in the reported case, that the deed was one really of sale though disguised as a gift.

We accordingly dismiss the appeal with costs. The money (Rs. 1,000) must be paid into the Court of the Subordinate Judge within one month from to-day.

Appeal dismissed.

(2) 117 P. R. 1890.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1243 AND 1979 TO 1981 OF 1912.

November 24, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice N. R. Chatterjea.

MATHURA MOHAN SAHA AND OTHERS—
—APPELLANTS

versus

RAMKUMAR SAHA AND CHITTAGONG DISTRICT BOARD—RESPONDENT.

Transfer of Property Act (IV of 1882), s 54—Sale—Admission, whether title can pass by—Release, whether can operate to pass title—Bengal Local Self-government Act (III of 1885 B. C.), s. 138 (d), *rr.* 93, 98, 102, 103, *scope of—Interpretation of Statute—Statutes, mandatory or directory—Contracts made by agents of Corporation, how far bind it—Contract, rescission of, by another contract—Contract, abandonment of—Civil Procedure Code (Act V of 1908), O. XLI, rr.* 22 (3), 33—*Cross-objection by one respondent against another.*

Where land being sold to the highest bidder for Rs. 1,280 by the District Board, a sale certificate (not registered) was issued to the purchaser, but the property not having been specifically described therein, the Chairman of the District Board executed in favour of the purchaser a registered deed of release which did not, however, purport to be a conveyance and was stamped as a release:

Held, (1) that by the documents no valid title passed to the purchaser, as the unregistered sale certificate could not operate as a conveyance and that the deed of release was inoperative to transfer title because title to land could not pass by a mere admission when the Statute required a deed; [p. 310, col. 1.]

(2) that even if the release was construed as a conveyance, as this document as well as the sale certificate, though sealed and signed by the Chairman, were not signed by two members of the Board, the sale was invalid, being in contravention of rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885, under section 138 *(d)* of the Bengal Local Self-government Act (III of 1885 B. C.); [p. 310, col. 2; p. 311, col. 1.]

(3) that these documents did not constitute even a valid contract for sale, as it was not sanctioned at a meeting of the Board, or executed in accordance with rule 103 of the District Board; [p. 314, col. 1.]

(4) that the purchaser, who came into Court as plaintiff for recovery of possession of the land and declaration of title thereto, must succeed on proof of a valid title and was not entitled to a postponement to entitle him to complete his title by securing a duly executed instrument from the District Board. [p. 314, col. 2.]

Rules 93 and 98 of the Statutory Rules made by the Lieutenant Governor under section 138 (*d*) of the Bengal Local Self-government Act are not *ultra vires* and rule 98 is not merely directory but is mandatory, and must be read along with rule 93; the effect of these two rules is that no immoveable property vested in a District Board can be sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board. [p. 311, col. 2; p. 312, col. 1.]

Section 138 (*d*) of the Bengal Local Self-government Act, which authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property, authorises him not only to frame rules which impose restrictions on alienations but also to frame rules which prescribe the formalities to be observed when alienations are made. [p. 311, col. 1.]

A rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power, though it cannot prevent or prohibit the exercise of the power. [p. 311, col. 2.]

Courts in construing a Statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty it has been to construe, execute or apply it, although such interpretation is not conclusive upon the Courts. [p. 311, col. 2.]

No universal rule can be laid down for the construction of Statutes. As to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed. [p. 312, col. 2.]

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, a rigorous observance of them is regarded essential to the acquisition of the powers or rights. But where a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have

no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. [p. 312, col. 2; p. 313, col. 1.]

Where a Corporation is acting within the scope of the legitimate purposes of its institution, even a parol contract made by its authorised agents raises implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation; provided, the contract is not by Statute positively required to be under seal or it is not *ultra vires* in the sense that it is beyond the scope of the authority of the Corporation under any circumstances. [p. 315, cols. 1 & 2; p. 316, cols. 1 & 2.]

One contract is rescinded by another between the same parties, when the latter contract is inconsistent with, and renders impossible the performance of, the former. But if it turns out that the latter contract cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights under the former contract. [p. 316, col. 2; p. 317, col. 1.]

Where one party, by acts and conduct, evinces an intention no longer to be bound by his contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. But such an abandonment of the contract must be made out by clear and precise evidence. [p. 317, col. 2; p. 318, col. 1.]

Where a Corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain it: either it must return it or make compensation for it: [p. 319, col. 2.]

A respondent in an appeal is not ordinarily entitled to urge cross-objections except as against the appellant, but under special circumstances of a case the Appellate Court can, under the provisions of Order XLI, rules 22 (3) and 33, give effect to the cross-objections of one respondent against another. [p. 320, col. 1.]

Appeals against the decisions of the District Judge, Chittagong, dated the 9th February 1912, modifying those of the Subordinate Judge, Chittagong, dated the 28th November 1910.

Sir *Rash Behary Ghose* and Babu *Dhirendra Lal Kastgir*, for the Appellants.

Babus *Mahendra Nath Ray* and *Gunada Charan Sen*, for Saha Respondent.

Babu *Kshitis Chunder Sen*, for the District Board, Respondent.

JUDGMENT.

MOOKERJEE, J.—The history of the litigations, which have culminated in these appeals, consists principally of matters of record, and has not formed the subject of controversy in the elaborate arguments addressed to this Court. In 1895, one Ram Kamal Saha made over a sum of money to the District Board of Chittagong for the acquisition of a tract of land, in order that a tank might be excavated thereon for the benefit of the inhabitants of the locality. On the 15th June 1897, the usual declaration was published under the Land Acquisition Act; the land was, in due course, delivered to and became vested in the District Board on the 11th and 21st February 1898. It subsequently transpired that Ram Kamal Saha, the donor, was not moved by motives of public philanthropy, but that his real object as also the object of Ramsundar Saha, now represented by the appellants, his three sons, was to spite his relation Ramkumar Saha (the respondent in these appeals), who was owner of a substantial portion of the property acquired. As Mr. Skrine, the then Commissioner of the Chittagong Division, observed, the country was honeycombed with tanks, and it was simply monstrous to wish to pull down godowns and buildings to excavate another tank. The result was that, on the 7th March 1898, the District Board decided to abandon the project; but as possession of the land acquired had already been taken, the Government was not at liberty to withdraw from the acquisition under section 48 (1) of Act I of 1894. The Bengal Government accordingly informed the Commissioner, on the 21st May 1898, that the Government could not withdraw from the acquisition of the land at that stage, and forwarded the opinion of the Superintendent and Remembrancer of Legal Affairs, that if the Board did not want the land, they could arrange with the original owners or others to take the land off their hands at the price paid for its acquisition. On the 29th August 1898, the Board intimated to Ramkumar Saha that as they had abandoned the project, it had become necessary to return the land to its original owner, and they enquired of him, whether he was willing to take back the land on payment of Rs. 25 as the expenses of acquisition. The owner, who was obviously anxious to get back the land, which he had lost by reason of what was essentially an unwarrantable misuse of the machinery provided in the Land Acquisition Act, deposited the amount in the Treasury on the 6th September 1898. The Land Acquisition Collector, apparently in ignorance of

these proceedings, called upon Ramkumar Saha on the 16th December 1898 to receive Rs. 538-5-6 as compensation for that portion of his land which had been acquired for the benefit of the District Board. On the 10th January 1899, Ramkumar Saha wrote to the Land Acquisition Collector and refused to take the compensation money on the ground that he had already accepted and acted upon the offer of the Board to re-transfer the land to him on payment of Rs. 25. The sum held in deposit by the Land Acquisition Collector as compensation was subsequently made over by him to the District Board. The District Board, however, did not execute a conveyance in favour of Ramkumar Saha, and, so far as we can gather, the latter also did not press for a regular deed. The reason, no doubt, was that notwithstanding the proceedings for acquisition, he continued in actual occupation of the land. More than two years later, on the 27th November 1900, the Land Acquisition Collector intimated to Ramkumar Saha that Rs. 957-11-1, had been spent for acquisition of the land, that Rs. 538-5-6, which at one time stood to his credit as owner of the land acquired, had been made over to the District Board, and that the land would be given to him on payment of the balance, Rs. 419-5-7. This offer, so far as can be made out from the record, covered not only the land of Ramkumar Saha which had been acquired for the District Board, but also other lands in the neighbourhood which had been acquired for the purposes of the same project of excavation of a tank. On the 4th December 1900, Ramkumar Saha deposited in the Treasury the entire sum of Rs. 957-11-1; and on or about the same date, a draft conveyance in his favour was drawn up on a stamped paper purchased at his cost for Rs. 10. The conveyance, however, for some unexplained reason, was neither executed nor registered. About a year later, on the 2nd August 1901, the Bengal Government intimated to the Commissioner of the Chittagong Division that the land should be offered to the original owners at cost price, and that if they declined it should be sold by public auction. The letter added that in either case, the net sale-proceeds should be given to the donor or his personal representatives, who had paid the cost of acquisition. On the 24th February 1902, the District Board issued a letter to Ramkumar Saha and informed him that if he did not, within thirty days, deposit Rs. 538-5-6 as price of the land and Rs. 13-9-6 as cost of acquisition (total Rs. 551-15 0) to take back his land, the land would be sold by public auction. Obviously, the District Board authorities overlooked that a much larger sum than what was demanded had already been deposited by Ramkumar Saha. The record does not show what reply was submitted by the latter. We know, however, that on the 20th October 1902, the Land Acquisition Collector intimated to Ramkumar Saha and several other persons (some of them apparently his superior landlords and other his tenants) that they should, on payment of Rs. 872-2-3 within 6th November 1902, take back the land, and that, otherwise, it would be sold by public auction. The notice explained, on the face of it, that the sum demanded was obtained by deduction of Rs. 118-9-9, that is, 15 per cent. from Rs. 990-12-0 (which was the cost of acquisition of the land in four parcels under four declarations; the respective amounts were Rs 50-8-3, 36-11-0, 62-8-10, and 841-10-0). The record does not show what followed upon this notice; but it is plain that the Land Acquisition Collector overlooked that a much larger sum than what he demanded had been deposited nearly two years before. The position now was that Ramkumar Saha did not get a title-deed for the whole land, although he had fully complied with the requisition of the District Board and of the Land Acquisition authorities. Meanwhile on the 17th May 1903, the Commissioner of Chittagong had asked permission of the Board of Revenue to restore the acquired land to the original owners. Why this was done is not explained, because we know that on two previous occasions, namely, on the 21st May 1898 and on the 2nd August 1901, the Local Government had, expressly or impliedly, approved the proposal for re-transfer of the land to the original owners; it is useless to speculate whether the letter of the 17th May 1903 was written because the previous correspondence and the orders contained therein were over-

looked. The record shows that on the 29th May 1903 the Board of Revenue held that their sanction was not necessary, and that as the land had vested in the District Board, the latter were competent to effect the proposed re-transfer to the original owners. What action was taken by the District Board on receipt of this reply does not transpire from the evidence on the record; but we find that on the 24th March 1904, Ramkumar Saha petitioned to the District Board for return of Rs. 992-11-1, which had been in deposit then for several years (the sum was made up of Rs. 25 paid on the 6th September 1898, Rs. 10 paid on account of stamp on the 3rd December 1900, and Rs. 957-11-1 deposited on the 4th December 1900). No notice was taken of this application by the District Board authorities. Ramkumar Saha waited for three years and renewed his application on the 9th June 1907, but with no better result. He again renewed his application on the 12th August 1907. Upon this application, the Chairman of the District Board, on the 26th December 1907, directed that the sum might be refunded, because, in his opinion, the land should be retained and the tank constructed; he added in his note that the acceptance of the refund by Ramkumar Saha would estop the latter in any claim on the unexecuted conveyance; and he specifically directed that the applicant might be asked to take the money. This instruction, however, was not carried out; the order of the Chairman was not notified to Ramkumar Saha, nor was the money ever paid or tendered to him, though an attempt is made in the oral evidence to show that a clerk of the District Board Office verbally communicated the substance of the order of the Chairman to an officer of Ramkumar Saha. The fact remains that the money is even now in the hands of the District Board authorities. On the 22nd February 1909, the District Board put the land to auction. Ramkumar Saha, who was in occupation all this time, as soon as he was apprised of the intentions of the Board, appeared and objected to the sale, on the ground that the Board had already contracted to sell the property to him. The objection was summarily overruled and the property was sold to Ramsundar Saha as the highest bidder for Rs. 1,280. On the 14th May 1909, what is called a sale certificate was issued to the purchaser; as the property was not specifically described in this document, the Chairman of the District Board executed in favour of the purchaser a deed of release on the 12th July 1909. Symbolical possession of the property is said to have been delivered to the purchaser on the 17th August 1909; but he was not able to obtain actual possession. The result was that on the 28th September 1909, the purchaser instituted four suits in the Court of the Munsif of Chittagong for declaration of title by purchase and for recovery of possession from Ramkumar Saha; the District Board of Chittagong was not joined as a party defendant to these suits. The purchaser instituted four different suits, apparently on the ground that the land had been acquired in four distinct parcels on the basis of four declarations under the Land Acquisition Act. On the 16th December 1909, Ramkumar Saha instituted a cross suit in the Court of the Subordinate Judge of Chittagong against Ramsundar Saha, the purchaser, and the Chairman of the District Board. The suit relates only to that portion of the land which had originally belonged to Ramkumar Saha. The plaint formulates the relief claimed as follows: *first*, that the title of the plaintiff in *kaemi dartapa* right and right by adverse possession be declared; *secondly*, that the purchaser defendant be restrained in his attempt to take possession; *thirdly*, that the District Board be made to execute a conveyance in his favour and that his possession be confirmed; *fourthly*, that he be awarded a decree for damages for Rs. 1,957-11-1 with interest and costs; *fifthly*, that he be granted such relief as the Court might think fit. Subsequently to the institution of this suit, the suits in the Court of the Munsif were transferred to the Court of the Subordinate Judge, and the five suits were tried together. The Subordinate Judge, in the suit of Ramkumar Saha, allowed him a decree for Rs. 992-11-1 against the District Board, with interest thereon from date of judgment until payment. In the suits by Ramsundar Saha, the Subordinate Judge gave him a decree for possession with mesne profits and costs against Ramukmar Saha. Four appeals were then preferred to the District Judge by Ramkumar Saha, namely, one appeal by him in his suit, and

three appeals by him in three of the four other suits; the lands comprised in these three suits were identical with what was comprised in his suit. Consequently, the subject-matter of the controversy before the District Judge was restricted to that portion of the land which originally belonged to Ramkumar Saha. The District Judge, in the suit of Ramkumar Saha, modified, to his detriment, the decree of the primary Court. He confirmed the decree in his favour for Rs 992-11-1; but he made the recovery of this sum from the District Board conditional on his making over possession of the land to the Board within 6 months. In the other three suits, brought by Ramsundar Saha, he allowed the appeals of Ramkumar Saha and dismissed the claim for possession on the ground that the sale of the 22nd February 1909 was inoperative in law. The representatives of Ramsundar Saha, who had died in the interval, have perferred four appeals to this Court and have contended that the sale mentioned was valid and operative. Ramkumar Saha has preferred a memorandum of cross-objections in the appeal which arises out of his suit and has argued that he had a good title to the land and was, at any rate, entitled to a decree for specific performance against the District Board. Notice of the memorandum of cross-objections was, however, served at first only on the appellants, and when this was brought to the notice of the Court, the hearing of the appeals was adjourned, at the request of the Counsel for the District Board, to enable him to consider the position and to receive adequate instructions; it was ultimately intimated to the Court that the District Board supported the contention of the appellants and opposed the cross-objections of their co-respondent, Ramkumar Saha. The appeals have been elaborately argued on both sides, and the points which emerge for consideration as also the facts whereon they are based may be briefly summarised.

The land now in dispute admittedly belonged originally to Ramkumar Saha. At the instance of Ramkamal Saha and Ramsundar Saha, the land was acquired under the Land Acquisition Act and was vested in the Chittagong District Board for the excavation of a tank. The project was subsequently abandoned, and the District Board, with the concurrence of the Local Government, decided to return the land to the original owner on payment of the actual expenses of the acquisition, as no compensation had been previously paid to him. The District Board, through their Vice-Chairman, then made an offer to Ramkumar Saha to return the land to him, if he paid Rs. 25 as the expenses of the acquisition. This offer was forthwith accepted, and the money was deposited in the Treasury. Though no formal conveyance was executed, Ramkumar Saha continued in occupation presumably on the strength of this agreement. Two years later, a second offer was made to Ramkumar Saha by the Land Acquisition Collector, on behalf of the District Board, to transfer to him the whole of the land acquired (inclusive of the land covered by the previous agreement) if he would pay Rs. 957-11-1, which had been assessed as compensation. This offer also was accepted, and the amount demanded was forthwith deposited. A draft conveyance was prepared, but was not executed for some unexplained reason. More than a year later, the District Board, through their Chairman, offered to Ramkumar Saha to re-transfer to him his portion of the land on payment of Rs. 538-5-6, the amount assessed as compensation therefor, and Rs. 13-9-6, the proportionate amount of expenses of acquisition. A few months later, the Land Acquisition Collector, on behalf of the District Board, offered to re-transfer the land to Ramkumar Saha, his landlords and his tenants, if Rs. 990-12-0 was paid. What took place on these offers, does not transpire from the record; but two years later, Ramkumar Saha petitioned for refund of his deposit; this was of no avail, and a renewed application three years later was equally fruitless. On a third application by him, some months later, the Chairman of the District Board directed a refund, but his order was neither communicated nor carried out. More than a year afterwards, notwithstanding protest by Ramkumar Saha, the District Board put up the land to auction, when it was purchased by Ramsundar Saha, who had, 11 years earlier, set the machinery of the Land Acquisition Act in motion to deprive his rival of the land in suit. The purchaser, however, was not able to obtain

actual possession, and was obliged to sue for recovery of possession, with the result that a cross-suit was instituted by Ramkumar Saha with a view to perfect his own title or to recover damages from the District Board. The outstanding features of the case, then, are, that Ramkumar Saha has never been paid any compensation for his land, and has, on the other hand, paid to the District Board authorities, with a view to obtain a re-transfer thereof, a sum of Rs. 992-11-1, of which the Board had enjoyed the benefit for 9 years at the date of the institution of the suit. The only question is, what are the legal rights of the parties; for there is not much room for doubt as to where the justice of the case lies. It is convenient to examine, at the outset, the position of Ramsundar Saha, who was the first to come into Court and to launch these litigations.

There is no controversy that under section 16 of Act I of 1894, the title vested absolutely in the District Board when possession of the land acquired was taken by the Collector on the 11th and 21st February 1898. The question arises, whether that title has been subsequently transferred to Ramsundar Saha. The District Judge has held that the answer must be in the negative. The purchaser relied upon the sale certificate granted to him on the 14th May 1909 and the release executed in his favour on the 12th July 1909; the Court of Appeal below has held that neither is of any avail. Section 54 of the Transfer of Property Act, provides that a sale of tangible immoveable property of the value of Rs. 100 and upwards can be made only by a registered instrument. The sale certificate was not registered and cannot consequently operate as a valid conveyance. The release was registered, but it does not purport to be a conveyance, and was stamped, not as a conveyance but as a release; as stated on the face of it, it was granted, because the property covered by the sale-certificate was not described with sufficient precision in that document. A release of this character cannot operate to transfer title, because, as has been repeatedly ruled in this Court, title to land cannot pass by a mere admission when the Statute requires a deed: *Jadu Nath Poddar* v. *Rup Lal Poddar* (1); *Dharam Chand Boid* v. *Mouji Shahu* (2); *Narak Lal* v. *Thagoo Lal* (3). The decision in *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (4) [which at an earlier stage is reported as *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (5)] is distinguishable; there this Court held upon a construction of all the terms of the particular instrument that though called a deed of disclaimer it operated as a deed of transfer; the Court did not formulate any general proposition of universal application that a deed of release has always the same operation as a conveyance. But, even if the release in this case could, by any stretch of language, be construed as a conveyance, there would be a fatal objection to its validity. Neither the release nor the sale certificate fulfils the requirements of rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885 under section 138 (*d*) of Act III of 1885 B. C. (Bengal Local Self-government Act). Rule 98 is in these terms: "Every transfer of immoveable property, vested in a Board, shall be made by an instrument under the common seal, signed by the Chairman and by two members of the Board, and, where these rules require the previous approval of the Commissioner of the Division, the fact that the transfer is signed with such approval shall be distinctly expressed." This rule must be read along with rule 93, which, so far as relevant to the present matter, provides that "no immoveable property vested in a District Board shall, *except* with the previous approval of the Local Government and in such manner and on such terms and conditions as that Government may approve, be transferred by the Board by way of sale." The effect of these two rules, consequently, is that no immoveable property vested in a District Board can be sold, *except* with the previous approval of the Local Government and *except* by an instrument under the common seal signed by the Chairman and by two members of the Board.

(1) 4 C. L. J. 22; 33 C. 967; 10 C. W. N. 650.

(2) 16 Ind. Cas. 440; 16 C. L. J. 436.
(3) 13 Ind. Cas. 455; 22 C. L. J. 380.
(4) 12 C. W. N. 478.
(5) 32 C. 169; 9 C. W. N. 96.

Neither the sale certificate nor the release fulfils this condition, as both the documents, though sealed and signed by the Chairman, were not signed by two members of the Board. The appellants have sought to escape from this difficulty by a twofold argument, namely, *first*, that rules 93 and 98 are *ultra vires*, and, *secondly*, that rule 98, if *intra vires*, is directory and not mandatory.

In support of the *first* contention, reference has been made to sections 20 and 138 (*d*) of Act III of 1885 B. C. The former section defines a District Board as a body corporate with power to acquire and hold property, both moveable and immoveable, and, subject to any rules made by the Lieutenant-Governor under the Act, to transfer any such property held by it and to contract and do all other things necessary for the purposes of the Act. A District Board has, consequently, power to transfer property held by it, subject to any rules made by the Lieutenant Governor under the Act. Section 133 (*d*) authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of *regulating the powers* of District Boards to transfer property. The appellants have argued that this authorises the Lieutenant-Governor to frame rules which impose restrictions on alienations, but not to frame rules which prescribe the formalities to be observed when alienations are made. After careful consideration of the argument addressed to us, we are unable to accept this contention. The expression '*regulate the powers*', when applied to a rule, appears to us to be comprehensive enough to include, not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. It is conceivable, for instance, that the rules may prescribe that a District Board may sell land for one purpose and not for another, or that the sale can be made only with the assent of the Local Government when the value of the land exceeds a prescribed limit, or that the conveyance is, in certain cases, to be executed by the Chairman alone, while, in other cases, it is to be signed by the Chairman and a member of the Board. Rules framed in this behalf may, without undue stretch of language, be deemed to be rules regulating the powers of the District Board. The term 'regulate' is defined as follows in the Oxford Dictionary, Vol. VIII, page 379: "to control, govern or direct by rules or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings." Consequently, a rule to regulate a power may be a rule to restrict the exercise of the power as also a rule to guide the exercise of the power; though, as Lord Davey said in *Municipal Corporation of Toronto* v. *Virgo* (6), authority to regulate does not include a power to prevent or prohibit, because, in the language of Lord Watson in *Attorney-General (Ontario)* v. *Attorney-General (Dominion of Canada)* (7), a power to regulate assumes the conservation of the thing which is to be made the subject of regulation. Subject to this qualification, a rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power. In our opinion, rules 93 and 98 are not *ultra vires*. In the interpretation of the scope of section 133 (*d*), some stress may also be laid upon the circumstance that immediately after the enactment of the section by the Legislature, the construction now accepted by us was placed thereon by the authority charged with the duty of framing the rules. As was explained in *Baleshwar Bagarti* v. *Bhagirathi Dass* (8), it is a well-settled principle of interpretation that Courts in construing a Statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not by any means a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons. We may add that if the contention of the appellants were to prevail, the object of the Legislature would obviously be defeated; instead of a simple and

(6) (1896) App. Cas. 88; 65 L. J. P. C. 4; 73 L. T. 449.

(7) (1893) App. Cas. 348; 63 L. J. P. C. 26; 74 L. T. 533.

(8) 7 C. L. J. 563; 35 C. 701 at p. 713; 12 C. W. N.

definite rule as to the mode in which transfers are to be effected, we would have here all the uncertainty which prevails in other systems of law as to the manner in which transfers may be validly effected by a corporate body.

In support of the *second* contention, namely, that rule 98, if not *ultra vires*, is merely directory and not mandatory, it has been argued that the rule does not, by the use of negative words, expressly provide that a valid transfer can be effected in no other way, and reference has in this connection been made to the decisions in *Liverpool Borough Bank* v. *Turner* (9) and *Cole* v. *Green* (10). In the first of these cases, it was ruled that although the Merchant Shipping Act, 1854, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the Act, the whole scope of the Act is to that effect, and an equitable mortgage is consequently invalid. In the second case, it was ruled that a contract within the scope of section 151 of Statute 3 & 4, Will. IV, Ch. 68, is not void, though not signed "by the Commissioners, or by any three of them, or by their clerk", as prescribed by that section. In our opinion, the contention of the appellants is not well founded. Rule 98 must be read along with rule 93, and the latter rule does use appropriate words to indicate that no immoveable property vested in a District Board can be transferred by way of sale, *except* in such manner as the Local Government may approve. The intention is clearly manifest that a transfer shall not be made *except* in the manner prescribed by rule 93. The whole aim and object of the law would plainly be defeated, if here the command to do the thing in a particular manner did not imply a prohibition to do it in any other; indeed, the language used in rule 93 leaves no room for doubt as to the intention: *Jolly* v. *Hancock* (11); *In re Dickinson, Ex parte Rosenthal* (12).

(9) (1860) 1 Johns. & Hem. 159; 29 L. J. Ch. 827 affirmed in (1860) 2 De G. F. & J. 502 at p. 507; 13 L. T. 494; 9 W. R. 292; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 70 E. R. 703; 128 R. R. 315.

(10) (1843) 6 M. & G. 872 at p. 890; 7 Scott (N. R.) 632; 13 L. J. C. P. 30; 134 E. R. 1145.

(11) (1852) 7 Ex. 820; 22 L. J. Ex. 38; 16 Jur. 550.

(12) (1882) 20 Ch. D. 315; 51 L. J. Ch. 736; 47 L. T. 266; 30 W. R. 667.

The decisions relied upon by the appellants are clearly of no avail. The observations of Lord Campbell, L. C., in *Liverpool Borough Bank* v. *Turner* (9), show that a transfer in a mode other than that prescribed may be null and void, even though there are no negative words in the Statute declaring that all transfers in any other form shall be null and void. No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed: *Howard* v. *Bodington*, (13). The decision in *Cole* v. *Green* (10) seems at first sight to assist the contention of the appellants, but, on closer examination, turns out to be clearly distinguishable, as there the clause in question, according to strict grammatical construction, was held not to form part of the proviso; the judgment of Tindal, C. J., shows that if the latter part of the section could be treated as part of the proviso, it would have been deemed imperative and not directory only. Here, however, rule 98, when read with rule 93, shows that the requirement as to signature by two members of the Board is mandatory and not directory. This is shown also by an application of a useful test, namely, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power. It is well settled that where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred: *Caldow* v. *Pixell* (14). On the other hand, where a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only,

(13) (1877) 2 P. D. 203 at p. 211.

(14) (1877) 2 C. P. D. 562; 43 L. J. C. P. 54[illegible]; 36 L. T. 46[illegible]; 25 W. R. 773.

when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The distinction between the two classes of cases is illustrated by the decisions in *Ward* v. *Beck* (15); *Stapleton* v. *Haymen* (16); *The Andalusian* (17); *Le Feuvre* v. *Miller* (18); *Cope* v. *Thamas Haven Dock Railway Company* (19); *Diggle* v. *London and Blackwall Railway Company* (20); *Frend* v. *Dennett* (21); *Cornwal Mining Company* v. *Bennett* (22); *Irish Peat Company* v. *Phillips* (23); *Alma Spinning Company, In re, Bottomley's* case (24); *Gifford & Bury Town Council, In re* (25). These cases show that when a public body or a Company is established by Statute or incorporated for special purposes only, and is altogether the creature of Statute Law, the prescriptions for its acts and contracts are imp rative and essential to their validity. The case of *Frend* v. *Dennett* (21) is specially instructive. The Public Health Act, 1848, enacted that contracts exceeding £ 10 in value should be sealed with the seal of the Board; that they should contain certain particulars; and that every contract so entered into shall be binding; provided always that before contracting for the execution of any work, the Board shall obtain from the surveyor a written estimate of the probable expense of executing it and keeping it in repair. The first of these requisites was decided to be imperative, and a contract unsealed was consequently held inoperative against the Board and the rates. But the provision which required an estimate, was held to be merely a direction or instruction for the guidance of the Board and not a condition precedent essential to the validity of the contract: *Hunt* v. *Wimbledon Local Board* (26); *Eaton* v. *Basker* (27); *Brooks* v. *Torquay Corporation* (28); *British Insulated Wire Company* v. *Prescot Urban District Council* (29); *Nowell* v. *Mayor of Worcester* (30); *Bonar* v. *Mitchell* (31). This meets completely the argument of the appellants that if any of the provisions of rule 98 be deemed mandatory, the same character must be imputed to all its provisions. The view we take is supported by the principles deducible from the decisions in *Ashbury Railway Carriage & Iron Company* v. *Riche* (32); *Chasteauneuf* v. *Capeyron* (33) and *Young* v. *Mayor of Leamington Corporation* (34). In the case last mentioned, the House of Lords ruled that section 174 of the Public Health Act, 1875, which enacts that every contract made by an urban authority whereof the value or amount exceeds £ 50, shall be in writing and sealed with the common seal of such authority, is obligatory and not merely directory. Lord Bramwell observed: "The Legislature has made provisions for the protection of ratepayers, shareholders and others, who must act through the agency of a representative

(15) (1863) 13 C. B. (N. S.) 668; 134 R. R. 691; 32 L. J. C. P. 113; 9 Jur. (N. S.) 912; 143 E. R. 265.

(16) (1864) 2 H. & C. 918; 133 R. R. 858; 33 L. J. Ex. 170; 10 Jur. (N. S.) 497; 9 L. T. 655; 12 W. R. 317.

(17) (1878) 3 P. D. 182; 47 L. J. Adm. 65; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. C. 22.

(18) (1857) 8 El. & Bl. 321; 112 R R. 582; 26 L. J. M. C. 175; 3 Jur. (N. S.) 1255; 120 E. R. 120.

(19) (1849) 3 Exch. 841; 77 R. R. 859; 6 Railw. Cas. 83; 18 L. J. Ex. 345.

(20) (1850) 5 Exch. 442; 19 L. J. Ex. 303; 6 Railw. Cas. 590; 14 Jur. 937.

(21) (1858) 4 C. B. (N. S.) 576; 114 R. R. 859; 5 L. T. 73; 27 L. J. C. P. 314; 4 Jur. (N. S.) 897; 140 E. R. 1217.

(22) (1860) 5 H. & N. 423; 120 R. R. 670; 29 L. J. Ex. 157; 6 Jur. (N. S.) 539.

(23) (1861) 1 B. & S. 598; 124 R R. 680; 30 L. J. Q. B. 363; 7 Jur. (N. S.) 1189; 4 L. T. 806; 9 W. R. 873; 121 E. R. 837.

(24) (1880) 16 Ch. D. 681; 50 L. J. Ch. 167; 43 L. T. 620; 26 W. R. 133.

(25) (1888) 20 Q. B. D. 368; 57 L. J. Q. B. 181; 58 L. T. 522; 36 W. R. 488; 52 J. P. 119.

(26) (1878) 4 C. P. D. 48; 48 L. J. C. P. 207; 40 L. T. 115; 27 W. R. 123.

(27) (1881) 7 Q. B. D. 529; 50 L. J. Q. B. 444, 44 L. T. 703, 29 W. R. 597; 45 J. P. 616.

(28) (1902) 1 K. B. 601; 71 L. J. K. B. 109; 85 L. T. 785; 66 J. P. 293; 18 T. L. R. 139.

(29) (1895) 2 Q. B. 463: 64 L. J. Q. B. 811; 15 R. 633; 73 L. T. 383; 44 W. R. 224; 59 J. P. 552.

(30) (1854) 9 Exch. 457; 96 R. R. 793; 2 C. L. R. 981; 23 L. J. Ex 139; 18 Jur. 64; 22 L. T. (o. s.) 244.

(31) (1850) 5 Exch. 415; 19 L. J. Ex. 302.

(32) (1875) 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 451; 24 W. R. 794.

(33) (1882) 7 App. Cas. 127; 51 L. J. P. C. 37; 46 L. T. 65; 4 Asp. M. C. 489.

(34) (1883) 8 App. Cas. 517 at p 522; 52 L. J. Q. B. 713; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.

body, by requiring the observance of certain solemnities and formalities, which involve deliberation and reflection. That is the importance of the seal. It is idle to say, there is no magic in a wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other cause a disregard of these safeguards, and improvident engagements are entered into.....The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." A similar view has been taken in a long line of cases in the Courts of the United States, where the principle has been repeatedly affirmed that if the charter or constituent act of a Corporation prescribes a particular mode in which the property of the Corporation shall be disposed of, that mode must be pursued: *Platter* v. *Elkhart County* (35); *Crow* v. *Warren County* (36); *Shimen* v. *Phillipsbery* (37). The point was discussed with characteristic clearness and striking logical force in able and interesting opinions by Field, C. J., in what are known as the City Slip cases in California, where it was ruled that sales of real estate belonging to the city by its officers, under the authority of an ordinance not adopted in accordance with statutory requirements, were void and did not pass title to the purchasers: *McCraken* v. *San Francisco* (38); *Crogan* v. *San Francisco* (39); *Pimemtal* v. *San Francisco* (40). There is thus no escape from the position that neither the sale certificate nor the release has operated to transfer title to the appellants.

It is further clear that they do not constitute even a valid contract for sale, because rule 103 requires that every contract or agreement entered into by any District Board in respect of a sum or involving a value above Rs. 500 shall be sanctioned at a meeting, be in writing, be signed by the Chairman and two other members of the District Board and shall be sealed with the common seal of such District Board. The rule adds that unless so sanctioned and executed, such contract shall not be binding on the District Board. It has been finally argued that the objection to the title of the appellants should not have been allowed to prevail, as the sale was admitted [*Satyesh Chunder Sircar* v. *Dhunpul Singh* (41)] and that, at any rate, the trial should have been postponed to enable the appellants to complete their title by securing a duly executed instrument from the District Board [*Ganpat Pandurang* v. *Adarji Dadabhai* (42)]. There is no force in either of these contentions. The appellants came into Court as plaintiffs and must succeed on proof of a valid title. Their title was challenged by the defendants, and though the *factum* of the sale by auction was admitted, it was asserted that the title had not been transferred thereby. The appellants had ample opportunity to produce a properly executed conveyance from the District Board, if they could, but they have not done so. The case before us clearly does not fall within the class of decisions where it has been ruled that a suit need not be dismissed merely because the authority for its institution, such as a certificate under the Pensions Act, 1861, or section 78 of the Land Registration Act, or section 60 of the Bengal Tenancy Act, or section 4 of the Succession Certificate Act, is not produced with the plaint. The cases on this subject will be found reviewed in the judgment of this Court in *Sarat Chandra Banerjee* v. *Apurba Krishna Roy* (43) and need not be re-examined here. They are distinguishable, as the plaintiffs here had no title at all at the date of the institution of the suit. We hold accordingly that the District Judge has correctly found that Ramsundar Saha had no enforceable title at the date of the commencement of his suits, which must be deemed to have been rightly dismissed. The inference

(35) (1885) 103 Ind. 360; 2 N. E. 544.
(36) (1888) 118 Ind. 51; 20 N. E. 642.
(37) (1896) 58 N. J. L. 506; 33 Atl. 852.
(38) (1860) 16 Calf. 591.
(39) (1861) 18 Calf. 590.
(40) (1863) 21 Calf. 351.
(41) 24 C. 20.
(42) 3 B. 312.
(43) 11 Ind. Cas. 187; 14 C. L. J. 55; 15 C. W. N. 925.

follows that the title to the land in dispute is still vested in the District Board, and, we must, consequently, examine the rights of Ramkumar Saha against that body, which form the subject of enquiry in his suit.

There is no controversy upon one fundamental point, namely, that after the land in dispute had become vested in the District Board, they abandoned the project to excavate a tank and obtained the sanction of the Local Government to re-transfer the land to the original owner. The question is, whether there is a valid contract for such transfer enforceable at the instance of Ramkumar Saha against the District Board. It cannot be disputed that there was an offer by the District Board to Ramkumar Saha on the 31st August 1898 to re-convey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and that the offer was accepted by him when he made the requisite deposit on the 6th September 1898. This plainly constituted an enforceable contract. Rule 102 of the Statutory Rules provides that every contract made by or on behalf of a Board in respect of a sum or involving a value exceeding Rs. 50 shall be in writing and shall be signed by the Chairman or Vice-Chairman of the Board. As the contract in this case was for re-transfer of the land for Rs. 25, neither rule 102 nor rule 103, which apply respectively to contracts in excess of sums of Rs. 50 and Rs. 500, has consequently any application; but we know that the offer of the 31st August 1898 was, as a matter of fact, signed by the Vice-Chairman. It has not been proved that the Vice-Chairman had no authority to make this particular offer; no copy of the rules, if any, framed by the District Board under section 32 (*e*) of the Bengal Local Self-Government Act as to the power to be exercised by the Chairman or Vice-Chairman, has been produced. We must assume that the Vice-Chairman was competent to make the offer, specially as his act has never been specifically repudiated in these proceedings. The document whereby the original offer was made, is apparently not in existence, and the draft copy kept in the office has been produced; it is consequently impossible to say, whether the original bore the seal of the District Board; but, if a seal is necessary, it is to be presumed, as Lord Denman says in *Doe* d. *Pennington* v. *Taniere* (44), against the Corporation that everything has been done that was necessary to make it a binding contract upon both parties. The Statutory Rules, however, do not expressly require that a contract of this description should be sealed. The omission to affix the seal would not, therefore, affect the validity of the contract. The strict rule of the ancient Common Law, no doubt, was that a Corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date and where a Corporation is acting within the scope of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation : 6 Vin. Abr. 267; 1 Wms. Saund. 615, 616; 1 Blackstone Com. 475; *Lawford* v. *Billericay Rural Council* (45); *Douglass* v. *Rhyl Urban Council* (46); *Melbourne Banking Corporation* v. *Brougham* (47); *Bank of Columbia* v. *Patteson* (48). This is borne out by the statement of Fry in his classical treatise on Specific Performance of Contracts, 1911, section 648: "it appears to be clear that such part performance as will prevent an ordinary defendant from setting

(44) (1848) 12 Q. B. 998 at p. 1013; 18 L. J. Q. B. 49; 13 Jur. 119; 116 E. R. 1144; 76 R. R. 450.

(45) (1903) 1 K. B. 772 at pp. 780, 786; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535; 19 T. L. R. 322.

(46) (1913) 2 Ch. 407; 82 L. J. Ch. 537; 109 L. T. 30; 77 J. P. 373; 11 L. G. R. 1162; 57 S. J. 627; 29 T. L. R. 605.

(47) (1878) 4 App. Cas. 156; 48 L. J. P. C. 12; 48 L. T. 1.

(48) (1813) 7 Cranch 299.

up the defence of the Statute of Frauds, will prevent the defendant Company from setting up either that defence or a defence grounded on the absence of the corporate seal or of the statutory formalities in accordance with which the Company may be enabled to contract. This was clearly laid down in the case of *Wilson* v. *West Hartlepool Harbour & Railway Company* (49) and there are other authorities leading to the same conclusion." Reference is then made to *Marshall* v. *Queenborough Corporation* (50); *Maxwell* v. *Dulwich College* (51) mentioned in *Carter* v. *Ely (Dean)* (52); *London & Birmingham Railway Company* v. *Winter* (53); *Earl of Lindsey* v. *Great Northern Railway Company* (54); *Crook* v. *Corporation of Seaford* (55); *Mayor of Drogheda* v. *Holmes* (56). Amongst more recent decisions, reference may usefully be made to the judgment of Neville, J., in *Hoare* v. *Kingsbury Urban Council* (57), which shows that the exception based upon the doctrine of part performance cannot be applied where, as in *Frend* v. *Dennett* (21) and in *Young* v. *Mayor of Leamington Corporation* (34), the contract is, by Statute, positively required to be under seal: to hold otherwise would in effect be, as Lindley, L. J., said in *Young* v. *Corporation of Leamington* (58) to repeal the Act of Parliament and to deprive the ratepayers of that protection which Parliament intended to secure for them. In the case before us, however, the statutory rules do not render a seal necessary for the validity of this class of contracts, and the doctrine of part performance may well be applied; the District Board have had the benefit of the money paid by Ramkumar Saha and have allowed him to remain in occupation of the land and to incur expenditure thereon for many years on the basis of the contract. It is worthy of note that the contract in this case is not *ultra vires* in the sense that it is beyond the scope of the authority of the District Board as a corporate body under any circumstances; such contract is not affected by the class of decisions, whereof *Ashbury Railway Carriage and Iron Company* v. *Riche* (32) may be taken as the type. We hold accordingly that there was an enforceable contract on the 6th September 1898.

Two questions next require consideration, namely, *first*, has there been an implied rescission of this contract by a substituted agreement, and, *secondly*, has there been an implied rescission of the contract by abandonment. As regards the *first* point, we have to bear in mind that, subsequent to the agreement of the 6th September 1898, an offer was made to Ramkumar Saha by the Collector on behalf of the District Board on the 27th November 1900 to re-transfer the entire land to him (inclusive of the land acquired from him as also from others), if he would make the required deposit. He may be deemed to have accepted this offer on the 4th December 1900, when he paid into the Treasury the amount demanded. What, then, was the legal effect of this transaction; did it amount to an implied rescission of the original agreement by a substituted agreement? The answer must be in the negative, first, because the second agreement was only more comprehensive than, but in no way inconsistent with, the first agreement, and, secondly because, the second agreement was inoperative in law.

As regards the *first* point, it is well settled that a contract need not be rescinded by an express agreement to that effect; if the parties make a new and independent agreement concerning the same matter, the latter may be construed to discharge the former, when the terms of the latter are so inconsistent with those of the former that they cannot stand together: *Gilbert* v. *Hall* (59). The true principle is that one contract is rescinded by another between the same

(49) (1864) 34 Beav. 187; 2 De G. J. & S. 475; 34 L. J. Ch. 241; 11 Jur. (N. S.) 124; 11 L. T. 692; 13 W. R. 361; 55 E. R. 606; 145 R. R. 476.

(50) (1823) 1 Sim. & St. 520; 24 R. R. 220; 57 E. R. 206.

(51) (1783) 4 L. J. Ch. 138.

(52) (1853) 7 Sim. 211 at p. 222; 40 R. R. 113 at p. 121; 4 L. J. Ch. 132; 58 E. R. 817.

(53) (1840) Cr. & Ph. 57 at p. 63; 41 E. R. 410; 54 R. R. 201.

(54) (1853) 10 Hare. 664; 22 L. J. Ch. 995; 17 Jur. 522; 1 W. R. 257; 68 E. R. 1094; 90 R. R. 515.

(55) (1870) 10 Eq. 678.

(56) (1855) 5 H. L. C. 460; 101 R. R. 251; 10 E. R. 979.

(57) (1912) 2 Ch. 452; 81 L. J. Ch. 666; 107 L. T. 492; 76 J. P. 401; 10 L. G. R. 829; 56 S. J. 704

(58) (1882) 8 Q. B. D. 579 at p 585; 51 L. J. Q. B. 292; 46 L. T. 555; 30 W. R. 500; 46 J. P. 516.

(59) (1831) 1 L. J. Ch. 15.

parties, when the latter is inconsistent with, and renders impossible the performance of, the former; but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed: *Hunt* v. *South Eastern Railway Company* (60); *Dodd* v. *Churton* (61); *Patmore* v. *Colburn* (62); *Thornhill* v. *Neats* (63). The same view has been adopted in the Courts of the United States: *Drown* v. *Forrest* (64); *Rhoades* v. *Chesapeake Railway Company* (65); *Mc Daniels* v. *Robinson* (66). It is further well settled that where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. As observed by Willes, J., in *Noble* v. *Ward* (67), this is in accordance with a series of cases which will be found referred to in the second of the Egreemont cases, *Doe* d *Liddulph* v. *Poole* (68). A similar view was taken in *Britt* v. *Ayllet* (69). In the case before us, the second agreement was inoperative in law, as it contravened the provisions of Rule 103 of the Statutory Rules previously mentioned. We cannot consequently hold that the original agreement of the 31st August 1898 was, by implication, rescinded by the subsequent agreement of the 4th December 1900.

As regards the *second* point, we have to consider whether the agreement of the 6th September 1898 was impliedly rescinded by abandonment, when Ramkumar Saha applied to the District Board, on the 24th April 1904, 9th June 1907 and 12th August 1907, for return of the sum previously paid by him; for there is no dispute that where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. The rule on this subject was formulated by Lord Coleridge, C. J., in *Freeth* v. *Burr* (70): "Where the question is, whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which, I think, the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, namely, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." This exposition has been twice affirmed by the House of Lords. In *Mersey Steel & Iron Company* v. *Naylor Benzon & Company* (71) Selborne, L. C., said: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as

(60) (1875) 45 L. J. C. P. 87.
(61) (1897) 1 Q. B. 562; 66 L. J. Q. B. 477; 76 L. L. T. 438; 45 W. R. 490.
(62) (1834) 1 Cr. M. & R. 65; 4 Tyr. 840; 3 L. J. Ex. 314; 149 E. R. 996.
(63) (1860) 18 C. B. (N. S.) 831; 125 R. R. 902; 2 L. T. 539; 141 E. R. 1392.
(64) (1891) 63 Vermont 557; 14 L. R. A. 80.
(65) (1901) 49 W. Va. 494; 87 Am. St. Rep. 826; 55 L. R. A. 170.
(66) (1854) 26 Vermont 316; 62 Am. Dec. 574.
(67) (1867) 4 H. & C. 149; L. R. 1 Exch. 117; 143 R. R. 534, 35 L. J. Ex. 81, 15 L. T. 672; 15 W. R. 520.
(68) (1848) 11 Q. B. 713; 75 R. R. 607; 17 L. J. Q. B. 143; 12 Jur. 450; 116 E. R. 641.
(69) (1850) 11 Arkansas 475; 52 Am. Dec. 282.
(70) (1874) 9 C. P. 208; 43 L. J. C. P. 91; 29 L. T. 773; 22 W. R. 370.
(71) (1884) 9 App. Cas. 434 at pp. 438, 442; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.

would amount to a rescission, if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part." In the same case, Lord Blackburn added: "Where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'if you go on and perform your side of the contract, I will not perform mine,' that in effect amounts to saying, 'I will not perform the contract.'" To the same effect is the observation of Lord Collins in *General Bill Posting Company* v. *Atkinson* (72), "the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract." As renunciation is thus based on an absolute abandonment of the contract, it follows, as Bowen, L. J., said in *Boston Deep Sea Fishing Company* v. *Ansell* (73), that a rescission of the contract implies that you relegate the parties to the original position they were in before the contract was made; that cannot be where half the contract has been performed. It is also well settled that the Court insists upon clear and precise evidence of a mutual intention to determine and abandon the contract: *Robinson* v. *Page* (74) and *Buckhouse* v. *Crossby* (75). Sugden, L. C., said in *Carolan* v. *Brabazon* (76): "The Court requires as clear evidence of the waiver as of the existence of the contract itself; and will not act upon less." To the same effect is his observation in *Moore* v. *Crofton* (77). Smith, M. R., in *Clifford* v. *Kelly* (78) and in *Cartan* v. *Bury* (79) quotes with approval the statement of Lord St. Leonards in his celebrated work on Vendors and Purchasers (1862), Chapter 4, section 9, paragraph 3, page 168: "An abandonment of the whole agreement, clearly made out (for the Court will look at the evidence with great jealousy), is a good defence in equity:" *Brophy* v. *Connolly* (80); *Chambers* v. *Betty* (81); *Homan* v. *Skelton* (82); *Chubb* v. *Fuller* (83); *Lloyd* v. *Collett* (84); *Reynolds* v. *Nelson* (85); *Garrett* v. *Besborough* (86); *Cubitt* v. *Blake* (87) and *Earl of Rosse* v. *Sterling* (88). Now let us examine the relative situation of the parties in the light of these principles. The applications by the plaintiff for return of his money do not state explicitly that he wished to rescind the contract. His conduct, indeed, was inconsistent with any such possible implication; he did not offer to quit possession of the land on receipt of the money. In fact, if he rescinded the contract and gave up the land, he would be entitled not only to a return of his money, but also to compensation assessed under the Land Acquisition Act. The Chairman, when he recorded the order for return of the money, no doubt, noted that if the plaintiff took back the money, he might find himself estopped in his attempt to enforce the contract, not, indeed, the earlier contract, but the later agreement, which formed the basis of the unexecuted draft conveyance; in any event, his remarks show that he, at any rate, thought that there was a subsisting contract between Ramkumar Saha and the District Board. But whatever the result might have been if the plaintiff had actually received back his money, the incontestable fact remains that the amount has not yet been paid to him. The order of the Chairman was never communicated to him; the money has never

(72) (1909) App. Cas. 118 at p. 122; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178.
(73) (1881) 39 Ch. D. 339 at p. 365; 59 L. T. 345.
(74) (1826) 3 Russell 114; 27 R. R. 26; 38 E. R. 519.
(75) (1737) 2 Eq Cases Abr. 32; 22 E. R. 28.
(76) (1846) 3 J. & L. 200 at p. 209; 9 Ir. Eq. Rep. 224.
(77) (1846) 3 J. & L. 438 at p. 445; 7 Ir. Eq. Rep. 344.
(78) (1858) 7 Ir. Ch. Rep. 333.
(79) (1860) 10 Ir. Ch. Rep. 387 at p. 400.
(80) (1857) 7 Ir. Ch. Rep 173.
(81) (1815) Beatty 488.
(82) (1860) 11 Ir. Ch. Rep. 75 at p. 97.
(83) (1858) 4 Jur. (N. S.) 153.
(84) (1793) 4Brown. C. C. 469; 29 E. R. 992.
(85) (1821) 6 Madd. 290; 22 R. R. 225; 56 E. R. 1101.
(86) (1839) 2 Dr. & Wal. 441; 2 Ir. Eq. Rep. 180
(87) (1854) 19 Beav. 454; 105 R. R. 209; 52 E. R. 426; 2 W. R. 604.
(88) (1816) 4 Dow. 442; 3 E. R. 1221.

been tendered, much less actually paid, to him. The District Board have never sought to obtain possession of the land from him, as they would unquestionably be entitled to do on a rescission of the contract. The plain truth is that whatever may have been recorded on paper, both parties have conducted themselves as if there had been no rescission; they have not been relegated to the original position they occupied before the contract was made. Their conduct has been inconsistent with the theory of rescission, and when, for the first time, more than a year after the order for refund had been recorded by the Chairman, the District Board attempted to sell the land as if they were emancipated from continued liability under the contract, the plaintiff forthwith protested and relied upon the contract, and there is no room for doubt that whatever might have been said, nothing had been done, up to that stage, on either side, on the hypothesis that the contract had been abandoned. The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract; but where, as in *Whalen* v. *Stuart* (89), such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later seek specific performance, for, as has been said, a non-existent contract cannot be specifically enforced. We hold accordingly that the conduct of the parties does not show that the contract was rescinded, and it has not been urged that, apart from this, the conduct of the plaintiff has been such that, though it does not amount to rescission, it still disentitles him from insistence on specific performance, as was held in *Price* v. *Assheton* (90) and *Price* v. *Dyer* (91). The conclusion follows that, at the date of the institution of this suit, there was a valid contract specifically enforceable by the plaintiff against the District Board.

No question of limitation obviously arises under Article 113 of the Schedule to the Indian Limitation Act, as the plaintiff had notice, for the first time, on the 22nd February 1909, that the performance was refused, and the suit was instituted within three years from that date.

The question *next* arises, whether the plaintiff is entitled to the assistance of the Court in any other manner. The District Judge has made in his favour a conditional decree for recovery of Rs. 992-11-1 from the District Board. In the view we take of the right of the plaintiff to enforce specific performance of the contract of the 6th September 1898, it is plain that this decree must be modified. The plaintiff is not entitled to a return of the sum of Rs. 25 paid on the 6th September, 1898 but he is entitled to a return of the sum of Rs. 957-11-1 paid on the 4th December 1900, when he accepted the second offer. The second agreement, as we have already seen, is not enforceable and never superseded the original contract. Consequently, the District Board is not entitled to retain the money paid by the plaintiff thereunder. It cannot be disputed that where a Corporation receives money or property under an agreement, which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation: *Rankin* v. *Emigh* (92). This is good sense and based on sound principle. The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the Corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract: *Central Transport Company* v. *Pullman Palace Car Company* (93). As Baggally, L. J., said in *Chapleo* v. *Brunswick Building Society* (94), if the Company has received the benefit of the payment, if, for

(89) (1909) 194 N. Y. 495; 87 N. E. 819.
(90) (1834) 1 Y. & C. Exch. 82; 41 R. R. 222; 4 L. J. Ex. 3.
(91) (1810) 17 Ves. 356; 11 R. R. 102; 34 E. R. 137.
(92) (1910) 218 U. S. 27.
(93) (1890) 139 U. S. 24.
(94) (1881) 6 Q. B. D. 696 at p. 711; 50 L. J. Q. B. 372; 44 L. T. 449; 29 W. R. 529.

instance, that amount has found its way to the credit of its banking account, the plaintiff might have been enabled to establish a claim against the Company to the extent of the benefit derived by it from the transaction: *Lawford* v. *Billericay Rural Council*(45) and *Douglass* v. *Rhyl Urban District Council* (46). In the case before us, the plaintiff is clearly entitled to a return of Rs. 957-11-1 together with interest thereon from the date of deposit to the date of realisation.

One *other* question requires consideration, namely, whether the plaintiff is entitled to relief against the District Board by way of cross-objection to the decree in an appeal preferred by the other defendants. It need not be disputed that, as an ordinary rule, a respondent in an appeal is not entitled to urge cross-objections except as against the appellant: *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (95); *Shabiuddin* v. *Deomoorat Koer* (96); *Kallu* v. *Manni* (97); *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (98); *Nursey Virji* v. *Alfred H. Harrison* (99) and *Abdul Ghani* v. *Muhammad Fasih* (100). But rule 22 (3) of Order XLI of the Code of 1908 has materially altered the pre-existing law by substitution of the words "party who may be affected by such objection" for the word "appellant" contained in section 561 (3) of the Code of 1882. It may further be observed that rule 33 of Order XLI has conferred wide discretionary powers on the Court of Appeal to alter the decree of the Court below as the case may require. In the case before us, the Saha defendants, who are appellants in this Court, have attacked even the conditional decree made by the District Judge in favour of the plaintiff; the appeal, in fact, re-opens the whole matter in controversy and calls upon the Court to re-examine the questions in dispute from all possible points of view. That appeal has been supported by the District Board respondent. The plaintiff-respondent has been constrained, with a view to ensure his safety, to take cross-objections, which, if successful, would make his title unassailable. These cross-objections, no doubt, primarily touch the co-respondent, but that co-respondent has throughout supported the defendants-appellants against the plaintiff-respondent. No question of surprise arises, as every party has been given full notice and opportunity to place his own case before the Court in its true bearing. The circumstances are thus obviously of a very special character; the District Board has decided to part with the land acquired for a purpose which has fallen through. The substantial question is, whether relief should be granted in respect of that land to the original owner or to the subsequent purchaser. If we allow the cross-appeal, though relief is granted in form against the District Board, the ultimate result is that the title of the original owner is secured as against the subsequent purchaser. In these peculiar circumstances, it is in no sense unjust that effect should be given to the cross-objections. There is no answer to the cross-objections on the merits, while the appeal itself is, as we have seen, groundless. The cross-objections must, consequently, succeed, while the appeal cannot be sustained.

We may add that even if we had declined to entertain the cross-objections, and had merely dismissed the appeal, the practical result would have been identical with what will be the consequence of our decree. The plaintiff Ramkumar Saha has been in undisturbed possession of the land all along, notwithstanding the acquisition. His possession became adverse to the Board on the 21st February 1898; consequently, he acquired an indefeasible title on the 21st February 1910. If the conditional decree, made by the District Judge, be maintained, the plaintiff need never take back the deposit, but he will be entitled to receive from the Collector the compensation awarded under the Land Acquisition Act. The plaintiff thus achieves the end he has in view, namely, retention of possession of the land; that possession can no longer be disturbed by the

(95) 26 C. 114.
(96) 30 C. 655.
(97) 23 A. 93; A. W. N. (1900) 212.
(98) 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612.
(99) 21 Ind. Cas. 7; 37 B. 511; 15 Bom. L. R. 781.
(100) 28 A. 95; A. W. N. (1905) 200; 2 A. L. J. 667.

District Board. The Counsel for the District Board fully appreciated the difficulties of the situation; he complained that the decree of the District Judge is ineffectual for his purposes, as it does not entitle the District Board to recover possession of the land by execution and on payment of the decretal amount to the plaintiff. The obvious answer is that the decree cannot be modified, in the way suggested, in favour of the District Board; the Board are not the plaintiffs in suit, and have never chosen to appeal against the decree made by either Court.

We have *finally* to consider the question of costs. In three appeals, in which the decree of the District Judge is affirmed, the appellants will pay the costs of the respondent in this Court. In the other appeal, in which the appeal is dismissed and the cross-objections allowed, the appellants will also pay the costs of the plaintiff-respondent. But the costs of the plaintiff, both in the primary Court and in the Court of the District Judge, should, in our opinion, be paid by the District Board: *Thornhill* v. *Weeks* (101). The history of this protracted litigation proves conclusively that the whole difficulty has been created by the utterly unbusinesslike manner in which the transactions reviewed by us have been carried on ever since 1898 by the District Board of Chittagong. There is no exaggeration whatever in the quaint observation, embodied in one of the office notes in the record, that this matter "remained to be decided from a long time owing to different opinions of different officers." One can only hope that the long delay and uncertainty, which have characterised the proceedings of the Board in this particular matter, furnish but a solitary instance of the way in which business is transacted by a Corporation created for purposes of public utility. The net result to the plaintiff has been that though his land was acquired under very doubtful circumstances in 1898, he has had to wait for more than 18 years to get back his property, notwithstanding that he has, in the interval, responded promptly to every demand of the District Board.

The result of our decision may now be summarised. Appeals Nos. 1979, 1980 and 1981 of 1912 are dismissed with costs. Appeal No. 1243 is dismissed, but the cross-objections therein are allowed and the decree of the District Judge discharged. In lieu thereof, we direct that the suit (No. 435 of 1909), out of which that appeal arises, do stand decreed in the manner following. The plaintiff Ramkumar Saha is awarded a decree for specific performance of the contract of sale of the land mentioned in the schedule to the plaint, as against the District Board of Chittagong; the Board is directed to execute a conveyance in his favour in accordance with law. On failure of the Board to execute the conveyance, the plaintiff will be at liberty to proceed in accordance with Order XXI, rules 32 and 34, of the Code. The possession of the plaintiff will be confirmed, and should it transpire that he has been dispossessed, he will be restored to possession in execution of the decree of this Court, as explained in *Madan Mohan Singh* v. *Gaja Prosad Singh* (102); *Fateh Chand* v. *Narsingh Das* (103). The plaintiff will, in addition, have a decree, against the District Board, for Rs. 957-11-1 together with interest thereon at 6 per cent. per annum from 4th December 1900 to the date of realisation. The plaintiff will have his costs in the Courts of the Subordinate Judge and the District Judge from the District Board, and his costs in this Court from the other defendants. A self-contained decree, which will set out the various sums in detail, will be drawn up in this Court.

It has been brought to our notice that the District Board have not been correctly described in these proceedings in accordance with section 20 of Act III of 1885 B. C. The cause title of the plaint will accordingly be amended and the expression "District Board of Chittagong" will be substituted for "The Chairman of the District Board, Chittagong."

Appeals dismissed; Cross-objection allowed.

(101) (1915) 1 Ch. 106; 84 L. J. Ch. 282.

(102) 11 Ind. Cas. 228; 14 C. L. J. 159.

(103) 16 Ind. Cas. 988; 22 C. L. J. 383.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 2148 OF 1915.

January 25, 1916.

Present:—Mr. Justice Rattigan and Mr. Justice LeRossignol.

GOPAL SINGH—PLAINTIFF—APPELLANT

versus

GANPAT RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9, O. XXI, rr. 58, 63—Sale in execution—Objection dis-

GOPAL SINGH *v.* GANPAT RAI.

missed—Withdrawal of execution proceedings—Fresh proclamation of sale, whether new cause of action—Order on objection passed summarily, whether conclusive—Suit for declaration that property is not liable to attachment—Limitation Act (IX of 1908), Sch. I, Art. 11.

Proceedings having been instituted in execution of a decree for moneys secured on the property in dispute, plaintiff, the son of the judgment-debtor, preferred an objection under Order XXI, rule 58, which was summarily dismissed by reason of its belated appearance. He then brought a regular suit for a declaration that the property was not liable to attachment and sale in execution of the decree against his father but that suit was dismissed for default in December 1912. The decree-holder, owing to failure to secure an adequate bid in 1912, withdrew his execution, but presented a fresh application for sale by auction in 1915 and proclamation of sale was made. Plaintiff again brought a suit for the same declaratory relief as in the 1912 case :

Held, (1) that as the proclamation of 1915 furnished no fresh cause of action the present suit was barred by Order IX, rule 9, of the Civil Procedure Code ; [p. 322, col. 2.]

(2) that the objection of the plaintiff having been rejected in 1912, the suit ought to have been brought within one year of that order of rejectment and not having been so brought was time-barred under Article 11 of the Limitation Act. [p. 322, col 2.]

Any order on an objection made by a third party to attachment of property in execution of a decree is conclusive, whether that order was passed summarily or after investigation. [p. 322, col. 2.]

Narasimha Chetti v. *Vijiapala Nainar*, 27 Ind. Cas. 944 at p. 945; 2 L. W. 206, referred to.

First appeal from the decree of the Subordinate Judge, 1st class, Lahore, dated the 12th July 1915.

Mr. *Broadway*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, and Messrs. *Beechey* and *Tek Chand*, for the Respondents.

JUDGMENT.

LeROSSIGNOL, J.—The respondent Ganpat Rai on 31st July 1907 obtained a decree for moneys secured on the property now in dispute and attached it in August 1910, whereupon the judgment-debtor Bhagat Singh raised objections which were dismissed on 22nd May 1911 and the executing Court proceeded to sell the property.

Then in November 1911 the son of the judgment-debtor who is the plaintiff in this case preferred an objection under Order XXI, rule 58, which was summarily dismissed by reason of its belated appearance.

He then brought a regular suit for a declaration that the property was not liable to attachment and sale in execution of the decree against his father, but that suit was dismissed for default in December 1912.

The decree-holder owing to failure to secure an adequate bid in 1912 had at that date withdrawn his execution, but presented a fresh application for sale by auction in 1915, and proclamation of sale was made.

Plaintiff again comes into Court, alleging that the proclamation of 1915 gives him a fresh cause of action, and asking for the same declaratory relief as in the 1912 case.

The Court below has dismissed the suit on the ground that it is barred by Order IX, rule 9, and by Article 11 of the Limitation Act.

We have no doubt that the appeal must fail. The fresh proclamation of 1915 furnished no fresh cause of action, the cause of action in 1915 as in 1912 was the threat levelled against plaintiff's title, the attachment and proclamation of auction connoting and importing a denial of any right of the plaintiff.

The plaintiff was not bound to take any action at all on this mere threat, but having preferred an objection and failed therein, he was bound to bring a regular suit within one year of that failure, and having brought a regular suit, he was bound to proceed with it, or withdraw it with leave to bring another suit.

As has been pointed out in *Narasimha Chetti* v. *Vijiapala Nainar* (1), the Code of 1908 has introduced a modification into the old law and any order on an objection made by a third party to attachment of property in execution of a decree is now conclusive, whether that order was passed summarily or after investigation.

The alteration in the Code was accompanied by a significant parallel alteration in the Limitation Act, Article 11.

Thus the objection of the plaintiff was rejected in 1912, and this suit is not brought within one year of that order of rejectment, and that though there can be no doubt but that the matter agitated is the same. The suit is time-barred.

It is barred also by Order IX, rule 9, for in both cases the cause of action, *viz.*, the threatened annihilation of plaintiff's asserted right, is the same.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 27 Ind. Cas. 944 at p. 945; 2 L. W. 206.

SOONA MAYNA KENA ROONA MEYAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAN CHETTY.

PRIVY COUNCIL.

APPEAL FROM STRAITS SETTLEMENTS, SINGAPORE.

March 2, 1916.

Present:—Earl Loreburn, Lord Atkinson, Lord Parker of Waddington and Lord Sumner.

SOONA MAYNA KENA ROONA MEYAPPA CHETTY—APPELLANT

versus

SOONA NAVENA SUPPRAMANIAN CHETTY—RESPONDENT.

Will—Executor, whether can sue before obtaining Probate—Administrator, title of—Straits Settlements Limitation Ordinance (VI of 1896), ss. 4, 17 (1), 22, scope of—"Legal representative," definition of—"Capable of instituting an action," meaning of—English practice—Supreme Court, whether can grant Probate of Will of person domiciled anywhere—Straits Settlements Civil Procedure Code Ordinance (XXXI of 1907), ss. 133, 169.

An executor derives his title and authority from the Will of his testator and not from any grant of Probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death and consequently he can institute an action in the character of executor before he proves the Will. He cannot, of course, obtain a decree before Probate, but this is not because his title depends on Probate, but because the production of Probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An Administrator derives title solely under his grant, and cannot, therefore, institute an action as Administrator before he gets his grant. [p. 324, col. 2.]

Comyn's Digest, "Administrator", B. 9 and 10, *Thompson* v. *Reynolds*, (1827) 3 Car. & P. 123; *Woolley* v. *Clark*, (1822) 5 B. & Ald. 744; 1 D & R. 409; 24 R. R 546; 106 E. R. 1363, followed.

An executor is not only the legal representative of his testator, but capable of instituting an action within the meaning of section 17 (1) of the Straits Settlements Ordinance VI of 1896. There is nothing in the Ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. The words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must be capable of Probate, otherwise the action must fail. [p. 324, col. 2.]

There is nothing in the Straits Settlement Civil Procedure Code Ordinance (XXXI of 1907) or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting Probate of the Will of a person wherever domiciled. [p. 324, col. 2; p. 325, col. 1.]

According to English practice, Probate may be granted of the Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile, and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile. [p. 325, col. 1.]

Section 22 of Ordinance VI of 1896 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. Section 133 of the Civil Procedure Code Ordinance provides against the defeat of an action on this ground, and enables the proper party to be added or substituted. [p. 326, col. 1.]

Section 22 of Ordinance VI of 1896 has no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within section 133, but within section 169, of the Civil Procedure Code Ordinance, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. [p. 326, col 1.]

Quære.—Whether one of two joint executors can properly institute proceedings on behalf of the estate? [p. 325, col. 2.]

Appeal from a judgment of the Supreme Court of the Straits Settlements (of Singapore), dated the 26th June 1914, reversing that of the Court of first instance.

Messrs. *Holman Gregory, K. C.*, and *Jowitt*, for the Appellant.

Messrs. *Upjohn, K. C.*, and *A. M. Latter*, for the Respondent.

JUDGMENT.

LORD PARKER OF WADDINGTON.—The facts of this case are not in dispute. Soona Ahna Suppramanian Chetty, a native of and domiciled in British India (hereinafter referred to as "the testator"), carried on for some years prior to his death a money-lending business in Singapore, in the Straits Settlements, in co-partnership with the respondent. He died on the 11th November 1904, having by his Will appointed Soona Ravena Mana Rama Ramasami Chetty and another to be his executors. Caveats were entered against the proof of this Will, and in August 1907, S. R. M. R. Chetty (his co-executor having renounced Probate) presented a petition in the Court of the District Judge of Madura, in the Madras Presidency, propounding the Will in solemn form. Ultimately, after protracted litigation, the High Court of Judicature at Madras ordered the District Judge at Madura to grant Probate of the Will to S. R. M. R. Chetty, and such Probate was on the 10th March 1912 granted accordingly. An appeal from the order of the High Court of Judicature in Madras has recently been dismissed by His Majesty in Council (February 21, 1916*.)

Meanwhile, on the 7th March 1910, Letters of Administration *pendente lite* to the estate of the testator, situate within

* *See* 35 Ind. Cas. 1.—*Ed.*

the jurisdiction of the Supreme Court of the Straits Settlements, were granted by that Court to Pana Lana Mana Avenna Vina Meyappa Chetty, the attorney of the testator's widow, and on the 23rd October 1911 the administrator *pendente lite* instituted the present action, asking for a declaration that the partnership existing between the testator and the defendant had been dissolved by the testator's death, and for the usual partnership accounts. The *first* question their Lordships have to decide is whether this action was at the date of its institution barred by section 4 of the Straits Settlements Ordinance No. 6 of 1896, being "An Ordinance to amend the law relating to the limitation of suits."

The 4th section to this Ordinance provides that (subject to the provisions contained in sections 5 to 25 thereof inclusive) every suit instituted after the period of limitation prescribed therefor by the Second Schedule thereto shall be dismissed, provided that limitation has been set up as a defence. The period prescribed in the Second Schedule in the case of an action for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution. The date of dissolution was in the present case the testator's death; and unless there is something to the contrary contained in sections 5 to 25 of the Ordinance, it is not disputed that time had run prior to the institution of the present action.

Reliance is, however, placed on section 17 (1) of the Ordinance, which provides that "when a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application." It is contended that there was no legal representative of the testator capable of instituting this action until the appointment, on the 7th March 1910, of an administrator *pendente lite*, and that, therefore, the period of limitation must be computed from the 7th March 1910.

Assuming, but without deciding, that this is to be deemed to be a suit, which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of Probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the Will. He cannot, it is true, obtain a decree before Probate, but this is not because his title depends on Probate, but because the production of Probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An Administrator (on the other hand) derives title solely under his grant and cannot, therefore, institute an action as Administrator before he gets his grant. The law on the point is well settled (see Comyn's Digest, "Administrator", B. 9 and 10; *Thompson* v. *Reynolds* (1) and *Woolley* v. *Clark* (2).

It would seem, therefore, that an executor is not only the legal representative of his testator, but is capable of instituting an action within the meaning of section 17 (1) of the Ordinance in question. There is nothing in the Ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But, in their Lordships' opinion, the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must, therefore, be capable of Probate; otherwise the action must fail. It has to be determined, therefore, whether the testator's Will was in the present case capable of Probate in the Straits Settlements. This question depends on the Civil Procedure Code, 1907 (Ordinance No. XXXI of 1907).

The 3rd section of this Code provides that where no other provision is made by the Code or by any law in force for the time being, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted. There is nothing in the Code or in any law in force in the Straits Settlements precluding the Supreme Court of the

(1) (1827) 3 Car. & P. 123.

(2) (1822) 5 B. & Ald. 744; 1 D. & R. 409; 24 R. R. 546; 106 E. R. 136.

Straits Settlements from granting Probate of the Will of a person wherever domiciled. The English practice is, therefore, applicable. According to English practice, Probate may be granted of the Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile. [See Jarman on Wills, 6th Edition, Vol. 1, p. 7, and *Robinson* v. *Palmer* (3).] It follows that the testator's Will could have been proved in the Straits Settlements (1) because it was valid according to the law of the testator's domicile as shown by its admission to Probate in the Court of the District Judge at Madura; and (2) because there were assets of the testator locally situate in the Straits Settlements.

There was a good deal of discussion before their Lordships' Board as to what would have been the result had the English Statutes of Limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court, and throwing light on the meaning of the Ordinances of the Straits Settlements.

For the purpose of the English Statutes of Limitation, time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be some one who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though Probate has not been obtained [*Knox* v. *Gye* (4)], but if there be no executor, time will run only from the actual grant of Letters of Administration [*Murray* v. *East India Company* (5)]. It is, in their Lordships' opinion, probable that section 17 (1) of the Ordinance in question was intended to apply this rule. A good deal was also said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced Probate. Their Lordships at first thought that this might be important for the purposes of the present case, because it is doubtful whether one of two joint executors can properly institute proceedings on behalf of the estate. On reference, however, to the record on the appeal from the order of the High Court of Judicature at Madras directing Probate to be granted, it appears that S. R. M. R. Chetty's co-executor renounced Proba e at some time before August 1907. Since August 1907, S. R. M. R. Chetty was, therefore, sole executor and capable of instituting the action. The three years prescribed by the Ordinance must, therefore, in any case have elapsed before the action was instituted.

The *second* question argued before their Lordships turns upon the effect of section 22 of the Limitation Ordinance, 1896. That section provides that when after the institution of a suit a new plaintiff is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party; provided that when a plaintiff dies, and the suit is continued by his legal representative, it shall as regards him be deemed to have been instituted when it was instituted by the deceased plaintiff. It appears that after the grant of Probate by the Court of the District Judge at Madura the Letters of Administration *pendente lite* granted to the original plaintiff in this action were cancelled, and in lieu thereof Letters of Administration with the Will annexed were granted by the Supreme Court of the Straits Settlements to the appellant as attorney for the proving executor. Subsequently, on the 14th April 1913, an order was made in the action striking out the original plaintiff and substituting the appellant as plaintiff in the action. It is contended that, as regards the appellant, the suit, therefore, must, under section 22 of the Ordinance, be deemed to have been instituted on the 14th April 1913, at which date the action was barred, even if it was not barred when the action was instituted by the original plaintiff. Having regard to their Lordships' decision on the *first* question, it is not, strictly speaking, necessary to decide this point. In view, however, of its importance in practice it may be desirable to deal with it,

(3) (1901) 2 Ir. R. 489; 6 Ir. L. R. 230.
(4) (1872) 5 H. L. 656; 42 L. J. Ch. 234.
(5) (1821) 5 B. & Ald. 204; 24 R. R. 325; 106 E. R. 1167.

Their Lordships are of opinion that section 22 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. Section 133 of the Civil Procedure Code provides against the defeat of an action on this ground, and enables the proper party to be added or substituted. If *A* is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the Limitation Ordinance, 1896, to take advantage of a suit improperly instituted by *B*. Their Lordships do not think that section 22 of the Ordinance has any application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within section 133, but within section 169, of the Civil Procedure Code, 1907, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to section 22 of the Ordinance may have been inserted *per cautelam* and cannot be relied on as controlling the operative words. The difficulty really arises out of the form of the order of the 14th April 1913. What was required was an order under section 169 of the Code, and, if the order was competent, it was competent under this section only. Their Lordships do not think that the respondent can take advantage of the form of order to escape a liability to which he would have been subject if the order had been made in proper form.

Under the circumstances, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Whites & Co.*

Solicitors for the Respondent: Messrs. *Lough Borough, Gedge, Nisbet and Drew.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 435 OF 1914.

May 12, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

Raja RAM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja NARAIN LAL, MINOR, UNDER THE GUARDIANSHIP OF RAGHUNANDAN LAL—PLAINTIFF—RESPONDENT.

Hindu Law—Legal necessity—Manager, powers of—Discretion.

A certain discretion must be allowed to the manager of a Hindu joint family but he is expected to deal with the family property as a reasonable person would deal with his own. [p. 327, col. 2.]

Under the circumstances of the case it was held that the building of a residential house was for family necessity. [p. 327, col. 2.]

First appeal from the decision of the Subordinate Judge, Ghazipur, dated the 4th December 1914.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Mangal Prasada Bhargava*, for the Appellants.

Mr. *Hameedullah*, Dr. *Surendra Nath Sen* and Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This was a suit by which a minor plaintiff sought to set aside certain alienations of the family property made by his father and grandfather. The grandfather was dead before the suit was instituted; the father was impleaded as defendant of the second party. There is a finding of the Court below that the suit was a collusive one as between the plaintiff and his father and was brought as much in the interests of the latter as in those of the plaintiff himself. The alienations were for a total sum of Rs. 2,900. Very nearly half of this was required to pay off antecedent debts binding on the family, and in particular on the present plaintiff. It is not denied that to this extent, at any rate, the alienations were for legal necessity. There were, however, cash payments on account of each of the three sale-deeds, the total thus advanced in cash amounting to Rs. 1,493-0-6. With regard to these advances the case for the defendants 1st party, who are now in possession of the property, is that the money was needed for certain necessary family expenses and more particularly for the building of a new residential

house which was in fact constructed out of the money thus raised. There was conflicting evidence on this point, the plaintiff going so far as to assert that no new house had been built by his father or by his grandfather. The learned Subordinate Judge has found against the plaintiff on this point and we have not been asked to re-consider his finding. We take it to be established by the evidence that at the time of these sales there was a real necessity on the plaintiff's father and grandfather impelling them to the acquisition of a new residential house. There had been a partition in the family; the old family house was out of repair, and it has indeed been found that most of it has since fallen down. The plaintiff's father and grandfather were justified, as managers of the property, in seeking out a new residence for themselves and for the minor son or sons of the defendant second party. So far we are fully prepared to accept the finding arrived at by the Court below. From this point the learned Subordinate Judge seems to have felt himself obliged to deal with the question in somewhat rough and ready fashion. He has come to the conclusion, though on what materials is not very clear, that the new house built by means of the money acquired under these alienations was out of reasonable proportion to the means of the family. In effect he has said that a suitable house could have been built for somewhere about one-third of the money. On this basis he has arrived at the conclusion that, out of the cash consideration of Rs. 1,493-0-6, a sum of Rs. 1,000 should be regarded as not covered by the principle of family necessity. He has accordingly given a decree in favour of the plaintiff for recovery of possession, subject to payment of the remainder of the consideration, *i.e.*, of Rs. 1,900 in all. The defendants of the 1st party have appealed to this Court.

One of their pleas raises a question as to the age of the minor plaintiff which was decided against them in the Court below, and this plea has not been pressed. The appellants have in substances asked us to deal with the matter on the basis of the finding arrived at by the Court below, re-considering only the opinion formed by the learned Subordinate Judge as to the necessity for the expenditure of Rs. 1,500 or more on the construction of a new house. In paragraph 6 of the plaint it is alleged that the entire family property was covered by these three alienations, with the result that "there was no means of livelihood left to the family." This is a somewhat extraordinary assertion. It must be remembered that the finding of the Court below is that the new residential house actually cost Rs. 1,500 or Rs. 1,700 and was in fact built by the plaintiff's father and grandfather. It is scarcely to be presumed that these gentlemen expended their entire financial resources in the construction of a palatial residence in which they were to starve for want of means of livelihood. Moreover, these alienations took place in the years 1899 and 1901 and presumably the plaintiff and his father have been able to find some means of livelihood during these intervening years. What we have felt in dealing with this appeal is that there does not appear to be any substantial basis in the evidence for the opinion of the learned Subordinate Judge to the effect that the new residential house constructed by the plaintiff's father and grandfather was out of all proportion to the family means. After all, a certain discretion must be allowed to the manager of a Hindu joint family. He is expected to deal with the family property as a reasonable person would deal with his own. The appellants, at the time when the alienations in their favour were made, had satisfied themselves that there was in fact legal necessity for the alienations, *i. e.*, there were antecedent debts to be paid off and the maintenance of the family did require a new residential house. It seems to us that on the evidence the defendants-appellants have fairly discharged the burden which lay upon them and that the finding of the Court below with regard to want of legal necessity for this particular sum of Rs. 1,000 is a conjectural one and not grounded upon the evidence led in the case.

We accordingly allow the appeal and setting aside the decree of the Court below, dismiss the plaintiff's suit with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

MANGRA *v.* BEDI RAM.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 666 OF 1915.

June 6, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

Musammat MANGRA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BEDI RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Evidence Act (I of 1872), ss. 65, 66—Secondary evidence, admissibility of—Original not forthcoming—Presumption.

Where a Court of first instance decides to admit secondary evidence of a very old document, when it is not known what has become of the original document, its discretion in admitting such secondary evidence ought not to be disturbed, except upon very special grounds. [p. 329, col. 1.]

Per *Walsh, J.*—Sections 65 and 66 of the Evidence Act must be read together and the adverse party must not be presumed to have knowledge that he would be required to produce an original document so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. [p. 329, col. 2.]

Second appeal from the decision of the District Judge, Benares, dated the 4th January 1915.

FACTS of the case appear from the judgment.

Mr. *Harnandan Prasad* (with him Mr. *Gokul Prasad*), for the Appellants.—The original sale-deed, dated the 11th of March 1830, by which Din Dayal is alleged to have acquired the house, has not been produced and it has not been shown that it was lost; therefore, a copy of it is not admissible in evidence. There is no presumption that the original was in the possession of the defendant. No notice was given by the plaintiff to the defendant to produce the document if he had.

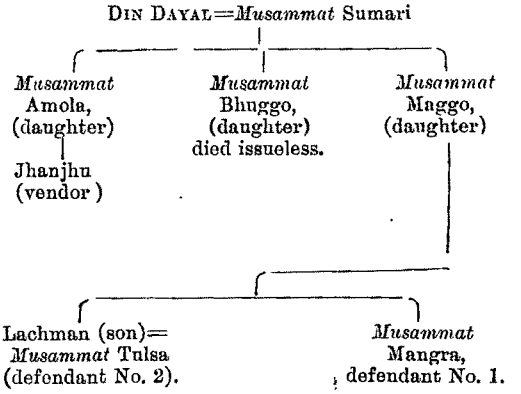
He referred to sections 65 and 66 of the Evidence Act and contended that the lower Appellate Court ought not to have held that the defendant must have known that he would be required to produce it so as to dispense with the necessity of a notice to produce.

He then argued as to the identity of the site of the house as given in the sale-deed dated the 11th March 1830 and the site of the house in dispute.

Messrs. *Mangal Prasad Bhargava* and *Janaki Prasada* (for Mr. *Prameshwor Dayal*), for the Respondent, were not called upon.

JUDGMENT.

SUNDAR LAL, J.—The position of the parties is explained by the following pedigree:—



The plaintiff's case is that the house in suit originally belonged to one Din Dayal who died thirty-three years ago. He was succeeded by his widow *Musammat* Sumari, who died seventeen years ago. One of the daughters *Musammat* Bhuggo had predeceased *Musammat* Sumari and consequently on the death of the latter her two daughters *Musammat* Amola and *Musammat* Maggo succeeded. *Musammat* Maggo died only three years ago, and *Musammat* Amola had predeceased her, having died about thirteen years ago. Jhanjhu, the son of Amola, was, therefore, the only surviving daughter's son of Din Dayal who, upon the statement of facts given by the plaintiff, would be entitled to Din Dayal's property. Jhanjhu has sold the house to the plaintiff, who as such purchaser has brought the present suit for possession. The defence of *Musammat* Tulsa was that the house in question was no part of Din Dayal's estate, but was the property belonging to her father-in-law, named Dhounkal, on whose death it devolved on his son Lachman and on the latter's death on his widow, the second defendant. The whole case, therefore, turns upon the question whether the house in suit was a part of the estate of Din Dayal or not. Both the Courts below have held that it was a part of the estate of Din Dayal and for this view they have relied upon a copy of a sale-deed dated the 11th of March 1830, by which Din Dayal purchased the site of the house. The appeal here has been argued very

ably by Mr. Harnandan Prasad, who has urged that no foundation was laid for admitting secondary evidence, namely, a certified copy of the sale-deed of 1830. The Court of first instance held that it was a very old document and that it was not known what had become of the original sale-deed. It, therefore, presumed its loss and admitted the copy. When under circumstances like these the Court of first instance decides to admit secondary evidence, their Lordships of the Privy Council in the case of *Harripria Debi* v. *Rukmini Debi* (1) held that the discretion of a Court of first instance in admitting such secondary evidence ought not to be disturbed, except upon very special grounds. The lower Appellate Court has affirmed the finding of the Court of first instance on this question. It has mentioned a further ground for the admission of the copy of the sale-deed, namely, that the original was possibly in the possession of the defendant, *Musammat* Mangra being the last holder of the property and having died only three years ago. We think that the admission of the copy cannot be questioned at this stage in second appeal. The only other question that remains is, whether the boundaries of the site correspond with the boundaries of the house. There is no doubt that the boundaries on three sides do correspond. There is a question about the fourth side. Both the Courts below have accepted the evidence given with reference to the boundary on the fourth side and have held that the identity of the property puchased in 1830 was established beyond doubt. The question is after all a question of fact and we do not see any ground for disturbing the finding of the Courts below on this point. These are the only two points urged in appeal. They are concluded by findings of fact. We accordingly dismiss the appeal with costs, including fees on the higher scale.

WALSH, J.—I want to add one word out of respect for the argument which was very properly addressed to us. I agree with the view submitted to us with reference to what the lower Appellate Court held as regards the presumption that the document was in the possession of the defendant. I think the argument is well founded that sections 65 and 66 must be read together and that the Court ought not to have held that the adverse party must have known that he would be required to produce it so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. I agree with my brother Mr. Justice Sundar Lal that there is ample evidence to justify the finding of the Court below that the original sale-deed was lost.

Appeal dismissed.

(1) 19 C. 438 ; 19 I. A. 79 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1782, 1783, 1785 TO 1798 AND 1800 TO 1869 OF 1912 AND NOS. 311 TO 316 AND 318 TO 322 OF 1913.

December 22, 1915.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

A. L. A. R. RM. ARUNACHALLAM CHETTIAR, THROUGH HIS AUTHORISED AGENT M. SUBRAMANIA IYER AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANGALAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (*I of* 1908), *ss* 3, 4, 77, 143—Kanganam, *meaning of—When can* Kanganam *be properly levied*—Zamindar's *right of entry—Tenant's liability to rent*—Kulam korvai *lands—Obstruction to free flow of water*—Sarasari, zamindar's *right to—Liability for wet rates.*

Kanganam fee, which is a contribution paid by the tenant to re-imburse the landlord for the cost of the supervision of harvest out of which *melvaram* has to be delivered to the landlord, falls under section 3 (*ii*), clause (*a*), of the Estates Land Act and is not an illegal cess within the meaning of section 143 of the Act. Consequently a term in a *pattah* providing for the payment of the fee is not improper. [p. 330, col. 2.]

Devanai v. *Raghunatha Row*, 18 Ind. Cas. 298; (1913) M. W. N. 886; 13 M. L. T. 351; *Karri Peddi Reddy* v. *Receiver of Nidadavole and Medur Estates*, 30 Ind. Cas. 529; 18 M. L. T. 171, followed.

Chidambaram Chetty v. *Ayyavu*, 32 Ind. Cas. 919; 29 M. L. J. 746, distinguished.

The claim of the *zemindar* to enter upon a holding for the purpose of forming an estimate of the outturn is opposed to section 73 of the Act and cannot be allowed. [p. 331, col. 2.]

ARUNACHALLAM CHETTIAR v. MANGALAM.

The Act does not cast on a tenant any liability for *panchamati*, or compensation to the landlord for loss caused to the crop by cattle, theft or clandestine removal. [p. 331, col. 2.]

Raja Parthasarathi Appa Rao v. *Chevendra China Sundara Ramayya*, 27 M. 543, referred to.

Where it is proved that by custom only cultivated extents are charged with rent and not lands left uncultivated, no rent can be charged in respect of the uncultivated portion. [p. 332, col. 2.]

The liability of the *ryot* to pay rent under section 4 of the Estates Land Act is subject to any custom or contract to the contrary that may be established. [p. 333, cols 1 & 2.]

Segu Rowthen v. *Alayappa Chetty*, 22 Ind. Cas. 834, (1914) M. W. N. 340, 26 M. L. J. 269; *Arunachellam Chettiar* v. *Muthayani Thevan*, 22 Ind. Cas. 675, 26 M. L J. 575; *Udayal* v. *Arunachalam Chettiar*, 27 Ind. Cas. 872; 2 L. W. 145; (1915) M. W. N. 190; *In re Arunachalam Chettiar*, 30 Ind. Cas. 679; 2 L. W. 826, followed.

Imandi Appalaswami v. *Rajah of Vizianagaram*, 20 Ind. Cas. 838; (1913) M. W. N. 806; 25 M. L. J. 50, distinguished.

In the case of *kulam korrai* lands, *i.e.*, lands in a tank bed, in the absence of proof of any custom by tenants to put up ridges on the land, the landlord has got the right to prevent tenants from putting up ridges so as to prevent the tanks having the full benefit of the rain water flowing into them. Therefore, tenants are bound to pay *sarasari* if they should put up ridges and cultivate *kulam korrai* lands. [p. 334, col. 2.]

Tenants are liable to pay *sarasari* wet rates if they raise dry crops on *nanja* land while they could have raised wet crops, but to pay the usual dry rates if they raise dry crops owing to insufficiency of water. [p. 335, col. 1.]

Second appeals against the decrees of the District Court of Ramnad, at Madura, in Appeal Suits Nos. 431, 432, 434 to 444, 447, 454, 457, 459 to 528 of 1911 and 198 to 203 and 205 to 209 of 1912, preferred respectively against those of the Court of the Special Deputy Collector, Ramnad, in Summary Suits Nos 9, 10, 12 to 14, 16, 17, 19 to 21, 65 to 67, 70, 80, 86, 116 to 134, 140 to 150, 205 to 224, 290 to 294, 296 to 303 and 631 of 1910 and against those of the Court of the Sub-Collector, Ramnad Division, in Summary Suits Nos. 1434, 1433, 1440, 1441, 1443, 1445, 1451 to 1453, 1455 and 1456 of 1911.

Messrs. *S. Srinivasa Aiyangar* and *S. Soundararaja Aiyangar*, for the Appellants in all.

Mr. *R. Krishnamachariar*, for Appellant No. 2 in S. A. No. 1782.

Mr. *C. S. Venkatachariar*, for the Respondents in S. A. Nos. 1782, 1785 to 1791, 1851, 1853 to 1868.

Mr. *C. Madhavan Nair*, for the Respondents in S. A. Nos. 1793 to 1798, 1800 to 1811, 1813 to 1841, 1850, 1869.

Mr. *G. S. Ramachandra Aiyar*, for the Respondents in S. A. No. 1800.

JUDGMENT.—Defendant is the appellant. The questions raised in these appeals relate to the propriety of the terms of the *pattah* as settled by the Special Deputy Collector and varied in appeal by the District Judge.

The *first* question relates to the *kanganam* fee which the defendant wants to levy. *Kanganam* is in effect a contribution paid by the tenant to re-imburse the landlord for the cost of the supervision of harvest out of which *melvaram* has to be delivered to the landlord. The Special Deputy Collector found that this was an item included in the total *jama* of the Ramnad *Taluk* at the time of the Permanent Settlement and formed one of the items of assets in fixing the *peishcush*, that it was not an illegal cess so as to bring it under section 143 of the Estates Land Act, and that it was being paid for a series of years. He, however, was of opinion that it could not be levied after the Estates Land Act came into force, as it was a charge for supervision not allowed by the Act, which removes all restraints on harvesting by the tenant on the part of the landholder. The District Judge on appeal confirmed the judgment of the Special Deputy Collector, on the ground that the service for which the fee was paid was no longer required. We are of opinion that on the facts found by the Special Deputy Collector *kanganam* fee falls under section 3 (*ii*), clause (*a*) of the Estates Land Act, being a sum payable by a *ryot* as such in addition to the rent due by him in respect of the land held by him. As the landlord is entitled to a share of the produce, the necessity for supervision is obvious. It is difficult to see how there can be any restraint on the harvest simply because the landlord employs a person to watch his interests.

Section 73, clause (2), provides that though the tenant may be in exclusive possession of the produce until it is divided, he must not remove it from the threshing floor so as to prevent the due division thereof at the proper time and clause (3) provides

that he should, before commencing to cut or gather the crops, give reasonable intimation to the landholder or his authorised agent of his intention to do so.

Section 74 contemplates the presence of the landholder or his agent at the time when the division is to be made.

The only change introduced by the Estates Land Act is to prevent the landlord from claiming that the tenant should not harvest without getting his permission to do so or from fettering the discretion of the tenant as to when he should harvest the produce.

Supervision is just as necessary now as it was before the Act came into force. *Kanganam* was being paid by the *ryots* even before the Permanent Settlement and ever since and, unless there is something in the Estates Land Act to render the payment illegal, we see no reason why it should not be included in the *pattah*.

Section 28 of the Act provides that in all proceedings under this Act the rent or rate of rent for the time being lawfully payable by a *ryot* shall be presumed to be fair and equitable until the contrary is proved.

At the date when the Act came into force *kanganam* was being paid and, unless the Act explicitly takes away from the *zemindar* the right to collect it, it must be presumed that it is a fair and proper charge to be levied.

In *Devanai* v. *Raghunatha Row* (1) it was held that *russums*, which were being paid by the *ryots* to the *mittadars* from the beginning of the last century and as to which there was no evidence that they were not paid at any time, constituted a charge or fees payable with the rent according to the established usage. It appeared in this case that *russums* were sometimes incorporated with the rent in the *rosuvari chitta*, although they were shown separately in the *pulli theerva*.

A similar view was taken in *Karri Peddi Reddy* v. *Receiver of Nidadavole and Medur Estates* (2), where it was held that fees payable with the rent can be included in the *pattah* and that under section 3 (*ii*) such fees are included in the term 'rent.'

Our attention has been called to *Chidambaram Chetty* v. *Ayyavu* (3), where *kanganam* was disallowed; but the facts of that case show that the *kanganam* claimed there was not in respect of wet crops but was in respect of dry crops, as to which a fixed money rent was payable. In such cases the *kanganam* fee can only be voluntary, for no supervision is necessary.

We are of opinion that both the lower Courts were wrong in refusing to allow *kanganam*.

The *next* item refers to the claim of the *zemindar* to enter upon the land for the purpose of forming an estimate of the outturn.

It is difficult to see what right the landlord has under the Act to enter upon the land of the tenant for the purpose of making what has been described by Mr. Srinivasa Aiyangar "as an experimental harvest." The object seems to be to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw upon the tenant the burden of showing that the actual crop was not equal to the experimental harvest.

We are of opinion that such a right is clearly opposed to the provisions of section 73 of the Act and both the lower Courts were right in disallowing this claim.

The *next* item refers to *panchamati*, or compensation for loss caused to the crop by cattle, theft or clandestine removal.

What the landlord really wants to do is to make the tenant an insurer and to cast on him the burden of making good the loss caused by acts beyond his control. We do not think that the Act casts on the tenant any such liability.

Sections 73 to 76 of the Act prescribe the rights of the landlord. If the loss is caused by the negligence of the tenant in the custody or preservation of the crops cut, he would be answerable in a suit for damages; but it is difficult to see how the tenant can be placed in a worse position than a bailee so far as the landlord is concerned simply because the Act allows him to be in exclusive possession of the crops until they are divided.

In *Raja Parthasarathi Appa Row* v. *Che-*

(1) 18 Ind. Cas. 298; 13 M. L. T. 351; (1913) M. W. N. 886.

(2) 30 Ind. Cas. 529; 18 M. L. T. 171.

(3) 32 Ind. Cas. 919; 29 M. L. J. 746.

vendra China Sundara Ramayya (4) it was held that a term in the *pattah* making the tenant responsible for theft of crops is improper. No doubt this decision was under the Rent Recovery Act of 1865, but we do not think that the present Act has made any difference in the liability of the tenant for theft of or damages to crops owing to circumstances beyond his control.

The *next* point is as regards taxes on palmyra trees. The Deputy Collector found on the evidence that palmyra trees which were not tapped for toddy were not taxed although they were bearing fruit, that no palmyra trees were taxed in the villages of Vallam, Sirugudi, Vania Vallum, Thuliyadikottai, Nallurukkai and Koyeri, that only 102 trees were taxed in Karandandagudi and that only the trees that were tapped for toddy were liable to be taxed.

On appeal the District Judge was of opinion that it has been proved that in addition to the trees taxed in Karandandagudi two trees were taxed in Nallirukkai village and that the only palmyra trees that were ever taxed were 102 trees in Karandandagudi and two trees in the village of Nallirukkai.

It has been argued in appeal that the custom has been to tax all palmyra trees when they are tapped: but we cannot think that we can go behind the findings of both the lower Courts that the custom has not been proved. Both the Courts found it proved from the documents that, although there were numerous trees in the *zamin*, 102 trees have been uniformly taxed in one village and that except two trees in Nallirukkai village, no other trees have been taxed in the whole of the suit villages. It is difficult to accept the explanation now given by Mr. Srinivasa Aiyangar that the tax was not levied because the fact that the trees in the other villages were tapped escaped the notice of the village servants. The custom pleaded has not been proved and we do not think that we can disturb the findings of fact arrived at by the District Judge in the matter.

The *next* question relates to *nanjatharam punja* and *punja*.

The Deputy Collector found that no rent was payable in respect of waste land and that it was proved that from time immemorial only cultivated extents were being charged and not lands left uncultivated. The District Judge on appeal confirmed the decision of the Deputy Collector and held that the evidence showed that the custom in the *zemindari* has been not to charge for dry waste. These findings of fact are binding on us in second appeal. It is argued by Mr. Srinivasa Aiyangar that under section 4 of the Act the landholder is entitled to collect in respect of all *ryoti* land in the occupation of the *ryot*, and that it does not make this liability subject to any custom but only subject to the other provisions of the Act.

Mr. Srinivasa Aiyangar states that he does not press his objection as regards wet land which has been left waste owing to want of water or irrigation facilities, but argues that, as regards dry waste, where money assessment is fixed, land, if left waste, can only be so owing to the default of the tenant.

It is argued by Mr. Madhavan Nair for the respondents that both the Courts have found that the custom is not to tax dry waste, that section 4 should be read with sections 27 and 28 of the Act and that where there is a custom to exclude dry waste, rent, as defined in section 3 (*ii*) of the Act, can only mean whatever is lawfully payable for the remaining portion of the land. There is considerable force in the argument of Mr. Srinivasa Aiyangar that section 4 of the Act does not refer to any custom as governing its provisions, and that where it was the intention of the Legislature that any of the provisions of the Act should be subject to any custom, it has been so stated in the sections of the Act. We, however, think that the question is covered by authority and we are not prepared to dissent from the judgments of several Benches of this Court.

In *Segu Rowthen* v. *Alagappa Chetty* (5) the Chief Justice was of opinion that section 4 would not help the plaintiffs where the parties meant and intended that rent should not be charged for waste. He observed as follows: —"The plaintiff relied upon section 4 and the definition of 'rent' contained in section 3, sub-section (11); section 4 says that

(4) 27 M. 543.

(5) 22 Ind. Cas. 834; 26 M. L. J. 269; (1914) M. W. N. 340.

the landlord is entitled to collect rent in respect of all *ryoti* land in the occupation of a *ryot*. *Prima facie* it is so, but if the evidence shows that it was not the intention of the parties that he should collect rent in respect of all land in occupation of the *ryot*, but should collect rent only in respect of the land in fact cultivated by the *ryot*, of course, the intention of the parties overrides the provision of the Act. This section of the Act merely lays down the general rule and, in my opinion, can be displaced by evidence as to what the parties meant and intended."

Mr. Justice Tyabji was of opinion that in such cases the charging by the landlord of rent in respect of cultivated and uncultivated land would really be an enhancement which was prohibited by the Act.

In *Arunachellam Chettiar* v. *Muthayanai Theven* (6) it was held that "section 4 of the Estates Land Act should be read subject to the provisions of section 27 and a custom of paying rent on the basis of only the cultivated area in the holding is not illegal." Their Lordships observe as follows:—"Both the lower Courts found that by immemorial custom, one of the conditions appertaining to the holdings in the plaint *mittah* is that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular *fasli* should be calculated only on the cultivated area. We think that condition is not against the statutory provision in section 4 of the Estates Land Act, as section 4 by its opening clause saves such and similar conditions. Our view, we think, is supported by the judgment of this Court in Second Appeal No. 2034 of 1910."

This was a case between the present appellant and another tenant in the same *zemindari*.

In *Udayal* v. *Arunachala Chettiar* (7) it was held that "a tenant is entitled to take advantage of a custom in a *zemindari* that no rent should be charged for lands which are allowed to lie fallow by him." This is a case which relates to the Ramnad *Zemindari* and the respondent therein is the appellant in the present case. It was found by the Sub-Collector that it was a custom in the Ramnad *Zemindari* not to charge any rent for lands which are allowed to lie fallow by the tenant.

As regards the argument that section 4 applied, their Lordships observe as follows:—"In the argument before us section 4 of the Estates Land Act was relied upon as indicating that the tenant is bound to pay the rent upon every portion of his holding whether he cultivates it or not. This general provision is subject to any custom that may be proved to exist in particular localities."

In *In re Arunachalam Chettiar* (8) it was held that "section 4 of the Madras Estates Land Act does not debar a tenant from claiming that, by agreement and custom, he is not liable to pay rent for the portion of his holding left fallow."

Imandi Appalaswami v. *Rajah of Vizianagaram* (9), which has been cited by Mr. Srinivasa Aiyangar, does not affect the present question, as in that case the tenant had built upon a portion of the land demised to him and claimed exemption from paying rent on the ground that it was not used for agricultural purposes. All that was there held, was that it was not necessary that the *ryots* should actually use land for purposes of agriculture. No agreement or custom was set up in that case whereby lands built upon were not to be charged.

In the present case, the findings of fact are clear, and the cases referred to show that in the Ramnad *Zemindari*, there is a custom whereby only cultivated lands were to be charged with rent. It is not suggested by Mr. Srinivasa Aiyangar that it was the practice to exclude such lands from the *pattahs* so as to entitle the landlord to let the lands to third persons if he chose. The custom as found by both the Courts is that, though the land was included in the holding, rent was not charged for it. We confirm the judgment of the District Judge on this point.

The *next* point for consideration is the right to levy *sarasari* where *kulam korvai* lands (lands in the lake beds) are cultivated.

It is not disputed that for the purpose of cultivating these lands, ridges were raised, and

(6) 25 Ind. Cas. 675; 26 M. L. J. 575.
(7) 27 Ind. Cas. 872; (1915) M. W. N. 199; 2 L. W. 145.
(8) 30 Ind. Cas. 679; 2 L. W. 828.
(9) 20 Ind. Cas. 838; (1913) M. W. N. 806; 25 M. L. J. 50.

the contention for the appellant is that as the ridges obstruct surface rain water from following to the tank and thereby reduce the wet *ayacut*, the plaintiffs should not build ridges at all, or, if they do so, they should pay *sarasari*. *Kulam korvai* is land in the bed of tanks, just within the limits of the full waterspread which is cultivated with paddy, and it is not disputed that such lands are classed as *punja* lands. The Deputy Collector was of opinion that, while the landord had a right to the flow of rain water into the bed of the tank free from obstruction, the tenants had an equal right to catch such rain water as fell on their *kulam korvai* lands and to cultivate the lands with the help of such water. He decreed that the usual rates should be charged so long as the tenants did not put up ridges, or, if they put them up, so long as the ridges did not exceed one span in height and that *sarasari* should be charged if the height exceeded one span.

On appeal the District Judge was of opinion that the ridges which were being put up by the tenants, would obstruct the flow of the rain water into the tank, that it was unreasonable to permit the *ryots* to retain tank water by putting up ridges on their land to the detriment of legitimate wet area without paying any extra charge for it and that no uniform custom had been made out by either side in the matter, though the balance of evidence was in favour of the *zemindar*. He was also of opinion that the *ryot* ought not to be liable to pay *sarasari* simply because he utilized rain water falling on his land. He tried to reconcile the interests of both the parties by directing that the tenants were not to construct ridges on their lands so as to divert from the tank any water other than rain water falling on their respective holdings and that if the rule was contravened and paddy crops were raised, *sarasari* should be charged.

It is difficult to see how the direction can be enforced by either party. In the absence of proof of any custom by the tenants to put up ridges, we think that the landlord has got the right to prevent tenants from putting up ridges on lands in the tank bed so as to prevent the tanks having the full benefit of the rain water flowing into them. It is proved by Exhibits 39, 40, 42, 56 (*b*), 58 (*a*), 81 series and 85 series that the right of the tenants to put up ridges on *kulam korvai* lands was not upheld. As against the exhibits, our attention has been called by the respondents' Counsel to Exhibit CC (judgment in Summary Suits Nos. 245 to 262 of 1900), where the right of the tenants to put up ridges was found by the Head Assistant Collector.

As pointed out by the District Judge, the balance of evidence is in favour of the contention raised by the *zemindar* that the tenants have no right to obstruct the free flow of rain water into the tank by putting up ridges. The Deputy Collector's restriction that the height of ridges should be one span does not seem to be based on any intelligible basis and the direction of the District Judge is unworkable, because when there are ridges and the land has been submerged by tank water, the ridges must reduce the volume of tank water when the level of the tank subsides below the level of those ridges, as the ridges retain water which should otherwise go into the tank.

We are of opinion that the plaintiff is bound to pay *sarasari* if he should put up ridges and cultivate *kulam korvai* lands.

This disposes of all the points taken by the Vakil for the appellant.

The respondent has filed a memorandum of objections.

The *first* objection is as regards dry crops raised on *nanja* lands without permission. The Deputy Collector was of opinion that *sarasari* should only be charged if the tenant raised dry crops on *nanja* lands when there was no water in the tank sufficient for a wet crop, but that it should not be charged where a dry crop was raised in adverse season for want of sufficient supply of water in the tank.

The District Judge on appeal held that *sarasari* should be charged whether there was water or not, so long as the tenant raised dry crops on wet land.

It is difficult to see on what principle the tenant should pay "wet *sarasari*" if, owing to want of water in the tank, he is unable to raise a wet crop. The effect of the District Judge's judgment will be to compel the tenant either to leave the land waste when there is insufficiency of water, or to penalize him if he raised a dry crop as the only possible means of raising something on the land. It stands to reason that if a tenant having water

in the tank and, therefore, means of raising a wet crop chooses to raise a dry crop, this should not affect the right of the landlord to charge wet rates; but where owing to want of water a wet crop could not be raised, there is no reason why the landlord should still be entitled to charge wet *sarasari* rates.

We vary the decree of the District Judge by declaring that plaintiffs will be liable to pay *sarasari* wet rates if they raise dry crops while they could have raised wet crops, and to pay the usual dry rates if they raise dry crops owing to insufficiency of water.

The *next* point is about remissions in respect of *punja Sari Nanjatharam Punja Sari.*

The Deputy Collector allowed the tenant's right to claim remission, but the District Judge was of opinion that the tenants were not, as a matter of right, entitled to any remission.

Remission is a matter of grace and it would require very strong evidence to show that remission can be claimed as a matter of right. Section 38 of the Estates Land Act refers only to remissions owing to permanent reduction in the yield and, so far as we can see, there is no provision for forcing the landlord to grant temporary remissions. There is no satisfactory evidence as to usage in the present case, nor was any issue raised as to the right of the tenants to claim remission. The Deputy Collector seems to have based his decision solely on a passage at page 337 of the Ramnad Manual.

We think that the District Judge was right in holding that the right to remission has not been proved in respect of dry lands. As pointed out in *Alagappa Chettiar* v. *Tirunagavalli* (10), there can be no legal right to obtain a remission of rent.

We confirm the decision of the District Judge on this point.

Subject to the modifications mentioned above we dismiss the second appeal and the memorandum of objections. As neither party has succeeded on all the points raised by him, we order that each party do bear his own costs.

Second Appeals Nos. 311 to 316 and 319 to 322 follow the decision in the above appeals and are dismissed with costs.

Second Appeal No. 318 is dismissed without costs.

(10) 13 M. L. J. 377.

Second Appeals Nos. 1792 and 1852 abate, as respondents are dead and no legal representatives have been brought on record.

Appeals dismissed; *Decrees modified*

V. R. P.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1247 OF 1915.

January 31, 1916.

Present:—Mr. Justice LeRossignol.

AKBAR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHAN BAHADUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation.—Pathans *of Mamanpur, Attock District, powers of—Distinction between gift and bequest—Appeal, question, whether can be raised for first time in.*

Among *Pathans* of Mamanpur in the Attock District, there is no restriction upon alienation by a male proprietor. [p. 336, col. 1.]

There is no distinction in principle between a power to gift and a power to bequeath. [p. 336, col. 1.]

Musammat Bano v. *Fateh Khan*, 48 P. R. 1903; 111 P. L. R. 1903, followed.

Where the parties in a case go to proof solely on the question whether the land in suit is ancestral and whether a right of alienation exists, the plaintiff cannot be allowed to raise an altogether new contention for the first time in appeal. [p. 336, col. 1.]

First appeal from the decree of the District Judge, Attock at Campbellpur, dated the 12th of November 1913.

Mr. *Bodhraj Saberwal*, for the Appellants.

Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—By a Will executed in February 1909 Shahanchi Khan left all his property to his great nephew Khan Bahadur, in whose favour mutation was sanctioned in February 1913 after the death of Shahanchi.

The plaintiffs are collaterals of Shahanchi in the third degree and they sue for the usual declaration to take effect after the demise of the testator's widow.

The lower Court has dismissed the suit, finding that the property is not ancestral and that among the parties, who are Pathans of Mamanpur in the Attock District, there

is no restriction upon alienation by a male proprietor.

The finding on the second point seems to be very sound and correct and I need deal with that alone.

The *wajib-ul-arz* of the Regular Settlement is very emphatic, the Pathans have an unrestricted power of alienation.

The *riwaj-i-am* of the present Settlement states that a landowner may make a gift even in the presence of sons.

The defendants have also produced seven instances in which this unrestricted right was judicially ascertained, and in one of them (*Banaras Khan* v. *Muhammad Amir* and others) a very thorough local inquiry was made.

These instances the appellants' Counsel has not attempted to counter, and the small number of two cases produced by the appellants to support his case is a very poor reply both in quantity and quality.

Appellants' Counsel has attempted to distinguish between a gift and a bequest. As held in *Musammat Bano* v. *Fateh Khan* (1), there is no distinction in principle between a power to gift and a power to bequeath.

However, the appellant is not entitled to raise that contention here for the first time, for the parties went to proof solely on the question whether the land was ancestral and whether a right of alienation existed.

I find that among these Pathans of Mamanpur, there is an unrestricted power of alienation of property and that the agnatic theory has no force among them.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 48 P. R. 1903; 111 P. L. R. 1903.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 138 OF 1915.

April 10, 1916.

Present:—Mr. Justice Parlett.

MAUNG KYA HNIN AND ANOTHER—APPELLANTS

versus

MAUNG KO KYAW AND ANOTHER—RESPONDENTS.

Construction of document—Mortgage—Sale and agreement for re-purchase, when amounts to mortgage—Burden of proof.

A sale of property followed by an agreement for its re-purchase within a specified time may be a species of mortgage, but the onus of proving that the transaction is a mortgage lies on the party asserting it.

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557, referred to.

Mr. *Gaunt*, for the Appellants.

Mg. *Ko Ko Gyi*, for the Respondents.

JUDGMENT.—Appellants sued to redeem certain land which, they alleged, they mortgaged to the respondents between 1902 and 1904. The Sub-Divisional Court held that the mortgage was not proved and dismissed the suit. The plaintiffs appealed and their appeal was dismissed. The Divisional Court, however, held that though the defendants admitted that there was a mortgage, they did not admit its amount and the plaintiffs had failed to prove it. The plaintiffs again appeal. It appears to me that the reasoning of the Divisional Court was incorrect. The plaintiffs alleged a mortgage for Rs. 700. The defendants alleged that the transaction was a sale for Rs. 1,600, and that there was an agreement between the parties that the plaintiffs should be allowed to re-purchase the land for the sum within three years. The Divisional Court considered this transaction a species of mortgage. This is incorrect, as was laid down by the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (1). There was no admission by the defendants of a mortgage, and it lay upon the plaintiffs to prove that there was one. The Court of first instance carefully considered all the evidence, gave reasons for distrusting some of it, and held that the mortgage was not proved. The lower Appellate Court held the same as regards the amount paid by the defendants. I have examined the evidence again and agree with the view of the Sub-Divisional Court that the plaintiffs failed to prove the mortgage they set up. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 196 OF 1915.

January 21, 1916.

Present:—Mr. Justice Maung Kin.

KUNA PUNA MAHOMED EBRAHIM—APPELLANT

versus

KABANA ENA MAHOMED—RESPONDENT.

Landlord and tenant—Execution of lease to one of co-sharer landlords—Lessor, right of, to recover rent or sue in ejectment—Parties, joinder of.

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue him in ejectment.

Jamsedji Sorabji v. *Lakshmiram Rajaram*, 13 B. 323, followed.

When a person sued for rent sets up the title of a third person, such third person ought not to be made a party to the case so as to convert a simple suit for arrears of rent into a suit for the determination of the title to immoveable property.

Lodai Mollah v. *Kally Dass Roy*, 8 C. 238 at pp. 240, 241; 10 C. L. R. 581, referred to.

Mr. *J. R. Das*, for the Appellant.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.—This is an appeal from a judgment confirming that of the Court of first instance.

Both the lower Courts have found that the plaintiff was a co-owner of the house in suit with another person, that the relation of landlord and tenant existed between the plaintiff and defendant respectively and that the rent sued for was due.

At the hearing it was pressed upon me on behalf of the appellant that the plaintiff alone could not sue and that he should have added the other co-owner as plaintiff or defendant, as the case might be.

The point raised has been disposed of in the case of *Jamsedji Sorabji* v. *Lakshmiram Rajaram* (1), where it was held that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.

This view of the Bombay High Court is supported by Field, J.'s views as to the nature of a suit for arrears of rent, expressed in *Lodai Mollah* v. *Kally Dass Roy* (2) in these words:—

"A suit for the recovery of arrears of rent raises two questions:—

"1. Does the relation of landlord and tenants exist between plaintiff and defendant?

2. Are the alleged arrears of rent due and unpaid?" and also by his views as to the addition of parties in such a case. The learned Judge on this latter point says:—"When persons sued for rent set up the title of a third person, such third person ought not to be made a party to the case so as to convert a simple suit for arrears of rent into a suit for the determination of the title to immoveable property."

I think the rulings cited above are conclusive against the defence.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 13 B. 323.

(2) 8 C. 238 at pp. 240, 241; 10 C. L. R. 581.

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEALS NOS. 520 AND 521 OF 1915.

July 17, 1916.

Present:—Mr. Justice Roe.

Musammat GUNJRA KOER—PLAINTIFF—APPELLANT

versus

Musammat LAKHAN KOER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 4—Execution, application for—Dismissal for default—Restoration, maintainability of petition for—Jurisdiction—Limitation, plea of, when to be raised.

Order IX, Civil Procedure Code, does not apply to proceedings in execution. [p. 338, col. 2.]

Thakur Prasad v. *Fakir Ullah*, 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526, followed.

Applications for execution should, when struck off, be presented afresh and not revived as in the case of plaints. [p. 338, col. 2.]

Hari Charan Ghosh v. *Manmatha Nath Sen*, 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343, followed.

An order restoring an application for execution, which was dismissed for default, is an order passed without jurisdiction and is a nullity. [p. 338, col. 2.]

An objection as to limitation may be taken at any stage of the execution proceedings, if the facts upon which the objection is based are patent upon the face of the record. [p. 339, col. 1.]

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *Khurshed Hussain*, for the Respondents.

JUDGMENT.—In this case the appellant obtained on the 13th March 1911 two decrees for rent against the respondents. These decrees were obtained by the

appellant as a co-sharer landlord. The other co-sharers were not brought upon the record.

On the 10th March 1914, the appellant made his first application for execution. The application was registered on the 13th June 1914. It was dismissed for default on the 6th November 1914. On the 3rd of December 1914, the appellant applied under Order IX, rule 4, for the restoration of the applications to the file and on the 12th of December 1914, these applications were granted without notice to the judgment-debtors-respondents. On the 24th of February 1915, the judgment-debtors put in an objection and the cases were registered as under section 47 of the Civil Procedure Code. The objections taken by the judgment-debtors were:

(1) That there had been a grave irregularity in the manner of the valuation of the property attached;

(2) That the execution of the decrees was barred by limitation.

In the proceedings before the Munsif's Court apparently no argument was addressed to the learned Munsif upon the question of limitation. The learned Munsif dealt only with the question of valuation and upon that made a peremptory order that the objection of the judgment-debtors was not made in good faith. From that order an appeal was made to the District Court and was disposed of by the Subordinate Judge. He pointed out that the question of valuation should have been treated more seriously by the learned Munsif, but decided the matter upon the question of limitation. He also pointed out that on the 13th of March 1914, the decree was dead and that unless the application of the 3rd of December 1914, could be treated as an application in continuation of the application of the 10th March 1914, the proceedings in execution were time-barred. Against that order appeals were made to this Court and have been argued upon two grounds only:—

Firstly, that the order of the 12th of December 1914, setting aside the rejection of the application of the 10th of March 1914, for default may be treated as not void but voidable, inasmuch as the Munsif's Court had jurisdiction at any rate to review its order dismissing the applications for default and the form of that order would be a question of irregularity and not of nullity.

Secondly, that inasmuch as no argument was addressed to the Munsif upon the lines taken before the Subordinate Judge, the judgment-debtors must have been held to have waived the irregularity whereby the Munsif's Court proceeded with the execution of the decree.

The points, therefore, for decision are:

Firstly, could the judgment-debtors waive the irregularity committed by the Munsif's Court in re-admitting the application of the 10th March 1914 for execution; if so, did they in fact waive that irregularity?

Upon both these points the appeal must fail.

Since the decision in *Thakur Prasad* v. *Fakir Ullah* (1) it is settled law that Order IX does not apply to proceedings in execution. It is contemplated both by the old Code of Civil Procedure and by the new Code that applications for execution should, when struck off, be presented afresh and not revived as would be done in the case of plaints. *Hari Charan Ghosh* v. *Manmatha Nath Sen* (2) is distinct authority for the proposition that any order passed under Order IX would be passed without jurisdiction in proceedings taken in execution of a decree. The words of Sir Lawrence Jenkins are: "The learned Munsif had not the jurisdiction which he purported to exercise." Where a Court has no jurisdiction its order may be treated as a nullity. The order of the Munsiff of the 12th of December 1914, continuing these proceedings, must be treated as a nullity. The judgment debtors could not waive the objection that the restoration of the application of the 10th March was void, but they could waive the objection to the petition of the 3rd of December being taken as a new application for execution not barred by limitation. This, it is suggested, they did. The argument is that as there is nothing in the order of the Munsif dealing with the question of limitation, the judgment debtors

(1) 17 A. 106; 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526.

(2) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

must be held to have waived the question of limitation.

The Munsif peremptorily threw out the objection of the judgment-debtors on the ground that it was made solely to harass the decree-holders. The form of his order would indicate that there was no proper hearing of the objection. It may well be that the Pleaders employed in the Munsif's Court had failed to notice that the order of the 12th of December 1914 was passed without jurisdiction and it may have been that they failed to press the objection properly before the learned Munsif, but it is settled law that objection upon the ground of limitation may be taken at any stage of the proceeding if the facts upon which the objection is based are patent upon the face of the record. They are rightly taken and rightly decided in the Court of the learned Subordinate Judge. The orders of 12th December 1914 were made without jurisdiction. There was nothing before the Munsif's Court upon which the application of 3rd December 1914 could be taken as proceedings in continuation of the order of the 10th March 1914. Execution was from the date of the striking off of the applications of the 10th March 1915 barred by limitation, and all further proceedings must be held void.

The appeals are dismissed with costs.

Hearing fee one gold *mohur* in each case.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 435 OF 1912.

February 16, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

NAGENDRA NATH BASU—DEFENDANT—APPELLANT

versus

PARBATI CHARAN KOYAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 108—Civil Procedure Code (Act V of 1908), O. VI, r. 4—Fraud, suit based on—Pleadings—Proof of fraud—Ex parte decree, suit to set aside, if barred by infructuous application to set it aside—Purchaser at certificate sale, rights and duties of, after cancellation of sale—Decree for rent obtained by such purchaser, validity of, after cancellation of certificate sale—Judgment pronounced on erroneous view of law, validity, of before reversal.

General allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. [p. 340, col. 2.]

Where a plaintiff seeks relief on the ground of fraud, he is bound, under Order VI, rule 4, of the Civil Procedure Code, to specify in his plaint the facts which constitute the fraud; and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. [p. 340, col. 2.]

A judgment will be vacated if it is proved that the successful party has taken means to prevent service of notice upon the other or has procured a false return of service. [p. 340, col. 2.]

Where the plaintiff brought a suit to set aside an *ex parte* decree and a sale thereunder on the ground of fraud on the allegation that the processes in the suit and in the execution proceedings were suppressed, and it was found that these processes were, as a matter of fact, not served but there was no ground for holding that the non-service was in any way attributable to the defendant's (the plaintiff in the previous suit interference:

Held, that as the plaintiff had failed to prove the fraud as laid in the plaint, he could not succeed in the suit. [p. 341, col. 1.]

The mere circumstance that a defendant has failed to have an *ex parte* decree set aside under section 108, Civil Procedure Code of 1882 or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief, in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. [p. 341, col. 1.]

A judgment pronounced by a Court upon an erroneous view of the law and subject, therefore, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the plaintiff, or for which, he is not actually or constructively to blame. [p. 341, col. 2.]

Simpson v. *Hornbeck*, 3 Lans. 53, referred to.

The effect of the reversal of a certificate sale of a tenure is that as between the tenure-holder and the purchaser at the certificate sale, or his representative-in-interest, the latter becomes liable to make restitution to the former; but a decree for rent obtained by the latter and a sale held on the basis thereof are not in any way affected by the subsequent cancellation of the certificate sale. [p. 341, col. 2; p. 342, col. 1.]

Appeal against the decree of the Subordinate Judge, Second Court, 24-Parganas, dated 14th November 1911, reversing that of the Munsif, Fourth Court, Diamond Harbour, dated the 2nd February 1911.

Babus *Mohini Mohan Chakrabutty* and *Prokash Chandra Mozumdar*, for the Appellant.

Babu *Gour Chandra Pal*, for the Respondents.

JUDGMENT.—This is an appeal by the second defendant in a suit to set aside an *ex parte* decree. The plaintiffs held the

disputed land within a tenure which was sold under the Public Demands Recovery Act, on the 7th September 1908 and was purchased by the first defendant. The second defendant purchased the tenure from the first defendant and on the 18th June 1909 instituted a suit for rent against the plaintiffs. The suit was decreed *ex parte* on the 16th July 1909; in execution of this decree, the property was purchased by the decree-holder on the 20th November 1909. Meanwhile proceedings had been instituted for cancellation of the sale under the Public Demands Recovery Act, on the ground amongst others that no notice had been served under section 10 and that consequently the proceedings were invalid and inoperative. The sale under the Public Demands Recovery Act was set aside for the reasons stated on the 29th March 1910. On the 7th May 1910 the plaintiffs commenced this action to set aside the *ex parte* decree as also the sale consequent thereon on a twofold ground, namely, *first*, that the decree was vitiated by fraud; and *secondly*, that as the certificate sale was subsequently set aside the rent-decree also was in essence cancelled. The Court of first instance held that the *ex parte* decree in the rent suit was not liable to be set aside on either ground. Upon appeal the Subordinate Judge has in concurrence with the Court of first instance held that the decree is not liable to be set aside on the ground that the certificate sale has been subsequently set aside; but he has also held, herein differing from the Court of first instance, that the rent decree must be set aside on the ground that it had been obtained by fraud. In this view, the Subordinate Judge has set aside the decree and sale and has declared that the title of the plaintiffs has not been affected by the proceedings in the rent suit.

On the present appeal by the second defendant the decision of the Subordinate Judge has been challenged on the ground that the facts found by him do not justify the inference that the rent-decree was vitiated by fraud. This position has been contested on behalf of the plaintiffs-respondents, who have further endeavoured to support the decree of the Subordinate Judge on the ground that his decision upon the second question raised was erroneous.

In so far as the question raised in the appeal is concerned it is, in our opinion, plain that the view taken by the Subordinate Judge cannot be supported. It is now well settled, as was laid down by the House of Lords in *Wallingford* v. *Mutual Society* (1) and by the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (2), that general allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice: *Jyotiprokas Nandi* v. *Jhowmull Johury* (3); *Balaji* v. *Gangadhar* (4). Where a plaintiff seeks relief on the ground of fraud he is bound, under Order VI, rule 4, of the Code of Civil Procedure, to specify in his plaint the facts which constitute fraud. It is also well settled that a charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof be substituted for it: *Abdul Hossein Zenail Abadi* v. *Charles Agnew Turner* (5). In the case before us, the specific allegation of fraud made in the plaint was to the effect that the second defendant had in collusion with the officers of the Court caused a suppression of the processes in the suit as also in the execution proceedings. No doubt, if this allegation had been established, the plaintiffs would have been entitled to succeed; because it is firmly settled that a judgment will be vacated, if it is proved that the successful party has taken means to prevent service of notice upon the other or has procured a false return of service: *Abdul Mozumdar* v. *Mahomed Gazi Chowdhry* (6); *Mahomed Golab* v. *Mahomed Sulliman* (7) and *Narsing Das* v. *Bibi Rafikan* (8). Unfortunately for the plaintiffs, however, the facts found by the Subordinate Judge do not support the conclusion that the processes, either in the suit, or in the execution proceedings were suppressed at the instance of the then plaintiff. The Subordinate Judge had found, so far as the processes in the suit are concerned, that they were not served. He does not find, nor has he stated any facts from

(1) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.
(2) 15 C. 533 (P. C.); 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168.
(3) 1 Ind. Cas. 784; 36 C. 134; 13 C. W. N. 87.
(4) 32 B. 255; 10 Bom. L. R. 276.
(5) 11 B. 620; 14 I. A. 111.
(6) 21 C. 605. (7) 21 C. 612.
(8) 5 Ind. Cas. 198; 37 C. 197; 11 C. L. J. 250; 14 C. W. N. 507.

which any inference could be drawn to the effect, that this non-service of processes in the suit was in any way attributable to the interference of the plaintiff in the rent suit. It may be conceded, as was laid down by their Lordships of the Judicial Committee in *Radha Raman Shaha* v. *Pran Nath Roy* (9) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (10), that the mere circumstance that a defendant has failed to have an *ex parte* decree set aside under section 108, Code of Civil Procedure, or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the plaintiff to succeed in a suit so framed he must specially allege the circumstances of fraud and he must prove the fraud as laid in the plaint. Reference has been made on behalf of the respondents to the decision of *Nemai Chand Kanji* v. *Deno Nath Kanji* (11), where certain circumstances were stated as *indicia* of fraud. That decision, however, is of no assistance to the respondents as the Subordinate Judge has not found all those circumstances to exist in the case before us. We must hold accordingly that the facts found by the Subordinate Judge do not constitute fraud and do not afford any basis for cancellation of the *ex parte* decree in the rent suit.

The *next* question for consideration is whether the Subordinate Judge in concurrence with the Court of first instance has taken an erroneous view as to the effect, if any, of the reversal of the certificate sale upon the decree in the rent suit. At the time when the suit for rent was instituted, the second defendant was the only person competent to maintain a suit for rent. He had purchased the property from the first defendant, who was the purchaser at the sale under the provisions of the Public Demands Recovery Act. He duly obtained the sale certificate from the Revenue Authorities, was placed in possession of the property by them and subsequently got his name registered under the Land Registration Act. At the time of the institution of the rent suit he was consequently the only person who could claim to recover rent from the tenants. Indeed, the tenants were not entitled under the provision of section 78 of the Land Registration Act, and section 60 of the Bengal Tenancy Act, to plead in answer to the claim that rent was due to another person. The decree was made by a Court of competent jurisdiction and was executed by the Court which made it. The sale, it has been found, was regularly held. Under these circumstances, we cannot hold that the fact that the certificate sale, which was the root of the title of the second defendant, was subsequently set aside did, in any way, affect the validity of the decree in the rent suit. The question of the effect of the cancellation of a decree upon intermediate acts based on it may sometimes be not altogether free from difficulty; but as pointed out in *Simpson* v. *Hornbeck* (12), one principle is well settled, namely, a judgment pronounced by the Court, upon an erroneous view of the law and subject, therefore, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the plaintiff or for which he is not actually or constructively to blame. In the case before us, the certificate under the Public Demands Recovery Act and the sale consequent thereon were set aside because the notice under section 10 had not been duly served; for this irregularity, however vital it may be, the purchaser at the certificate sale, a stranger to the proceedings, clearly, cannot be held responsible and it is not possible on any legal principle, to justify the view that all acts of the purchaser on the basis of his purchase at the certificate sale should be deemed nullified as soon as the sale was set aside. The effect of the reversal of the certificate sale is that as between the original tenure-holder and the purchaser at the certificate sale or his representative-in-interest, the latter becomes liable to make restitution to the former. But it does not follow that all legal processes, duly

(9) 28 C. 475 (P. C.); 5 C. W. N. 757.
(10) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473.
(11) 2 C. W. N. 691.
(12) 3 Lans. 53

and regularly taken at a time when the title of the certificate purchaser or his representative was in full force, were vitiated by the reversal of the certificate sale. A fruitless attempt has been made to invoke the aid of the well-established doctrine that the Court may, in exceptional cases, take notice of events which have happened since the institution of the suit so as to do complete justice between litigants: *Ram Ratan Sahu* v. *Mohant Sahu* (13); *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (14); *Udit Chobey* v. *Rashika Prasad Upadhya* (15). Nor is there any real analogy between the present case and the class of cases to which reference was made, namely, *Shama Purshad Roy Chowdery* v. *Hurrow Purshud Roy Chowdery* (16) and *Kali Churn Dutt* v. *Jogesh Chunder Dutt* (17). In these cases it was held that where decrees have been made on the basis of a decree in an earlier suit, which was subject to the result of an appeal, the reversal of the earliest decree operated in essence as a reversal of the subsequent decrees based thereon. That clearly is a case of an entirely different description. There is also no analogy between the case before us and another class of cases in which it has been held that where an order has been obtained on the basis of a decree, the cancellation of the decree operates to discharge the order made on the basis thereof: *Nawab Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan* (18); *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (19); *Set Umedmal* v. *Srinath Ray* (20). In our opinion it is plain that the rent-decree and the sale held on the basis thereof have not, in any way, been affected by the cancellation of the certificate sale. Indeed, in the present case, if the plaintiffs were to succeed, the defendant would be deprived of the property he has acquired in satisfaction of his claim for rent, and would nevertheless continue liable to make restitution to the tenure-holder, whom he had dispossessed on the strength of his purchase at the certificate sale; such a position as this cannot be supported on any conceivable principle of justice, equity and good conscience.

The result is that, as both the grounds on which the plaintiffs seek to impeach the title of the second defendant fail, this appeal must be allowed, the decree of the Subordinate Judge reversed and that of the Court of first instance restored with costs in all the Courts.

Appeal allowed.

(13) 6 C. L. J. 74 at p. 78; 11 C. W. N. 732.
(14) 6 C. L. J. 102.
(15) 6 C. L. J. 662; 3 M. L. T. 41.
(16) 10 M. I. A. 203 at p. 212; 3 W. R. 11 (P. C.); 19 E. R. 948; 2 Suth. P. C. J. 103.
(17) 1 C. L. R. 5; 3 C. 30.
(18) 15 I. A. 12 at p. 15; 10 A. 166; 5 Sar. P. C. J. 129.
(19) 10 C. 220.
(20) 27 C. 810; 4 C. W. N. 692.

PUNJAB CHIEF COURT.
CIVIL MISCELLANEOUS CASE NO. 261 OF 1915.
CIVIL APPEAL NO. 460 OF 1915.
June 29, 1916.
Present:—Mr. Justice Shadi Lal.
KHALIL AND OTHERS—PLAINTIFFS—PETITIONERS
versus
YAQIN-UD-DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XLVII*, *r.* 1—*Review, application for—Grounds.*

An application for review cannot be granted when it is made not on the ground of the discovery of new and important matter but on the ground that the judgment is erroneous on the merits. The applicant is not entitled to re-argue the whole case. [p. 343, col. 1.]

Nga La v. *Nga Than*, 14 Ind. Cas. 837; 5 Bur. L. T. 57; *Musammat Hussaina* v. *Musammat Sahib Nur*, 22 Ind. Cas. 785; 208 P. W. R. 1913; 103 & 197 P. L. R. 1914, referred to.

Petition, under Order XLVII, rule 1, of the Civil Procedure Code, for review of the order of Sir Alfred Kensington, dated 4th March 1914.

Lala *Kishen Chand*, for the Petitioners.

Dr. *Muhammad Iqbal*, for the Respondents.

ORDER.—This is an application for the review of an order passed by the Hon'ble Sir Alfred Kensington on the 4th of March 1915 dismissing the petitioners

appeal *in limine*. I am invited to review the judgment of my predecessor, not on the ground of the discovery of new and important matter, but on the ground that the judgment is erroneous on the merits. Now, the question whether the vendee was a proprietor in the village at the time of the sale was considered and decided by all the three Courts against the pre-emptor, and I do not think that he is entitled to re-argue the whole case upon the merits, *vide Nga La* v. *Nga Than* (1) and *Musammat Hussaina* v. *Musammat Sahib Nur* (2). It appears that the sale by which the vendee became proprietor was the subject-matter of a pre-emption suit by one Nazra, who, after obtaining a decree for pre emption, re-sold the property to the vendee. The exact effect of this transaction on the status of the vendee is a matter which is not free from difficulty, but it is clear that it should have been argued before the Courts at the proper time.

For the aforesaid reason I am unable to hold that there is any adequate ground for granting the application for review. Accordingly I reject the application, but direct the parties to bear their own costs in this Court.

Application rejected.

(1) 14 Ind. Cas. 837; 5 Bur. L. T. 57.
(2) 22 Ind. Cas. 785; 208 P. W. R. 1913; 103 & 197 P. L. R. 1914.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 500 OF 1914.

June 28, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Walmsley.

ASHMATULLA SIRCAR AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

PAN MAHMUD CHOWDHURY—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c)—Agriculturist, meaning of—Burden of proof, when exemption from attachment pleaded by agriculturist.

Section 60 (c) of the Code of Civil Procedure, 1908, protects from attachment in execution the whole house occupied by an agriculturist who belongs to the class of common agriculturists such as live in Bengal, that is, the *raiyat* who tills the field and whose main source of livelihood is cultivation. [p. 343, col. 2.]

Persons who have a small cultivation in land, but who have apparently been engaged in the jute business and also as middlemen, are not agriculturists within the meaning of section 60 (*c*), Civil Procedure Code. [p. 343, col. 2.]

The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. [p. 344, col. 1.]

Appeal against the order of the District Judge, Rungpore, dated the 23rd May 1914, reversing that of the Subordinate Judge of that place, dated the 7th March 1914.

Babu *Jotendranath Roy*, for the Appellants.

Babu *Mohini Mohan Chakrabutty*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned District Judge of Rungpore reversing the decision of the Subordinate Judge. The appellants before us are the judgment-debtors, the respondent being the decree holder. The only point that is involved in this appeal is whether the judgment-debtors are agriculturists and, as such, are entitled to claim exemption of six corrugated iron huts which have been attached in execution of a decree against them. Section 60 (*c*) of the Code protects from attachment in execution of the whole house occupied by an agriculturist, the common agriculturist such as lives in this country, that is, the *raiyat* who tills the field. The class of tenant-farmer in the western countries is practically unknown here. These alleged agriculturists in the present case have a small cultivation in the land; but apparently they have been engaged in the jute business and also as middlemen. The learned Judge has, on the evidence before him, found that these people are not agriculturists within the meaning of section 60 (*c*) of the Code of Civil Procedure.

In that the learned Judge seems to be right. The cases in the Bombay High Court show that the protection given under section 60 to the house of an agriculturist is, that his house should be maintained. It has been held that the protection applies only to the house occupied by an agriculturist in that capacity. I should doubt whether these alleged agriculturists who have got six corrugated iron huts, belong to the class of common agriculturists that are known in

Bengal, whose main source of livelihood is by cultivation. It has also been held that the plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. The Judge, in any case, is entitled to hold that the judgment-debtors have not proved that they are agriculturists in the strict sense of the word as used in section 60 (*c*), Code of Civil Procedure. The learned Vakil, who has appeared for the appellants, has quarrelled with the use by the learned Judge of the words "strict sense" as applied to agriculturists. That term has, however, been used in the cases in Bombay and it seems to me to be a fairly accurate definition of the class of agriculturists that is meant to be protected by section 60 (*c*), Code of Civil Procedure. I think the learned Judge was, on the evidence before him, entitled to come to the finding as he did, that these judgment-debtors were not agriculturists within the meaning of section 60 (*c*). The present appeal, therefore, fails and is dismissed with costs, one gold *mohur*.

WALMSLEY, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1977 OF 1914.

July 27, 1916.

Present:—Mr. Justice Kingsford.

ANANT LAL SAHU—PLAINTIFF—APPELLANT

versus

GOKUL SAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Local investigation by Court, value of—Procedure.

It is doubtful whether under the provisions of the present Civil Procedure Code it is legal for the Court in person to hold any local investigation. In case the Court holds any local investigation, the result of the investigation should be made a matter of record in order that the party adversely affected by it may have an opportunity of meeting it, and further, it should be used only for the purpose of enabling the Judge to understand the evidence and not for the purpose of finding his decision thereon. [p. 345, col. 1.]

Rai Kishori Ghose v. *Kumudini Kanta Ghose*, 14 Ind. Cas 377; 15 C. L. J. 138, referred to.

Messrs. *Kulwant Sahai* and *Abani B. Mukherji*, for the Appellant.

Syed *Fakhr-ud-din* and Mr. *Surendra Mohan Das*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff from an order of the learned District Judge affirming that of the Munsif dismissing the plaintiff's suit.

The plaintiff sued to recover possession of two parcels of land, one of which he asserted that he had obtained by exchange from the defendant second party and the second under a settlement from the landlord.

The case of the defendant No. 1 was that he had purchased both these plots from the defendant No. 2 in whose holding they were situated. Both the Courts found that the plaintiff had failed to prove the alleged exchange and the alleged settlement.

It appears that a local enquiry was made by the Munsif and with the result of that investigation the Munsif has dealt at some length in his judgment.

The question of possession was of very considerable importance in the suit and with reference to this question the learned Judge observes as follows:—"The plaintiff's case as to possession generally is discredited by the results of the inspection held by the learned Munsif. It would have been well if the learned Munsif had embodied the result of his inspection in a separate note—still the fact that he has not done so does not deprive his inspection of all utility." It is contended in appeal by the learned Vakil for the plaintiff in this Court, in the *first* place, that under the provisions of the present Code of Civil Procedure no Court is authorised to hold any local enquiry whatever; and the *second* contention is that the judgments of the lower Courts have been vitiated by the use to which the local enquiry was put. In this connection I am referred to the provisions of Order XXVI, rule 9, Code of Civil Procedure, and to the ruling in the case of *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (1).

I do not think it is necessary for me to decide the *first* point put forward by the learned Vakil for the plaintiff, but I may observe that the fact that the words "and the same cannot be conveniently conducted by the Judge in person" have been omitted

(1) 14 Ind. Cas. 377; 15 C. L. J. 138.

from the old section 392, of the Civil Procedure Code, renders it, at any rate, a matter of some doubt as to whether under the provisions of the present Code it is legal for the Court in person to hold any local investigation.

Now as to the *second* point, I think that there are two principles applicable to a local enquiry. One of these is, that the result of it should be made a matter of record in order that the party adversely affected by it may have an opportunity of meeting it, and the other is that the enquiry should be used only for the purpose of enabling the Judge to understand the evidence, and not for the purpose of finding his decision thereon. Both these principles appear to have been infringed by the learned Munsif. In the first place he has not reduced his enquiry to writing; the enquiry appears to have been made after the case was closed; and as to the manner in which the learned Munsif has used the enquiry which he made, I may refer to certain passages in his judgment.

In the first place, he notes that he could find no '*ari*' on the land, and from that fact he makes a deduction in favour of the plaintiff's case in which he says there are irreconcilable discrepancies upon this point. Then he says that in his opinion the '*nikas*' of the plaintiff's house is really on the south and not the east; he also says that he found a shop on the south side of the plaintiff's house and from these facts he deduces that the plaintiff has set up a false reason for his desire to obtain the land. Then he notes that the whole of the disputed land is surrounded by a wall, whereas the plaint was absolutely silent as to the existence of any such wall. Upon this point he has been corrected by the learned Judge. Then he says that he found that the plot had been levelled and he finds that this fact lends greater support to the defendants' case than it does to that of the plaintiff. So it appears that the Munsif, without giving the plaintiff any opportunity of meeting the facts which the Munsif found at the local enquiry, has used these facts to a very large extent in order to impugn the plaintiff's veracity and for the foundation of his decision.

In these circumstances I am of opinion that the Munsif's judgment and also that of the learned Judge have been vitiated by the manner in which the local enquiry was used.

I, therefore, allow the appeal and set aside the orders of both the lower Courts and remand the suit to the Court of the Munsif for re-hearing, after excluding from consideration the results of the local enquiry held by the previous Munsif.

Costs of this appeal will abide the result.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1342 OF 1910.

May 25, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

HIRA PANDEY, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES JOY GOBIND PANDAY AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

BACHU PANDEY—PLAINTIFF, AND *Musammat* JASODA OJHAIN AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Civil Procedure Code (Act V of 1908), s. 9—Right to office—Suit to establish right of priest to perform ceremonies within certain birt, *maintainability of—Legal character—Voluntary offering, suit for recovery of—Contract—Custom.*

The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character and a suit to establish such a right is maintainable under section 9, Civil Procedure Code. [p. 346, col. 1.]

But no right vests in any priest to claim to go to the house of a disciple, even when not called for by him, for performance of religious ceremonies there, and a suit does not lie for a declaration that the plaintiff is entitled to perform all funeral ceremonies within a certain '*birt*' [p. 346, cols. 1 & 2.]

No suit lies for the recovery of a voluntary offering if that suit is based on custom. [p. 346, col. 2.]

Muddun Mohun Ghosal v. *Nuboram Chuckerbutty*, 2 W. R. 69, followed.

Oochi v. *Ulfat*, 20 A. 234; A. W. N. (1898) 23, referred to.

A suit by one priest for recovery of offerings made to another, on the ground that the latter unlawfully performed ceremonies within the former's *birt*, is not maintainable in the absence of an express contract whereby the defendant undertook to make refund to the plaintiff. [p. 346, col. 2.]

Appeal from a decision of the Subordinate Judge, Bankipore, dated the 9th December 1909.

Mr. *Lal Mohan Ganguly*, for the Appellants.

Mr. *Lachmi Narain Singh*, for the Respondents.

JUDGMENT.—This suit is by a priest of the town of Bankipore, alleging that

he has by custom a right to officiate at all funeral ceremonies performed upon the bank of the Ganges between certain definite points. The plaint further sets forth, that the principal defendant in the case, in contravention of this custom, entered the house of one Durgan Sahu within the '*birt*' of the plaintiff, and received from his household the sum of Rs. 49-7-6, that by old established custom based upon a Will made 300 years ago, any priest entering upon the '*birt*' of another is bound to refund any sums realised from disciples living in that '*birt*'. The relief sought for in the plaint is, therefore, (1) for a declaration of the plaintiff's '*Mahapatri birt jujmanka*', (2) that the boundaries thereof be declared, (3) that it be declared that Durgan Sahu's house lies within those boundaries, (4) that Rs. 49-7-6 be recovered from the defendant No. 1, and (5) that a permanent injunction be issued against defendant No. 1 from trespassing upon the plaintiff's '*birt*'.

Before dealing with the facts found by the learned Subordinate Judge in appeal, it is necessary to set down the terms of section 42 of the Specific Relief Act: "Any person entitled to any legal character, or to any right as to any property may institute", a suit et cetera. And section 9 of the Civil Procedure Code sets out: "A suit in which the right to property or to office is contested, is a suit of a civil nature, notwithstanding that such right may depend entirely upon the decision of questions as to religious rights or ceremonies". It is not necessary to go deeply into the whole history of case-law with regard to suits for succession to offices in or about temples. It has been decided that such suits are maintainable, for the reason that the right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character. On the other hand, it has been held definitely that the right to go into the house of a disciple when called for by him or to enter upon it as of right though not called for, does not create any legal character, and that no suit for a declaration of such a right is maintainable. The words in the two sections are "legal character or the right to an office." We are unable to see that in the case set forth in the plaint there vests in the plaintiff any legal character or any right to any office. Obviously the freedom of the subject entitles all Hindus to call in at any time their own particular priest, or any priest whom they may themselves prefer, to perform any office; and so long as that inherent freedom exists, there can vest in no one any legal character or any right to the office of performing ceremonies in private houses. Therefore, no suit for a declaration of any such right will lie.

It remains only to consider whether the plaintiff is entitled to a decree for Rs. 49-7-6. We are agreed that he is not entitled to a decree, unless he can prove that there was a contract between himself and the defendant No. 1, whereby that defendant has bound himself to pay to the plaintiff all sums received from ceremonies performed within the plaintiff's '*birt*.' The question, therefore, turns upon the issue of fact, what is the nature of the plaintiff's claim? and is it a claim upon a contract or is it a claim upon a custom? The learned Subordinate Judge finds, and his finding of fact is final, that "the fact that this right is enjoyed in this city by different Mahapatra Brahmins in different localities, goes clearly to imply a sort of contract that they should not interfere with the rights of each other, and if the same right is proved both by oral and documentary evidence to have been in existence for a long time, I think the alleged usage and custom has also been made out." Therefore, the plaintiff's suit has been decreed in the lower Court upon usage and custom and a sort of contract between third parties.

It is clear that the defendant No. 1 cannot be bound by any contract made by a third party; and it is clear that there is on the record no evidence of any specific contract made by himself. We hold that the decision in *Muddun Mohun Ghosal* v. *Muboram Chuckerbutty* (1) is good authority, which has not been dissented from, that no suit will lie for recovery of a voluntary offering, if that suit is

(1) 2 W. R. 69.

based upon custom. And we are not shaken in this view by the fact that in the case of *Oochi* v. *Ulfat* (2) a suit for the recovery of such offerings was held maintainable, on the ground that it was based upon a definite contract. The learned Munsif in his judgment has shown that all previous occasions in which suits were instituted against defendants in the city of Patna, the suits were decreed on the basis of contract and not on the basis of custom.

We are of opinion that the suit should be dismissed entirely. It is now dismissed with costs in all Courts. The appeal is decreed with costs.

Appeal allowed.

(2) 20 A. 234; A. W. N. (1898) 23.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 185 OF 1915.

March 13, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

BINDESHRI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu SOMNATH BHADRY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration Act (XVI of 1908), s. 47—Operation of registered deed, date of.

A house was sold on January 20th, 1909. The sale-deed was presented for registration the same day but the registration was completed on the 29th of January 1909. The present suit for *zar-i-chaharum* was brought on the 28th of January 1915:

Held, that the suit was barred by limitation, the right to sue having accrued to the plaintiff from the date of the sale and not from the date of completion of registration.

First appeal from the order of the District Judge, Benares, dated the 3rd of September 1915.

Mr. *Narain Prasad*, for the Appellants.

Mr. *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.—We think the learned District Judge has overlooked the effect of section 47 of the Indian Registration Act (Act XVI of 1908). We think that, when registration of this deed was completed, it operated from the date of the execution, namely, the 20th of January 1909. A right to sue accrued to the plaintiff from the date of the sale, and he was beyond time when he filed his suit on the 20th of January 1915. We allow this appeal, set aside the order of the lower Appellate Court and restore the decree of the first Court dismissing the plaintiff's claim as barred by limitation. The defendants-appellants in this Court will get their costs in all the three Courts.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL FIRST CIVIL APPEAL NO. 12 OF 1916.

March 31, 1916.

Present:—Mr. Justice Parlett.

WOR LONE—APPELLANT

versus

G. RAINEY—RESPONDENT.

Lower Burma Courts Act (VI of 1900), s. 27 (2)—Appeal—Amendment, formal, in decree—Computation of time—Limitation.

Where an appeal is directed against a decree which is not substantially altered by an amendment made in it at the appellant's instance and which is wholly in the appellant's favour, the appellant cannot claim to compute the time for his appeal from the date of the amendment. [p. 348, col. 1.]

Parameshwaraya v. *Seshagiriappa*, 22 M. 364, referred to.

Mr. *Campagnac*, for the Appellant.

JUDGMENT.—Respondent sued appellant for Rs. 1,809-11-2 and costs and attached before judgment Rs. 1,978-7-2 in the hands of J. H. Templeton out of Rs. 5,000 due from him to appellant. The case went to a Commissioner and on 6th December the Court ordered a decree to issue in terms of the Commissioner's report and a decree was drawn up and signed that day, under which appellant was to pay respondent Rs. 1,749-10-10 and Rs. 466-4-0 costs. On 10th December, on the decree-holder's application, Templeton was called on to deposit the Rs. 2,000 in Court, and on 22nd December was apparently ordered to do so. Appellant applied to the Court to amend an error in the decree and on 17th January the amendment was made by consent, a new decree being drawn up for Rs. 1,049-10-10 and Rs. 396-4-0

costs. On 8th January appellant applied for copies of the judgment and decree of 6th December, and they were furnished on 17th January. On 24th he applied for a copy of the amended decree and obtained it the next day. On 31st January he filed this appeal.

In the first place it is contended that the appeal is in time, since section 27 (2) of the Lower Burma Courts Act gives an appeal from every decree under that section and, therefore, there is an appeal from the amended decree which only came into existence on 17th January. If the appeal was against something introduced into the decree by the amendment there might be some force in this. The amendment, however, is entirely in appellant's favour and was made on his application, and his present appeal is directed entirely against the judgment of 6th December, and is, I consider, out of time: *Parameshraya* v. *Seshagiriappa* (1).

Application, supported by affidavit is, however, made under section 5 of the Limitation Act. In the affidavit appellant states that he did not personally know of the decree against him till 2nd December. His Advocate, however, did, and in any case he could not take advantage of his ignorance. On his own showing, however, he believed, on 22nd December, that a decree had been passed against him on the terms of that now appealed against. Yet he never even applied for a copy of it and of the judgment on which it was based, until after the time for appealing against it had already elapsed. The applicant has completely failed to satisfy me that he had sufficient cause for not preferring the appeal within time. The appeal is, therefore, dismissed.

Appeal dismissed.

(1) 22 M. 364.

CALCUTTA HIGH COURT.

CIVIL RULE No. 227 OF 1916.

APPEAL FROM APPELLATE DECREE No. 1706 OF 1913.

May 1, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

GANGADHAR KARMAKAR AND OTHERS —DEFENDANTS—APPELLANTS—PETITIONERS

versus

SHEKHARBASINI DASYA AND OTHERS— PLAINTIFFS—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 114—Review, application for—Limitation Act (IX of 1908), s. 12, applicability of—Calcutta High Court Rules, Appellate Side, Chap. XI, r. 4, applicability of—Deputy Registrar's certificate on a review application—Chief Justice, power of, to hear application for review of judgment pronounced by other Judges—Appeal—Bengal Tenancy Act (VIII B. C. of 1885), s. 153—Decree passed without jurisdiction, if appealable.

Section 12 of the Limitation Act applies to an application for review of judgment, and the period of limitation in regard to such application will not commence to run until, at all events, the day on which the decree was signed, even though it is not necessary to attach the decree to the application. [p. 349, col. 2.]

Rule 4 in Chapter XI of the Calcutta High Court Rules, Appellate Side, is intended to apply to a case where the Deputy Registrar gives a certificate that all the proceedings on an application for review of judgment are in order, and not to a case where the certificate of the Deputy Registrar is to the effect that the proceedings are not in order. Until the Deputy Registrar certifies that the review proceedings are in order, no application for review of judgment can be moved in Court. [p. 350, col. 2.]

The Chief Justice can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. [p. 350, col. 1.]

In a suit for rent, the amount claimed not exceeding Rs. 502, a question relating to title to the land in suit as between the parties having conflicting claims thereto was raised before the Munsif (empowered by the Local Government to exercise final jurisdiction under section 153, Bengal Tenancy Act) but was not decided by him, and in appeal from his decision, the Appellate Court decided that question, although it was contended before it that the appeal was incompetent:

Held, that no appeal lay from the decision of the Munsif but an appeal lay to the High Court, from the decision of the first Appellate Court as that Court had decided a question of title between the parties. [p. 352, cols. 1 & 2; p. 353, col. 1; p. 354, col. 1.]

Bhagabati Bewa v. *Nanda Kmuar Chuckerbutty*, 12 C. W. N. 835, *Amrito Lal Mukherjee* v. *Ram Chandra Roy*, 29 C. 60, explained and distinguished.

GANGADHAR KARMAKAR *v.* SAKHARBASINI DASYA.

Minakshi Naidu v. *Subramanya Sastri*, 11 M. 26 (P. C.), 14 I. A. 160; 5 Sar. P. C. J. 54: 11 Ind. Jur. 393 and *Ranjit Misser* v. *Ramndar Singh*, 16 Ind. Cas. 940; 16 C. L. J. 77, relied on.

Per *Mookerjee, J.*—A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto and if there is a statutory appeal from decrees made in suits of that character, the decree does not become unassailable because it has been made without jurisdiction. [p. 354, col. 1.]

Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. [p. 354, col. 1.]

Appeal against the decree of the District Judge, Khulna, dated the 5th April 1913, reversing that of the Munsif, 1st Court, Satkhira, dated the 26th April 1912.

FACTS appear from the judgments.

Babu *Sarat Chandra Roy Chaudhuri* (with him Babu *Dhirendra Krishna Roy* for Babu *Sasadhar Roy*), for the Opposite Party, took a preliminary objection to the maintainability of the Rule.

The application, he contended, was presented out of time. The judgment sought to be reviewed was passed on the 23rd November 1915, the application for review was presented in office on the 21st February 1916, *i.e.*, on the 90th day, with insufficient Court-fees. The deficit Court-fees were paid on the 8th March 1916 after the expiry of the period of limitation. No order was obtained from the Court for extension of time.

[MOOKERJEE, J.—But have you looked into section 12 of the Limitation Act? The petitioner would be entitled as of right to count limitation from the date when the decree was signed, and it is clear that the decree in this case could not be signed before the 6th January 1916. This time would be absolutely necessary to obtain a copy of the decree.]

But the petitioner has not filed, nor is he required under the rules to file, a copy of the decree sought to be reviewed. He is not, therefore, entitled to deduction of time under section 12 of the Limitation Act.

Further, the application was not presented in Court, as required under the rules, within 7 days of the date of the certificate of the Deputy Registrar. The certificate was signed on the 3rd March and the petition was moved and the Rule obtained on the 15th March 1916.

[MOOKERJEE, J.—But in his certificate of the 3rd March the Deputy Registrar said that proper Court-fees had not been paid, and could the petitioner's Vakil have come to us before paying the deficit Court-fees? He moved his application within seven days from the time when it was in proper form, *i. e.*, when he paid the Court-fees.]

My *next* point is that the application is barred by the provisions of rule 2, Order XLVII, of the Civil Procedure Code.

Mr. Justice Holmwood left this Court on the 10th March 1916 and the application could easily have been presented to him before he left.

Babu *Baranashi Basi Mukherji*, for the Petitioner, was not called upon to reply.

Their Lordships overruled the preliminary objections by the following

JUDGMENT.

SANDERSON, C. J.—The whole of this matter arises out of the fact that on the 21st of February 1916, when an application for a review of a certain judgment was made, the fee of Rs. 1-2-0 was paid instead of a fee of Re. 2-4-0. The *first* point with reference to that, which was made by the learned Vakil for the respondent, was that the Article in the Statute of Limitation says that the time is ninety days from the date of the decree, which must be taken, by reason of another provision, to be the same date as the pronouncement of the judgment. That would be so, but for the fact that section 12 of the Limitation Act provides that "in computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment (as in the case here) the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed shall be excluded." In my judgment, that is a specific direction which has reference not only to an appeal but to an application for a review of judgment and even though the rules do not prescribe that a copy of the decree should be attached to the application, there is this specific direction contained in the Statute that the time requisite for obtaining a copy of the decree shall be excluded; and inasmuch as the decree was not signed until the 6th of January 1916, in my opinion the

period of limitation would not commence to run until at all events that day in January 1916. Consequently the payment, which was made on the 8th of March 1916, of the additional fee of Re. 1-2-0 would be within time. Therefore the *first* point which the learned Vakil for the respondent takes fails.

The *second* point is that under Chapter XI, rule 4, of the High Court Rules, Appellate Side, the appellant, to whom was handed a certificate by the Deputy Registrar that his application was irregular ought to have moved the High Court within seven days from the date upon which the Deputy Registrar handed him the certificate. The words of the rule are, "within seven days from the date of such certificate the applicant, either in person or by a Vakil or Advocate, shall present the application by way of motion in open Court to the Division Court of whose judgment a review is sought." The learned Vakil, when I asked him what was meant by the word *application*, agreed that that could only mean an application for review. I think that is the correct interpretation. It is clear to me that that rule was intended to apply to the case where the Deputy Registrar gives a certificate that all the proceedings were in order and not to cases where the certificate of the Deputy Registrar was to the effect that the proceedings were not in order. As was pointed out by Mr. Justice Mookerjee, if the appellant under these last mentioned circumstances came to the High Court on an application for review of judgment, he would at once be met with the answer that the High Court would not hear the application it not being in order, having regard to the certificate of the Deputy Registrar. Therefore, in my opinion, that point is not a good one. It was next argued the application should not be heard by this Court now, because the Chief Justice of this Court can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. It appears that the additional fee was not paid until the 8th of March of this year. Until then the Registrar was not in a position to certify that the proceedings were in order. Until that moment no application could be made for review of judgment and inasmuch as Mr. Justice Mullick retired from this Court on the 29th of February 1916 and Mr. Justice Holmwood went on furlough on the 10th of March, two days after this matter was put in order, there was no time to make the application to either of the Judges. I, therefore, think that the application may be made to this Court and for the reasons above mentioned it is not out of time.

MOOKERJEE, J.—I agree.

Their Lordships then proceeded to hear the appeal.

Babu *Baranashi Basi Mukherjee*, for the Appellants-Petitioners, relied upon section 153, Bengal Tenancy Act, *Bindeswari Prosad Singh* v. *Lakpat Nath Singh* (1) and the cases therein cited. The case of *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2), upon which reliance had been placed in the judgment under review, was clearly distinguishable, as there the Judge in appeal had not needed any of the questions mentioned in section 153.

Babu *Sarat Chandra Roy Chaudhri* (with him Babu *Dhirendra Krishna Roy* for Babu *Sasadhar Roy*), for the Opposite Party, relied upon *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2) and *Amrito Lal Mukherjee* v *Ram Chandra Roy* (3). At any rate the learned Judge in the lower Appellate Court had jurisdiction to deal with the matter under the proviso to section 153, Bengal Tenancy Act. He dismissed the application for revision under that proviso only because he thought that my client ought to succeed in the appeal. If the appeal be held to be incompetent, he should be asked to deal with the matter in the exercise of his powers of revision.

Babu *Baranashi Bashi Mukherjee*, being called upon to reply only on the question of revival of the petition for revision before the District Judge, said:—

The jurisdiction under the proviso to section 153 is entirely discretionary, and when the lower Appellate Court dismissed the application under that section your Lordships should not interfere. Moreover, the

(1) 8 Ind. Cas. 26; 15 C. W. N. 25.
(2) 12 C. W. N. 835.
(3) 29 C. 60.

application before the District Judge did not raise any question of jurisdiction and was as such incompetent. The decision of the Munsif might have been wrong in fact or in law or in both. But that would not give jurisdiction to the District Judge to correct the decision in exercise of his powers under the proviso to section 153, which is exactly the same in its terms with section 115 of the Code of Civil Procedure.

JUDGMENT.

SANDERSON, C. J.—In this case the facts are a little peculiar. The action was brought by the plaintiff against the first defendant who is her father and the second defendant who is her husband, and the action was brought for arrears of rent. The plaintiff alleged that she had purchased the property from the superior landlord of the first defendant, her father, on the 1st September 1908, and she sued for four years' arrears of rent—two before the purchase and two after the purchase.

The defence set up by the first defendant, the plaintiff's father, was that the land had not been purchased by the plaintiff at all but that he himself was the purchaser and that the purchase had been carried through in the name of his daughter, the plaintiff. When the case came before the Court of first instance, this issue, as to whether the plaintiff was the owner in her own right and in the interest which she claimed or whether she was simply a nominee of her father, was raised; but the learned Munsif did not deal with it. He expressly said that he did not deal with the question of title; but he said that inasmuch as the plaintiff had not proved the receipt of any rent from the first defendant he was justified in giving judgment for the defendant against the plaintiff. Thereupon the plaintiff appealed to the District Judge and, besides appealing, she made an application at the same time as the appeal under the proviso of section 153 of the Bengal Tenancy Act.

On the hearing of the appeal it was urged before the learned District Judge on behalf of the defendant that it was not competent for the plaintiff to appeal, because the case had been heard by the Munsif in pursuance of section 153, clause (*b*), the Munsif being a Judicial Officer especially empowered by the Local Government to exercise final jurisdiction under this section and the amount claimed in the suit not exceeding fifty rupees. It was urged that those being the facts no appeal lay from the decision of the learned Munsif. On the other hand, the plaintiff said that an appeal did lie, because, she urged, the learned Munsif had decided a question relating to the title to the land, and the learned District Judge came to the conclusion that the learned Munsif had decided a question relating to the title to the land and, therefore, he held that an appeal lay and he heard the appeal and decided that the truth lay on the side of the plaintiff, that she, in fact, was the purchaser of the superior landlord's interest in the land, and her father was liable to pay the rent for which she was suing. The application for revision under the proviso of section 153 naturally, was not pressed, because the plaintiff got all that she wanted, she having succeeded in the appeal, and that application was dismissed each party paying his own costs. Then the defendant appealed to the High Court and the High Court decided, first, that the learned District Judge was wrong in holding that there was an appeal from the learned Munsif to himself, and inasmuch as there was no appeal from the Court of first instance to the learned District Judge there was no appeal from the learned District Judge to the High Court and, on these grounds, the two learned Judges of this Court dismissed the appeal. An application was made to those two learned Judges on behalf of the defendant to exercise their powers of revision under section 115 of the Civil Procedure Code, but they said that having regard to the nature of the case and the facts which the learned District Judge found, they did not intend to exercise their power of revision under section 115.

Under those circumstances the defendant obtained a Rule from this Court for a review of the judgment of the two learned Judges of the High Court.

The *first* question we have to consider is whether the learned Judges were right in holding that inasmuch as there was no appeal from the learned Munsif to the District Judge there was no appeal from the District Judge to the High Court.

I agree with the decision that there

was in this case no appeal from the Court of first instance to the learned District Judge, because the section says "that an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where (*b*)." (I have already read clause (*b*) and I need not read it again) "unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto..." As I have already said, in my opinion there was raised before the Court of first instance a question relating to title to land as between parties having conflicting claims thereto, but the Munsif expressly refrained from deciding that question. Therefore that question did not come within the words of the section, *viz.*, "where the decree or order decided a question relating to title to land as between parties having conflicting claims thereto."

Then comes the second branch of the question whether the learned Judges were right in holding that there was no appeal to this Court. In my judgment, with every respect to them, they were wrong. The judgment was based upon a decision, to which our attention was drawn this morning, in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2). In that case the head-note is to this effect: "A suit by a co-sharer landlord for his share of the rent only, without making the other co-sharers parties, is a suit instituted by a landlord for the recovery of rent within the meaning of section 153, Bengal Tenancy Act. Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was especially empowered under clause (*b*) of section 153: *Held*, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsif." Now at the first sight that would appear to be material to this case. But when we look at the facts of the case it is clear that neither the learned Munsif nor the learned Judge of the first Appellate Court had decided a question of title to land: and as in that case neither of the Courts had decided that point, it may have been right to have held that "if no appeal lies from the Munsif to the Subordinate Judge no appeal lies from the Subordinate Judge to the High Court." I express no opinion on that question, as it is not necessary for the purpose of this case to do so: for in the present case the learned District Judge had decided a question of title between the parties and, therefore, in my judgment the case clearly comes within section 153 which, I may repeat, says that an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal...unless in either case the decree or order has decided a question relating to title to land. In this case it seems to be obvious that on appeal there was a question of title decided by the learned District Judge. Therefore, the case comes within the express provision of that section and an appeal did lie from the learned District Judge to this Court. Therefore, the position is this. It being decided that an appeal does lie from the District Judge to this Court and it having been already decided that there was no appeal from the learned Munsif to the learned District Judge, the consequence is that the decision of this Court must be set aside and as a natural consequence the decision of the learned District Judge must also be set aside.

I should be sorry if the matter had to rest there, because one cannot disregard the finding of the learned District Judge, who has investigated the case and has come to the conclusion that the plaintiff is entitled to the relief which she sought in this case and has found that the truth lay on her side and that she was the real purchaser of this property, and I am glad to find that it is open to us to direct further investigation of the matter. It is not disputed by the learned Vakil for the defendant that we have jurisdiction to send this case back to the District Judge for further enquiry to be made either by himself or, if he thinks right, by the learned Munsif, and we think that the proper course to adopt is that this matter should be sent back to the learned District Judge in order that he may investigate the application, which was made under the proviso of section 153 for the revision of the judgment of the learned Munsif. That proviso is to this effect: "The District Judge may call for the record of any case in which a judicial officer as aforesaid has passed a decree or order to which this

section applies, if it appears that the Judicial Officer has exercised a jurisdiction not vested in him by law, or *has failed to exercise a jurisdiction so vested* or has acted in the exercise of his jurisdiction illegally or with material irregularity, and may pass such order as the District Judge thinks fit."

Therefore, this case will go back to the District Judge. and if he has sufficient material already before him to enable him to deal with the application under the proviso of section 153, of course he will deal with it. But if he thinks that it will be necessary to refer the matter to the learned Munsif for taking evidence as to the facts which may be necessary for making the further enquiry, he will do so.

The result of my decision is that the judgment of the High Court and that of the District Judge must be set aside, and the defendant must have the costs of this Rule (hearing fee two gold *mohurs*) and also the costs of the appeal to the High Court as well as the costs of the appeal to the learned District Judge.

MOOKERJEE, J.—I agree that this application for review of judgment must be granted, as the proceedings throughout this litigation have been characterized by a succession of inexplicable errors.

The plaintiff instituted the suit to recover arrears of rent from her father. The amount claimed did not exceed Rs. 50 and the suit was tried by a judicial officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act. The defendant pleaded that the plaintiff had no title to the rent claimed, inasmuch as the interest of the superior landlord had been purchased not by the plaintiff but by himself. On this state of the pleadings, a question clearly arose "relating to an interest in the land as between parties having conflicting claims thereto." The Trial Court, however, declined to investigate this point and dismissed the suit, on the ground that as the plaintiff had failed to prove realization of rent from the defendant in previous years, she was not entitled to succeed in her present claim. The first question is, did an appeal lie against this decree. Now in order to determine whether an appeal lies from a judgment passed by a Judicial Officer specially empowered by the Local Government to exercise final jurisdiction under section 153 of the Bengal Tenancy Act, the test to be applied is, not whether one of the special questions mentioned in the section has been in controversy between the parties, but whether the decree has actually decided such a question. In the case before us, the judgment of the Trial Court makes it clear that the question of conflicting title was not decided. Consequently no appeal lay to the District Judge; yet an appeal was preferred to him. A preliminary objection that the appeal was incompetent was erroneously overruled; the appeal was heard on the merits, the judgment of the Trial Court was reversed and a decree was made in favour of the plaintiff on the ground that the interest of the superior landlord had been purchased by her and not by the defendant. A second appeal was then preferred to this Court, and a decree of the District Judge was assailed on the ground that it had been made without jurisdiction. This was controverted by the respondent, who argued that the appeal to the District Judge was competent. This contention was rightly overruled on the authority of the decision in *Shilabati Debi* v. *Roderigues* (4). This Court, (Holmwood and Mullick, JJ.) however, did not give effect to the view that the appeal to the District Judge was incompetent, but proceeded to hold on the basis of the decision in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2) that inasmuch as the decree of the District Judge had been passed without jurisdiction, the appeal to this Court was incompetent. The result was that the appeal to this Court was dismissed and the decree of the District Judge stood untouched. On the present application for review of judgment, we are invited to consider the correctness of this decision.

On behalf of the respondent, the view has been maintained that if an appeal has been heard without jurisdiction, no appeal lies from the appellate decree which must be deemed a nullity; reliance has been placed on the decision in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2) and the observations in *Amrito Lal Mukherjee* v. *Ram Chandra Roy* (3). In my opinion, the proposition formulated by the respondent is unsound in principle and

(4) 35 C. 547; 12 C. W. N. 448.

is opposed to the authorities. It is clear that the observations in *Bhagabati Bewa* v. *Nanda Kumar Chuckerbutty* (2), though expressed in general terms, must be limited by the facts of the case then before the Court. The facts were such as made an appeal from the decision of the Trial Court to the Subordinate Judge incompetent, and the decision of the Subordinate Judge was also of such a character as made a second appeal to this Court incompetent under section 153. That decision, when analysed, cannot rightly be regarded as an authority for the general proposition that if an appeal has been heard without jurisdiction no appeal lies against the appellate decree. The observations in *Amrito Lal Mukherjee* v. *Ram Chandra Roy* (3) are also capable of a similarly limited interpretation. On the other hand, we have the decision in *Abdul Hossein* v. *Kasi Sahu* (5), where this Court heard an appeal against an appellate decree made without jurisdiction, and reversed the decision of the Court of Appeal below. That the Court was competent to do so is plain from the decision of the Judicial Committee in *Minakshi Naidu* v. *Subramanya Sastri* (6). We have finally the decision in *Ranjit Misser* v. *Ramudar Singh* (7), in which this very question was discussed and the rule was laid down that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. See also *Juala Prasad* v. *Salig Ram* (8), *Walayat Husain* v. *Ram Lal* (9). A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character the decree does not become unassailable because it has been made without jurisdiction. That an appeal lies against a decree made without jurisdiction is indeed also clear from the terms of sections 99 and 115 of the Civil Procedure Code. In the case before us, as the Subordinate Judge had decided a question of interest in the land as between parties having conflicting claims thereto, an appeal did lie to this Court against his decree under the express provisions of section 153. It is difficult to appreciate how that appeal could be nullified because the decree was vitiated by absence of jurisdiction in addition to other possible errors. I am clearly of opinion that the decision of this Court passed in appeal was consequently erroneous and that this Court should have reversed the decision of the District Judge on the ground that it had been passed without jurisdiction. This application for review must accordingly succeed and the decision of this Court must be set aside.

The result of our order is that the appeal to this Court stands revived for disposal under Order XLVII, rule 8, of the Code of Civil Procedure. For reasons already assigned, that appeal must be allowed, the decree of the lower Appellate Court discharged and that of the Court of first instance restored. But the question arises, what further course, if any, should be adopted in the interest of justice. It is plain that the decision of the Trial Court was liable to be revised by the District Judge under section 153 of the Bengal Tenancy Act. As a matter of fact an application for revision was presented to him, but when the appeal succeeded, the application was abandoned. Now that it has been held that the appeal was incompetent, the plaintiff should clearly be allowed to fall back upon the application, which may be deemed to stand revived; it will consequently be open to the District Judge to proceed on the basis of that application and to make such order as he is competent to pass under section 153 of the Bengal Tenancy Act.

On these grounds I agree with the order proposed by the Chief Justice in this matter.

Appeal allowed; Case remanded.

(5) 27 C. 362; 4 C. W. N. 41.
(6) 14 I. A. 160; 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind Jur. 393.
(7) 16 Ind. Cas. 940; 16 C. L. J. 77.
(8) 13 A. 575; A. W. N. (1891) 158.
(9) 25 Ind. Cas. 643; 12 A. L. J. 1113.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2731 OF 1914.

April 12, 1916.

Present: – Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Scott-Smith.

THE MUNICIPAL COMMITTEE, KARNAL—DEFENDANT—APPELLANT

versus

Nawabzada MAHOMED UMAR DARAZ ALI KHAN—PLAINTIFF—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 3 (13) (b) —Public street—Limited access by public to private place, effect of—Municipal Committee whether can interfere in repairs of private gateways.

A limited access by the public to a private place does not operate to convert it into a public street.

Kalidas v. *Municipality of Dhandhuka*, 6 B. 686; *Ahmedabad Municipality* v. *Manilal Udenath*, 20 B. 146, referred to.

Where, therefore, the gateways of a private *serai* belonging to the plaintiff and two other private persons having fallen down, he proceeded to put them in position and the Municipal Committee served him with a notice to remove the gates, upon which he brought a suit for a perpetual injunction to restrain the Municipal Committee from interfering with the gateways in dispute:

Held, that inasmuch as the *serai* was a private one occupied by the tenants of the proprietors, who had a right of way over the road leading through a square owned by the plaintiff, the closing of the gateways would give them a cause of action, but the Municipal Committee had no right to interfere with the gateways in dispute.

First civil appeal from the order of the District Judge, Karnal, dated the 23rd November 1912.

Mr. *C. Bevan Petman*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondent.

JUDGMENT.

SCOTT-SMITH, J.—This case out of which the present appeal arises is intimately connected with that to which Civil Appeal No. 461 of 1913 relates. Both the cases were decided in the lower Court by the same judgment, and the appeals have been argued consecutively before us by the same Counsel.

The present case concerns two gates of the Korianwala *serai* in a suburb of the town of Karnal. The plaintiff owns $\frac{1}{3}$rd of the *serai* and two other proprietors own the other $\frac{2}{3}$rds. On the north of the *serai* there is a large gateway leading into the *Nawabganj*, it is gateway No. 5 in the other case, and we have held in our judgment that there is a public street in the *ganj* up to the gateway.

The other gate is a small one on the east of the *serai* and leads into a passage communicating with another part of the *Nawabganj*. There were, it is admitted, formerly gates at the northern gateway, but these had fallen down some years before the present dispute arose in 1912. The Committee sent the plaintiff a notice saying that the gates had fallen, and that the public had made a latrine behind them, and asked him to remove them. Upon this the plaintiff proceeded to put up the gates in position and also to repair the gates on the east of the *serai*. The Committee then served plaintiff with a notice to remove the gates, upon which he brought the present suit for a declaration and an injunction.

The lower Court, holding that the *serai* is a private one and that the Municipal Committee has no right to interfere, decreed the claim. The Committee appeals.

It is clear from the evidence that the gates in question used to be regularly shut at night, but that for a period variously estimated at 5, 10 or 15 years prior to suit those of the northern gateway had been lying on the ground.

It is further clear that the *serai* Korianwala is a private *serai* occupied by tenants of the proprietors, who have a right of way over the road leading through the *Nawabganj* by way of the Golakh gate. No one can interfere with this right of way, and if the northern gate in dispute were to be closed so as to interfere with their right, they would have a cause of action; but we do not understand how the Municipal Committee can have a right to interfere with the gates. There are no shops in this *serai* and there is no presumption of dedication of a highway to the public in general, such as arises in the other case. The rulings cited by Mr. Shafi in the other case, *viz.*, *Kalidas* v. *Municipality of Dhanduka* (1) and *The Ahmedabad Municipality* v. *Manilal Udenath* (2), apply here and are authority for the proposition that a limited access by the public to a private place does not operate to convert it into a public street.

We, therefore, agree with the decision of the lower Court in this case and dismiss the appeal with costs.

Appeal dismissed.

(1) 6 B. 686.
(2) 20 B. 146.

MAUNG KAW LA *v.* MAUNG KE.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 140 OF 1915.
January 24, 1916.
Present:—Mr. Justice Maung Kin.
MAUNG KAW LA—PLAINTIFF—APPELLANT
versus
MAUNG KE—DEFENDANT—RESPONDENT.

Riparian rights, nature of—Infringement of right, action for - Damage, proof of, unnecessary—Proceedings of Revenue Officers—Res judicata - *Civil Procedure Code (Act V of* 1908), *s.* 11.

The right which a riparian owner has to the use of water flowing past his land is a natural right and it must be in respect of a natural stream and not an artificial waterway. [p. 356, col. 2.]

It is not necessary, for the exercise of this right, that the water should empty itself in a lake or river. So long as water runs in a defined channel, which is not artificial, and from a known source and it goes past a man's land, that man has the right to treat it as a stream from its source as far as the lower end of his land. [p. 357, col. 1.]

Secretary of State v. *Balvant Ganesh*, 28 B. 105 at p. 118; 5 Bom. L. R. 790, referred to.

A person who owns land which is not on the bank of a river or stream cannot have the rights of a riparian owner, and even an owner occupying land on the bank of a stream cannot use the water from the stream for the purpose of a piece of land which is not on the bank. [p. 357, col 2.]

First Assistant Collector of Nasik v. *Shamji Dasrath Patil*, 7 B. 209; *Mc Cartney* v. *Londonderry and Lough Swilly Railway Co.*, (1904) A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385 and *Aiyavu Mooppan* v. *Sawminatha Kavundan*, 28 M. 236, referred to.

It is not necessary for a riparian owner seeking to restrain another riparian owner from diverting the water of a stream beyond his riparian tenement to prove that he has suffered any damage. Nor is it a defence to such an action that the plaintiff's land is amply irrigated independently of the stream. [p. 358, col. 1.]

Debi Pershad Singh v. *Joynath Singh*, 24 C. 865; 24 I. A. 60; 1 C. W. N. 401 (P. C.), followed.

As there are no Revenue Courts in Burma, there is no question of *res judicata* by reason of the orders of Revenue Officers. [p. 358, col. 2.]

Mr. *Ginwala*, for the Appellant.
Mr *Ba Dun*, for the Respondent.

JUDGMENT.—This is a suit for the removal of a *bund* across what the parties and the witnesses call a *Yo*.

The plaintiff owns a piece of land past which the *Yo* in question runs and with the water of the *Yo* he irrigates his land. The defendant put up a *bund* across the *Yo* a little distance above the plaintiff's land, thus completely preventing the flow of the water of the *Yo* to it.

The defendant by his written statement replies that the water of the *Yo* does not flow into the plaintiff's land which, being low lying, is amply supplied with water independently of the *Yo*; that the land formerly belonged to Maung Kya, from whom the plaintiff had bought it and that about 14 years ago, as the defendant's land was high and the land in suit was amply supplied with water independently of the *Yo*, Maung Kya allowed the defendant to put up the *bund* in question.

There had been some revenue proceedings before the Revenue Officers and the result had been adverse to the plaintiff.

The Township Judge held the suit *res judicata* by reason of the revenue proceedings and dismissed the suit without going further into the merits.

The Additional Judge of the District Court on appeal held that the suit was not *res judicata*; and that the plaintiff, as a riparian owner, was entitled to have the *bund* removed, as it had entirely stopped the flow of the water into plaintiff's land; and gave a decree as prayed for.

In this appeal it is necessary to determine only the following points:

1. Is the *Yo* in question a natural stream?

2. Is the defendant a riparian owner?

3. Irrespective of the answers to the above question, has the defendant acquired any right in respect of the *bund* by custom, prescription or grant?

4. Does the fact that the plaintiff's land is amply irrigated independently of the *Yo* constitute any defence for the action of the defendant?

Now, the plaintiff's claim as a riparian owner is a natural right and it must be in respect of a natural stream and not an artificial waterway. There is no evidence that the *Yo* was made by anybody. The evidence regarding the nature of it is that the water which runs in the *Yo* comes down in the rains from the hills above, that it flows down the *Yo* past the plaintiff's land, and that the plaintiff and his predecessors-in-title had made use of the water from the *Yo* for the purpose of irrigating the land which they had successively owned. There is no

evidence to show how far the *Yo* extends beyond the plaintiff's land. Evidently, it is dry for a part of the year, probably in March, April and May. It is clear that the *Yo* is a defined channel.

In the case of *Secretary of State* v. *Balvant Ganesh* (1) a stream is defined in these words:—"A stream of water is water which runs in a defined course, *Taylor* v. *St. Helens Corporation* (2), nor is a perennial flow a necessary condition to the legal conception of a stream provided the source, though irregular, be one of constant recurrence, and not merely fortuitous or temporary." And the *nala* in question in that case is described as follows:—"For about one half the year the *nala* was a running stream, deriving its flow of water from sources which though not perennial were constant in their recurrence." Again, we find in the Indian Easements Act; a definition which might be referred to as embodying the principles of law involved, though the Act does not apply. The definition runs: "A natural stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course."

Applying these definitions to the *Yo* in the present case, there can be no doubt that it is a natural stream. Mr. Ginwala for the appellant argues that a natural stream must have its source and empty itself into a river or a lake and that as there is no evidence where the *Yo* in suit goes to, it cannot be held to be a natural stream. In my judgment the argument cannot be conceded to. So long as water runs in a defined channel, which is not artificial, and from a known source and it goes past a man's land, that man has the right to treat it as a stream from its source as far as the lower end of his land. I am unable to agree with the learned Counsel's argument that the water must be proved to empty itself into a lake or a river. There must be many streams which taking their rise in the hills run for a few miles and then lose themselves in a marsh or sandy ground or the like. The river Tarim which is stated in the school geographies as the shortest river in Asia takes its rise in a lake in the Tibetan Plateau and loses itself in the Gobi Desert.

For these reasons I hold that the *Yo* in question is a natural stream.

The *next* point is whether the parties are riparian owners.

The learned Additional Judge of the District Court says in the course of his judgment that the parties are riparian proprietors and as such are equally entitled to use and consume the water of the stream for drinking, etc., and he also describes them as parties owning lands adjoining a stream. That it is partially wrong will appear presently.

The question has been dealt with in the case of *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (3), where it was laid down that the right to the enjoyment of the water of a river belongs to the occupants of the bank, whatever the nature of their tenancy. And in *Mc Cartney* v. *Londonderry and Lough Swilly Railway Co.* (4), which has been followed in *Ariyaru Mooppan* v. *Sawminatha Kavundan* (5), it was laid down by the House of Lords that the owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and there consume it for purposes unconnected with the tenement. The inference from this ruling is that a person who owns land which is not on the bank of a river or stream cannot possibly have the rights of a riparian owner, for even a riparian owner properly so called, because he occupies land on the bank of a stream, cannot use the water from the stream for the purposes of a piece of land which is not on the bank.

Turning to the facts of this case, we find on reference to the map that the *Yo* runs from the north-east direction past the plaintiff's land on the north-west boundary of it, taking a south-westerly course. Just

(1) 28 B. 105 at p. 118; 5 Bom. L. R. 790.
(2) (1877) 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253; 25 W. R. 885.
(3) 7 B. 200.
(4) (1904) A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385.
(5) 28 M. 236.

a little above plaintiff's land there is across the *Yo* a bund marked B in red. From a point a little above the *bund* we see a canal * * * running through a piece of vacant land on the north-east of the plaintiff's land and then entering the defendant's land, which adjoins the plaintiff's on the south-east of it. The canal is marked C in red. It is admitted that by means of this canal the defendant diverts the water of the stream to his land, which we find is not on the stream at all. It is, therefore, clear that the defendant is not a riparian owner, and has no natural right to the water in the stream. And it is equally clear that the plaintiff is a riparian owner, as his land is on the left bank of the stream.

Regarding the *third* point, I am unable to hold that the defendant has proved any grant from the plaintiff's predecessor-in-title as alleged by him. Further, it cannot be held that he has acquired any prescriptive right over the water as on his own showing he made the *bund* and the canal only 14 years ago. And it is doubtful if it was so long ago as that. Moreover there is no question of custom.

The *fourth* question is whether the fact that the plaintiff's land is amply irrigated independently of the stream constitutes a defence to the plaintiff's suit. There is no reliable evidence to prove the fact Even if there is, it is no defence at all. In the Privy Council case of *Debi Pershad Singh* v. *Joynath Singh* (6) it was held that in order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that the plaintiff should prove that he has suffered any damage. That being the case, the alleged fact, even if proved, does not constitute a defence.

For the reasons above stated the plaintiff must succeed. I may in passing say that, assuming that the defendant is a riparian owner, I agree with the learned Additional Judge of the District Court in holding that the defendant as such had no right in stopping the flow of water to plaintiff's land by erecting the *bund*.

I have not dealt with the question of *res judicata*, as it has not been raised by the appellant. In this country there are no Revenue Courts and there can be no case of *res judicata* by reason of the order of the Revenue Officers. The only question that can arise is whether the Courts are debarred by any provisions of any fiscal enactment from giving the relief asked for in any particular case. In the present case the question of the jurisdiction of the Court cannot possibly arise.

The appeal is dismissed with costs.

Appeal dismissed.

(6) 24 C. 865 (P. C.); 24 I. A. 60; 1 C. W. N. 401.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 104 OF 1914.

June 9, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

KHUDIRAM MAHTO—DEFENDANT—APPELLANT

versus

CHANDI CHARAN MAHTO AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 10, 15, 16—Arbitration, reference to—Absence of some of the arbitrators during enquiry—Award, signing of, by absentees after submission to Court—Illegality—Decree in terms of illegal award—Appeal.

Under section 10 of Schedule II, Civil Procedure Code, it is incumbent upon all the arbitrators to sign the award before it is filed in Court, and a Court has no power to allow any of them to sign it after it is duly submitted. [p. 362, col. 1.]

A decree passed in accordance with an award which was signed by some of the arbitrators after its submission to Court is illegal and invalid. [p. 360, col. 1; p. 362, col. 1.]

Ramesh Chandra Dhar v. *Karunamoyi Dutt*, 33 C. 498 and *Junglee Ram* v. *Ram Heet Sanay*, 19 W. R. 47, referred to.

Though it is open to the Court which made the reference to set aside an invalid award yet, when the objections to its validity have been overruled by it and a decree has been passed in terms of the award, an appeal does not lie from such a decree under section 16 of Schedule II, Civil Procedure Code, except where the decree is in excess of or not in accordance with the award. [p. 360, col. 2; p. 362, col. 2.]

Ghulam Khan v. *Muhammad Hassan*, 29 C. 167, 29 I. A. 51; 6 C. W. N. 226, followed.

Chairman of the Purnea Municipality v. *Siva Sankar Ram*, 33 C. 899; *Kanakku Nagalinga Naick* v. *Nagalinga Naick*, 4 Ind. Cas. 87; 19 M. L. J. 480; 6 M. L. T. 166; 32 M. 510; *Lutawan Kubar* v. *Lachiya*, 21 Ind. Cas. 989, 36 A. 69; 12 A. L. J. 57; *Rai Charan Purkait* v. *Amrita Lal*, 5 Ind. Cas. 98; 11 C. L. J. 131, referred to.

KHUDIRAM MAHTO *v.* CHANDI CHARAN MAHTO.

Per *Atkinson, J.*—A provision in the petition of compromise providing that any of the parties might object to the award on any account is *ultra vires* and contrary to the procedure applicable to arbitration proceedings arising in a pending suit, as laid down by Schedule II, Civil Procedure Code, and more especially by clause 15 thereof. [p. 361, col. 2.]

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 13th January 1914.

Mr. *S. M. Mullick*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This suit was brought for the partition of the several *mauzas* set forth in the schedule to the plaint, and for separate possession on allotment of the property when partitioned. The suit was instituted on the 27th October 1911. During the course of its proceeding a compromise petition was agreed upon between all the parties in the action with the sanction of the Court, providing that the partition of the properties mentioned in the plaint should be referred to arbitration. The petition of compromise is dated the 23rd August 1912, and the only material paragraphs in the petition to which it is necessary to refer, are paragraphs 6 and 7. Paragraph 6 *eo nomine* appoints five arbitrators to make a partition. It is unnecessary to name more than two of these arbitrators, and the two to be named are Abinash Chandra Ojha and Hari Mahto; and this clause also provides that, as between the parties to the suit, the partition to be made by the arbitrators was to be conclusive. Paragraph 7 merely embodies a declaration that the parties were to fully abide by the division and partition to be made by the arbitrators in pursuance of paragraph 6, with the additional provision that if any of the parties objected to the division on any account then, in that event, the partition should be effected through the Court at the cost of the individual or individuals who might object to the partition made and effected by the arbitrators. Only three of the five arbitrators met to consider and inquire as to the proper partition which it would be fair and right to make as between the parties to the suit. The two arbitrators whom I have named and mentioned, did not take any part in the arbitration, but the remaining three arbitrators having inquired and satisfied themselves made their award, declaring the nature of the partition which they had agreed upon. Hari Mahto, although he did not take part in the proceedings of the arbitration leading to the completion of the award, signed and executed the award before it was filed in Court as one of the arbitrators, after it had been prepared and drawn up by his three colleagues who acted. Abinash Chandra Ojha, on the other hand, neither acted as an arbitrator in the inquiry, nor did he sign and execute the award prepared by his colleagues before the same was filed on the 6th of September 1913. The award, as stated, was filed in Court on the 6th of September 1913, and on the 18th of September 1913 the defendants Nos. 6 and 10 objected to the award on the grounds set forth in their respective petitions dated the 18th of September 1913; and, shortly stated, their objection to the award was twofold: *one*, that the award was not the joint adjudication of all five arbitrators who had been appointed to arbitrate, but was only the award of three, that two had not acted, that one had acted, signed and executed the award without having taken part in the arbitration inquiry, and on the further ground that Abinash Chandra Ojha had neither acted nor signed and executed the award prior to its being filed in Court; and that, *secondly*, in point of law the award was a nullity, and in no sense could it be considered a legal and valid award of the matters referred to the arbitration of the persons specifically named by the compromise petition.

On the 12th of January 1914 the matters arising on the petition of objection of the defendants Nos. 6 and 10 came before the learned Subordinate Judge for his consideration and adjudication, and the learned Judge held that the objection of the defendants was barred by limitation of time, the same not having been made within 10 days from the date of the filing of the award; and he apparently regarded the action of Abinash Chandra Ojha, in not having acted in the arbitration proceedings and not having signed the award, as a mere informality; because on the 22nd of November 1913, this matter having been brought to his notice, he there and then in his own presence in open Court

had the award, which was filed on the 6th of September, signed and executed by Abinash Chandra Ojha. So that, when the case arising on the objections of the defendants Nos. 6 and 10 came before him, the award was signed by all the arbitrators, and the Judge, without considering the legal effect of how the award was procured, held that the award was regular upon its face and the plaintiff's right to challenge or set aside the award was barred by limitation. He accordingly pronounced a decree in the terms of the award.

We think that the award, which was brought into being as a result of the adjudication of only three persons instead of five, coupled with the fact that the award before it was filed was only signed by four instead of five, made the award itself void and without legal effect. But this matter is not really one which we have to consider with any great detail in this case. The main question for consideration is, whether an appeal lies under paragraph 16 of the 2nd Schedule to the Code of Civil Procedure from the adjudication of the Subordinate Judge, declining to set aside the award on the objection of the defendants Nos. 10 and 6 and the decree made and pronounced by him as the result of such rule. Paragraph 15 of the 2nd Schedule to the Code of Civil Procedure provides that no award shall be set aside, arising in any pending matter or suit, except on one of the three grounds set forth in the clauses (*a*), (*b*) and (*c*); and clearly it would have been open to the learned Judge, had he so thought fit, under clause (*c*) to have set aside this award on the ground of its invalidity. Prior to the year 1901 it was well recognised and established in all Courts in India, that a decree pronounced and passed in respect of an award which was void or illegal, was subject to a right of appeal under the old section 522 of the Code of Civil Procedure, 1882, which is in terms identical with paragraph 16, Schedule II, of the existing Code of 1908, because the interpretation which was given to the old section was, that the right of appeal was only taken away in cases where there had been a decree pronounced on a valid and legal award and that, if the award was void and illegal, then in fact there was no award and there was nothing upon which the provisions of the section could legally operate. However, in 1901 their Lordships of the Privy Council had to consider the terms and provisions of the old section 522 of the then Civil Procedure Code. In the case of *Ghulam Khan* v. *Muhammad Hassan* (1) their Lordships of the Privy Council laid down in distinct and definite terms what they believed to be the true interpretation to be put upon the arbitration section set out in Schedule II of the Code, and more especially with regard to the interpretation they put upon section 522. Lord Macnaghten there laid it down clearly and distinctly that to hold that an appeal lay from a decree pronounced on foot of an award in an arbitration matter from the Court having seisin of the arbitration proceedings, would be doing violence to the plain language and obvious intention of the Code, except in so far as the decree might be in excess of or not in accordance with the provisions of the award. The actual wording of section 16, clause 2, of Schedule II of the Civil Procedure Code is as follows:—"Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as that decree is in excess of, or not in accordance with, the award." Thus, whether the award be valid or invalid, no appeal lies from the decision of the Judge of first instance as to the validity or invalidity of the award, except in cases where a decree pronounced in pursuance of the award is in excess or not in accordance with the provisions of the award itself. Up till that time the Courts in India had acted on a totally different basis. After the decision of the Privy Council in the case I have referred to, all the Courts in India, Calcutta, Madras, Bombay, Allahabad, and the Punjab, loyally and universally followed and gave effect to the law as laiddown by the Privy Council, thereby going back on the many previous decisions in which a contrary rule or principle had been laid down. In the year 1906 in the case of the *Chairman of the Purnea Municipality* v. *Siva Sankar Ram* (2), Sir Francis Maclean, Chief Justice,

(1) 29 C. 167 (P. C.); 29 I. A. 51; 6 C. W. N. 226.
(2) 33 C. 899.

laid down what he conceived to be the true legal meaning of the decision of the Privy Council; and he says at page 902* of the report: "The Judicial Committee there held that no appeal lay where a decree had been passed under section 522 of the Civil Procedure Code in accordance with....the award, which is not the case before us. No doubt, before that decision of the Judicial Committee, there were a series of cases in most, if not in all, the High Courts in India, which held in effect that, where a decree was passed upon an award, which is not valid or legal, an appeal would lie. I need not refer to these cases, because I think it must be taken that those cases were practically overruled by the decision of the Judicial Committee, to which I have referred." Uniformly since then all the Courts in India have followed the principles enunciated by Sir Francis Maclean, Chief Justice, in the case I have referred to. *Kanakku Nagalinga Naick* v. *Nagalinga Naick* (3), *Lutawan Kubar* v. *Lachiya* (4), *Rai Charan Purkait* v. *Amrita Lal* (5) all point to the same conclusion, and, therefore, I think that we are inevitably bound to follow the course of practice established by a decision so universally recognised as now being the existing law of India. I desire only to mention the case of *Ramesh Chandra Dhar* v. *Karunamoyi Dutt* (6), a case identical with the present one before us, but judgment in which was delivered two days before the decision of Chief Justice Maclean, to which I have referred and, therefore, I think that the latter case, although in point, is not an authority which can bind us, having regard to modern and more recent decisions. Personally I doubt if the decision of the Privy Council in the case reported as *Ghulam Khan* v. *Muhammad Hassan* (1) was intended to have so far-reaching a meaning as has been ascribed to it, or that it could be considered as applying to a case where the award is *ab initio* void.

Thus it follows that there is no appeal from the decree and decision of the Subordinate Judge in this matter, and that his view as to the validity of the arbitration award established by his order of the 13th of January 1914 cannot be impeached on the appeal before us, and that, therefore, the decree of the Subordinate Judge pronouncing judgment in the terms of the award must stand. The provision in clause 7 of the compromise petition, providing that any of the parties might object to the award on any account, is, in my opinion, *ultra vires* and contrary to the procedure applicable to arbitration proceedings arising in a pending suit, as laid down by the 2nd Schedule of the Civil Procedure Code, and more especially by clause 15 thereof. However, this point is immaterial as the decision of the Subordinate Judge is final and conclusive.

This appeal must be dismissed.

JWALA PRASAD, J.--The suit out of which this appeal arises was instituted on 27th October 1911 for partition of certain *mauzas* set forth in the plaint. On 23rd August 1912 the parties filed a petition of compromise agreeing to appoint 5 persons as arbitrators to make partition and prepare *chittahs* according to the respective shares of the parties. On 11th September 1911, the Court passed a preliminary decree for partition and referred the matter to the arbitrators named in paragraph 6 of the petition to effect partition. By paragraph 7 of the petition the parties agreed to fully abide by the award of the arbitrators. On 6th September 1913 the award with the partition papers was filed in Court with the signatures of only four of the arbitrators. The fifth arbitrator, Abinash Chandra Ojha, had not signed the award. On 18th September 1913, defendants Nos. 6 to 10, who are appellants here, filed objections against the award, impugning its validity on, amongst others, the following grounds:—

That the award was not prepared by all the 5 arbitrators appointed to make the award. Two of the arbitrators were not present at the time of making the award, one of whom only signed after the award was prepared, and the other arbitrator, Abinash Chandra Ojha, had not signed it even when the award was filed in Court.

On 22nd November 1913, the date fixed for the hearing of the objections, the fifth arbitrator, Abinash Chandra Ojha, who happened to be present in Court, signed

(3) 4 Ind. Cas. 871; 19 M. L. J. 480; 6 M. L. T. 176; 32 M. 510.
(4) 21 Ind. Cas. 939; 36 A. 69; 12 A. L. J. 57.
(5) 5 Ind. Cas. 98; 11 C. L. J. 131.
(6) 33 C. 498.

* Page of 33 C.—*Ed.*

the award under the orders of the Court. The objections of the appellants as to the validity of the award were overruled by the learned Subordinate Judge for the reasons given in his judgment dated 13th January 1914. After disposing of the above objections a decree was made by the first Court on the basis of the award. The defendants Nos. 6 to 10 have come up in appeal to this Court and seek to set aside the decree of the Subordinate Judge.

The respondent disputes the competency of this appeal and contends that the decree of the Subordinate Judge is final and the appeal to this Court is barred by clause (2), rule 16, Schedule II of the Code.

The appellants, on the other hand, contend that the clause does not apply to this appeal inasmuch as rule 16 presupposes a valid award, whereas in the present case the award was invalid as not having been made by all the arbitrators appointed, and upon such an award the Court could not pronounce any judgment or base its decrees.

In *Ramesh Chandra Dhar* v. *Karunamoyi Dutt* (6), where the award was filed in Court without the signature of one of the three arbitrators, who, however, subsequently came in Court and signed it, and in *Junglee Ram* v. *Ram Heet Sahoy* (7), where the award was not signed by all the arbitrators appointed and there was no authority in the petition of submission for the majority to make it, the awards were held to be invalid.

Under rule 10 of the Second Schedule it was incumbent upon all the arbitrators to sign the award before its being filed in Court, and as soon as the award was filed in Court, the powers of the arbitrators came to an end, they became *functus officio*, and it was not open to any of the arbitrators to come in afterwards and sign the award, nor had the Court any power to allow him to do so. There is no provision in Schedule II of the Code, nor in the terms of the petition of submission to arbitration in the case, nor in the order of the Court referring the matter to arbitration, authorising the majority of the arbitrators to make the award.

The respondent relies on the authority of the Privy Council ruling reported as *Ghulam Khan* v. *Muhammad Hassain* (1). The case in the Privy Council, unlike here, was that all the arbitrators had signed the award when it was filed in Court, but the objection as to the validity of the award was on the ground that the arbitrators had wrongly decided the question of jurisdiction of the Civil Court involved in that case. Their Lordships held that as the whole case, including the issue as to jurisdiction, was referred to them, the arbitrators were both Judges of law and fact, for an error in law did not vitiate the award. Their Lordships, however, laid down generally that no appeal lies from a decree made under section 522, Civil Procedure Code of 1882, corresponding to rule 16 of Schedule II of the present Code, on the basis of an award except in so far as it is in excess of, or not in accordance with, the award and observed that to do otherwise would be doing violence to the plain language of the section.

The broad proposition laid down by Lord Macnaghten in the Privy Council, that no appeal lies from a decree based on an arbitration award except in so far as the decree is in excess of, or not in accordance with, the award (in exact terms of clause 2 of rule 16), has the effect of overruling all the decisions of the Courts in India to the contrary and has since been followed and acted upon by almost all the Courts.

Since the Privy Council ruling, the power of the original Court has been extended to set aside an award on the ground of its being invalid, by adding the words "or being otherwise invalid" to clause (*c*) of rule 15 of the Schedule.

No doubt when the parties take the matter in dispute between them out of the hands of the Court and agree that it should be decided by Judges or arbitrators of their own choice, they intend to put an end to litigation and the policy of the law is to give finality to the decision of the arbitrators, *finis rei attendus est*. The Court that refers is bound to give effect to the award and in order to do so is vested with the necessary powers (*vide* rules 12 to 15) by the rules in Schedule II to determine questions that arise after the filing of the award in Court. After determination of those questions the Court is required to pronounce judgment according to the award

(7) 19 W. R. 47.

under rule 16 of the Schedule, clause (2) of which runs as follows:—

"Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award."

The objection as to the validity of the award was taken by the appellants in the first Court which, however, held that the objection was a formal one as the fifth arbitrator Abinash Chandra Ojha, who had not signed the award when it was filed, did actually do so afterwards in Court, and thus the award ultimately came to be signed by all the arbitrators, and was, therefore, a valid award. The Court further held that the objections as to the validity of the award were out of time. The Court, rightly or wrongly, has held that the award was valid. Under clause 1 (c) to rule 15 of the Schedule as it now stands, the Court had jurisdiction to determine objections as to the validity of the award. The appeal in this case is solely on the ground that the decree is based upon an invalid award and not that it is in excess of, or not in accordance with, the award.

In view of the general proposition laid down by the Privy Council and its universal observance, this Court cannot but hold that the appeal is incompetent, however the facts of this case may be differentiated from those in the Privy Council case. The appeal is, therefore, dismissed, but without costs in the circumstances of the case.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL MISCELLANEOUS APPEAL No. 2477 OF 1915.

February 7, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

ABUL FATTEH—PLAINTIFF—APPELLANT

versus

FATTEH ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Rival pre-emptors—Decree providing for succession of one by other in case of failure to pay decretal money into Court by certain date—Payment to vendee out of Court before that date certified later whether amounts to proper payment into Court.

An action on the part of the pre-emptor and the vendee completed before the due date and calculated to put the Court into a position to issue an immediate warrant for possession may be taken as equivalent to payment into Court. [p. 364, col. 2.]

Two rival pre-emptors, *F* and *A* secured a joint decree for pre-emption, the rights of *F* being preferred to those of *A*. The decre provided that *F* should pay the price into Court on or before the 15th March 1915, that in default his claim should stand dismissed and *A*'s claim should come in. On the 5th March *F* put in a receipt for the whole sum and asked the Court to certify the payment. The Court issued notice to the judgment-debtors to appear on the 25th March. Notice not having been served, fresh notices were issued for the 12th April. On the 31st March 1911 the judgment-debtors appeared and confirmed the receipt and also vouched for two others who were dead. On the 12th April four more appeared and confirmed the receipt. In the meantime *A* on the 16th March applied for execution:

Held, that *A* was entitled to a very strict compliance by *F* with the terms of the decree and as the payment by the latter to the judgment-debtors had not been certified to Court by the fixed date, his decree became a mere waste paper afterwards and *A* was entitled to execute his decree. [p. 364, col. 2; p. 365, col. 1.]

Sher Shah v. *Sher Jang*, 21 P. R. 1889, explained and distinguished.

Miscellaneous second appeal from the decree of the District Judge, Gurdaspur, dated the 24th June 1915.

Messrs. *Oertel* and *Muhammad Hussain*, for the Appellant.

Messrs. *Bhagwan Das* and *Duni Chand*, for the Respondents.

JUDGMENT.—In this case two rival pre-emptors, Fatteh Ali and Abul Fatteh, secured a joint decree for pre-emption, the rights of Fatteh Ali being preferred to those of Abul Fatteh. It was laid down in the decree that on or before the 15th March 1915 a sum of money fixed as the price to be paid should be paid by him into Court and in default his claim should stand dismissed, and that, if he does commit default, then Abul Fatteh's claim is to come in and *he* would have a period within which he must pay in the money and take possession.

On the 5th March Fateh Ali put in a receipt for the whole sum and asked that payment should be certified. The Court thereupon issued notice to the judgment-debtors to appear and declare whether they had received the money

or not. The date for hearing was fixed for 26th March 1915: but in consequence of notice not having been served fresh notices were issued for the 12th April. On the 31st March eleven of the judgment-debtors appeared and confirmed the receipt, and intimated that two judgment-debtors were dead, and vouched for them. On the 12th April four more judgment-debtors appeared and confirmed the receipt of the money, whereupon the Court gave an order for possession of the land, but immediately cancelled it, and then on the 28th April passed a lengthy order holding that Fatteh Ali had not complied with the decree and that, therefore, Abul Fatteh was entitled to execute *his* decree. In the meantime on the 16th March Abul Fatteh had applied for execution, and the order of 28th April decided both applications.

The lower Appellate Court took a different view of the law, holding that *Sher Shah* v. *Sher Jang* (1) was fully in point and that the presentation of the receipt aforesaid on the 5th of March 1915 was equivalent to payment into Court. It, therefore, accepted the appeal, declared that Fatteh Ali had fulfilled the conditions of the decree, and, inasmuch as Abul Fatteh had contested the matter, gave costs against Abul Fatteh, who has now come up to this Court with a second appeal.

In my opinion, though I do not agree entirely with the reasons given, the decision of the first Court was correct. It seems to me impossible to hold that Fatteh Ali complied with the terms of the decree. The ruling *Sher Shah* v. *Sher Jang* (1) is distinguishable in several particulars. In connection with this matter there is no perceptible difference between the Statute Law on the subject in force in 1889 and at the present time, though the phraseology has been altered a good deal. (*Cf.* section 214 of the Civil Procedure Code, 1877 and 1882, and Order XX, rule 14, of the present Code.) In the original Act, IV of 1872, there was nothing about payment into Court at all. Section 18 said the decree shall specify the date on or before which this money shall be paid, but it did not say where it shall be paid. This section, however, was repealed by Act VII of 1895, and the rules in the Civil Procedure Code took its place.

The distinction between the present case and that dealt with in the ruling of 1889 is twofold.

Firstly, in the earlier case the dispute was between a pre-emptor and a vendee and not between rival pre-emptors. It might well be considered extremely pedantic, where none but the pre-emptor and the vendee were concerned, to hold that money had not been paid into Court when both the pre-emptor and the vendee had certified in Court that it had been paid. Here, however, the dispute is between rival pre-emptors, and it seems to me that Abul Fatteh is entitled to a very strict compliance by Fatteh Ali with the terms of the decree.

Secondly, in the case of 1889 everything necessary was done *before due date, i. e.*, part of the money was paid in cash into Court and as to the rest the decree-holder put before the Court the receipt of the payee of that part, while the payee *then and there* admitted in Court that he had received the money. This obviously put the Court at once into the position of being able to issue a warrant for possession in favour of the decree-holder.

The history of the present case shows how different is the state of affairs here. I have already given that history, and from it, it appears that it was not until the 12th April 1915, at the soonest, that the Court was satisfied that the money had really been paid. This, of course, was long after the due date, and I do not think that the interpretation put by the Judges in 1889 upon the words "payment into Court" can properly be made to cover a state of affairs like those in the present case. My own feeling has always been that the ruling of 1889 went too far in the way of relaxing the law, but at present I am quite willing to accept that ruling. It, however, appears to me to go no further than this, that action on the part of the pre-emptor and the vendee *completed before the due date and calculated to put the Court into a position to issue an immediate warrant for possession* may be taken as equivalent to payment into Court. In the present case Fatteh Ali did not take such action as this. On due date it was still uncertain

(1) 21 P. R. 1889.

whether he was entitled to execution and, therefore, I have no hesitation in saying that Fatteh Ali's decree became a piece of waste paper on the 16th March 1915.

Therefore, I must accept this appeal, set aside the judgment of the lower Appellate Court and restore the judgment of the Senior Subordinate Judge. Fatteh Ali will pay Abul Fatteh's costs in all the three Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 40 OF 1914.

May 28, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

KRISHNA CHANDRA BAGDI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

SATISH CHANDRA BANERJEE— DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Limitation, special, applicability of—Dispossession, necessity of.

In applying the law of limitation prescribed by Article 3, Schedule III, of the Bengal Tenancy Act the purpose and scope of the Act must not be lost sight of. [p. 366, col. 1.]

To deprive a tenant of his right of suit as being barred by the special limitation of Article 3 of Schedule III of the Act, there must be a plain dispossession within the meaning of the Article. [p. 366, col. 2.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 27th of September 1913, reversing that of the Munsif, 2nd Court, Katwa, dated the 6th June 1912.

FACTS appear from the following judgment of the lower Appellate Court:—

"In this appeal the first question to be tried is whether the suit is barred by two years' limitation under the Bengal Tenancy Act.

The suit was for the declaration of the plaintiffs' right to seven *bighas* of land, which was alleged to have been held within a *jama* of Rs. 9 by the plaintiffs as heirs of the recorded tenant Muchiram, and from which the plaintiffs were dispossessed by the defendants in *Ashar* 1312. The plaintiffs also sued for possession. The defendants pleaded that in execution of a rent-decree the *jama* was sold and purchased by one Ram Chand Roy from whom the defendants purchased the same. They denied the plaintiffs' right and possession and pleaded limitation. The lower Court deciding the issues raised in plaintiffs' favour has decreed the suit. Hence this appeal by the defendant.

The first question before me, as I have said, is limitation.

It is admitted that the *jama* stood in the name of one Muchiram. The *dakhilas* produced by the plaintiff show that he paid rent up to 1308. It appears that he died in 1309 or thereafter. The plaintiff No. 1 is his son. It is alleged on the plaintiffs' side that Muchiram had a brother named Bipra Das, who had a share in the *jama* and who was succeeded by his son Umesh, who is dead and the plaintiff No. 2 is Umesh's widow.

It, however, appears that some time after Muchiram's death, the landlords sued for rent due on this *jama* against one Jugal Mohini, who appears to be the daughter of Muchiram, and got a decree. It was in execution of this decree that the *jama* was sold and purchased by one Tara Chand Roy, from whom defendant purchased the same. It is admitted by the plaintiffs that the defendant is in possession since the purchase in *Ashar* 1313. The defendant's vendor was inducted (?) into the lands in suit by the landlords, either wrongly or rightly it does not matter. Therefore, though the landlords are not made parties in this suit, two years' limitation under the Bengal Tenancy Act is applicable in this case The law is clear and I need not discuss it.

There are, however, certain facts to be noticed here. It appears that sometime after the said auction sale, the landlord's *gomasta*, who gave evidence for the plaintiffs in this suit, colluded with the plaintiffs. So a rent suit for this *jama* was brought (No. 1119 of 1910) against the plaintiff No. 1 and decreed *ex parte* and the decretal amount was paid by the plaintiffs. I have said that this was due to the collusion of the *gomasta*. For Exhibit B shows that the rent of the period 1313 to 1316 was paid by the defendant; still for the rent of this period the suit aforesaid was brought.

This decree, therefore, does not affect the case.

It is also, contended that the first rent decree (in Suit No. 2095 of 1905) in execution of which the *jama* was sold was brought by fractional co-sharers and against a wrong person, and as, by the sale in execution of this decree, the *jama* did not pass. It appears that in the first suit Devendra, Gobesh and Sripati were plaintiffs. In the second suit Devendra being dead, his heirs were plaintiffs. Gobesh is a plaintiff in the second suit also. Only in place of Sripati his minor brothers were added along with him. It thus appears that in this rent suit 16 annas co-sharer landlords were represented and the suit was for the entire rent. Thus then this plea does not stand. If the suit, was a fraudulent one all the landlords were parties to the fraud and all of them helped to dispossess the plaintiffs.

In this view of the case I hold that the suit is barred under two years' limitation under the Bengal Tenancy Act. The plaintiffs' suit must fail.

Babu *Hira Lal Sanyal*, for the Appellants.

Babu *Hemendra Nath Sen*, for the Respondent.

JUDGMENT.—This suit has been decided adversely to the plaintiffs on the ground that it is barred by what is commonly called the special law of limitation, that is, the law of limitation as prescribed by the Bengal Tenancy Act. It seems to be overlooked at times, in applying the provisions of that Act, that it is one to amend and consolidate certain enactments relating to landlord and tenant and that, as its preamble shows, what was regarded as expedient was to amend and consolidate certain enactments relating to landlord and tenant.

Section 184 of the Act prescribes certain rules of limitation by a reference to the Schedule. But section 184 as also Chapter XVI, of which it is a part, is but a portion of this Code which governs the relations of landlord and tenant. In determining what Article 3 of Schedule III of the Bengal Tenancy Act means, we must not leave out of sight the purpose and scope of the Act. It was not the design of the Act, as I understand it, to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant.

I am aware that very extended operation has been attributed to Article 3, in one case at any rate. But that is contrary to the general current of decisions and to the spirit of the Act. To deprive a tenant of his right of suit there must be a plain dispossession within the meaning of Article 3 of the Schedule. Bearing in mind what it was that the Act did intend, in my opinion there is no justification here for saying that there was such a dispossession as the learned Subordinate Judge in reversal of the Munsif has thought fit to find Therefore, his decree must be set aside and the case must go back to the lower Appellate Court, in order that it may there be determined on the merits apart from the special law of limitation which has no application.

Costs will follow the result.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2332 OF 1913.

February 4, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

RAMJI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat THAKAR DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Error in weighing evidence, whether defect of procedure—Punjab Courts Act (III of 19.4), s. 41 (c).

A mere alleged error in weighing evidence is no ground for second appeal under section 41 (*c*) of the Punjab Courts Act. [p. 367, col. 1.]

Second appeal from the decree of the Divisional Judge, Sialkot, dated the 18th August 1913.

Mr. *Mul Raj*, for the Appellants.

Mr. *Asquith*, for the Respondents.

JUDGMENT.

CHIEF JUSTICE.—The parties belong to the *Acharaj* caste and live in Pasrur, District Sialkot. The suit is by the two nephews of one Billu deceased for cancellation of the adoption of Manohar Lal defendant No. 2

by a deed of adoption executed on 16th February 1912 by *Musammat* Thakar Devi defendant No. 1, widow of the said Billu, who had died nine months earlier. The learned District Judge held that the adoption by the widow was under Hindu Law invalid, inasmuch as it was not proved that the widow really had been given authority to adopt by her late husband. On appeal the learned Divisional Judge found that the express giving of authority by Billu on his death-bed was proved, and that Manohar Lal, being in no way barred by law from being adopted, the adoption by the widow was clearly valid.

The suit having thus been dismissed, plaintiffs have come up here on second appeal and we have heard arguments. It is admitted before us that clauses (*a*) and (*b*) of section 41 of the Courts Act do not help plaintiffs to a second appeal in this case, as the question in dispute is not one of law or custom but merely of fact, *i. e.*, whether Billu, before he died, gave his widow authority to adopt or not. But plaintiffs invoke clause (*c*), urging that the lower Appellate Court has ignored valuable evidence. In connection with this we lay it down that mere alleged error in *weighing* evidence is no ground for second appeal.

Relying on clause (*c*) the learned Pleader contends: —

(*i*) That the oral evidence as to Billu's being unconscious before death and so unable to give authority to adopt was ignored.

This contention does not much impress us. There were three witnesses on this point. The first says Billu was dying of plague and no one would go near him, and that witness stood outside and called to him but got no answer. The second said he asked defendant No. 1 about her husband and she said he was *behosh*: this witness, though he stoutly asserts that Billu gave no authority to adopt, actually attested the adoption deed! The third witness says he called out consoling remarks to the patient from a distance and that no authority to adopt was given. It is not surprising if the lower Appellate Court thought such testimony hardly worth noticing.

(*ii*) That Manohar Lal did not do *kirya karm* has been overlooked. This is sufficiently answered by the remark that Manohar Lal was not at that time *adopted* and so not perform those ceremonies. The lower Appellate Court has noticed the matter.

(*iii*) That the long delay in adoption has been overlooked. A feast had to be given and arrangements had to be made. We do not think this a vital matter.

(*iv*) That the lower Appellate Court never noticed that in the deed the widow keeps the estate for herself for life, whereas in case of a real adoption the adoptee would at once become full owner. But there is a real adoption, though the widow, ignorant of the law, has attempted by an addition to the deed to secure herself for life. Probably this addition is really inoperative. It is said Manohar Lal has sued for partition of the estate in his own name.

We can see no sufficient reason for interference. Dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
SPECIAL BENCH.

MATRIMONIAL REFERENCE CASE No. 6 OF 1915.

February 18, 1916.

Present:—Mr. Justice Rattigan, Mr. Justice Scott-Smith and Mr. Justice Le Rossignol.

R. J. MORTON—PETITIONER

versus

N. M. MORTON—RESPONDENT.

Divorce Act (IV of 1869), *ss.* 3 (1), (2), (3), 10—*Petition for dissolution of marriage—District Court, jurisdiction of.*

Where in an application for dissolution of marriage it appeared that the petitioner and his wife last lived and cohabited together at Bangalore, that the respondent did not reside and had not for many years resided, within the Ambala District and that at the time of the institution of proceedings she was not residing at any place within the Punjab:

Held, that having regard to the definitions of the terms "High Court," "District Judge" and "District Court" in section 3 of the Divorce Act, the District Judge of Ambala had no jurisdiction to try and determine the case. [p. 368, col. 1.]

Case referred by the District Judge, Ambala, with his No. 1180-*G*, dated the 4th August 1915.

Mr. *Dalip Singh*, for the Petitioner.

ORDER.—Mr. Dalip Singh (on behalf of Mr. Bevan Petman) applies under section

17 of the Indian Divorce Act, 1869, for confirmation of the decree *nisi*, passed on the 24th of July 1915 by the District Judge of Ambala, for the dissolution of the marriage of Richard John Morton petitioner, and Norah Mary Morton, respondent.

It is unnecessary for us to discuss the facts of the case, as it is obvious upon the face of the proceedings that the District Judge had no jurisdiction to entertain the petition. It is stated in paragraph 2 of the petition that the petitioner and his wife last lived and cohabited together at Bangalore, and it is clear from the record that the respondent does not reside, and, so far as we can see, has not for many years resided, within the District of Ambala. She appears to have been living at the time of the institution of the proceedings in Calcutta, and was certainly not residing, dwelling or present at any place within the Punjab.

In the circumstances and having regard to the definitions of the terms "High Court," "District Judge," and "District Court" in section 3 of the Act, we must hold that the District Judge had no jurisdiction to try and determine the case.

As a result we must decline to confirm the decree, which is accordingly set aside.

Decree set aside.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 26 OF 1916.

June 6, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

RAGHUNATH TEWARI AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Musammat RADHESSOR KUAR—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 9, 13—Execution—Description of property in decree amplified in application for execution—Sale proclamation, terms of.

The decree-holder, being apprehensive that the description of property given in the decree was not sufficient to identify it, gave an amplified description of it in the application for execution of decree:

Held, that in such a case the proper course for the Court was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree, and then enter for purposes of identification the description given by the decree-holder in the application for execution in order that intending purchasers might have an idea of the value of the property. But this entry should be made as a foot-note and it should be made clear that the additional information was furnished by the decree-holder. [p. 369, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 7th October 1915.

Babus *Jogesh Chandra De* and *Susil Chandra Mallik*, for the Appellants.

Mr. *Sivanandan Rai*, for the Respondent.

JUDGMENT.—In this case the appellant before us is a judgment-debtor, who has been held liable to pay maintenance to the respondent decree-holder in accordance with the terms of a Will. In a suit upon this Will a decree was obtained by this lady, the respondent, declaring a charge upon certain properties described in her plaint. By this decree she obtained an order for sale of properties as described by her in her plaint as liable to the charge created by the sale. She now comes in execution of this decree and asks that these properties be put up for sale for the realisation of the debt due under her charge. She was apparently apprehensive that the description given in her original plaint was not sufficient to make it clear exactly what properties were being sold. She, therefore, in her application for execution amplified largely the details of the description of these properties, with the result that it was found by the learned Subordinate Judge that in several instances the properties as described in the decree made in her favour were not identifiable at all. The learned Subordinate Judge was, however, satisfied that the remaining properties were clearly identifiable on the description given in the decree and that there would be no prejudice to the judgment-debtor by reason of the amplified description given by the decree-holder in her application for execution. He, therefore, ordered the properties to be advertised for sale under the description given by the decree-holder in her application for execution. This, I think, was not justified by any provision contained in Order XXI.

The learned Subordinate Judge called to his assistance rule 13. But rule 13 is applicable only to execution in decrees for money, not to decrees made upon a

charge or mortgage. The learned District Judge has explained that this section was quoted by the lower Court only as creating an analogy. He dismissed the appeal on the ground that Order XX, rule 9, allowed general descriptions to be given in the decree, and that there was no reason why such a description should not be amplified in the application for execution. The judgment-debtors have again appealed. The proper course for the learned Subordinate Judge was, in my view, to make an enquiry and, if satisfied that the description given in the decree was sufficient to secure in due course identification of the property when the time came for delivery of possession, to proceed to sale. It was also open to him to refuse to proceed to sale when the sale was bound to be futile by reason of the impossibility of identifying the property by the description given in the decree. But he had not arrived at the stage when an adjudication was required of what property would actually pass by the sale. His proper course was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree and then enter for purposes of identification the description given by the decree-holder in the application for execution, in order that intending purchasers might have an idea of the value of the property. But this entry should have been made as a foot-note and it should have been made clear that these additional boundaries were not boundaries adjudicated by the Court but only boundaries alleged by the holder of the decree. I would direct, therefore, that fresh sale proclamations be drawn up in these terms. The appeal is to this extent allowed. I would make no order as to costs.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 215 OF 1915.

April 6, 1916.

Present:—Mr. Justice Parlett

MAUNG PO MYAING AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. M. P. L. PALANIAPPA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2 (2)—Execution of decree—Petition by judgment-debtor setting forth full satisfaction—Order striking off execution application with consent of decree-holder—Consent secured by mistake, effect of—Satisfaction petition, filing of, after time—Fresh execution application, whether barred.

A decree-holder having applied for execution of his decree, the judgment-debtor filed a petition in Court on 12th November 1909, stating that the decree was fully satisfied by an adjustment made by parties out of Court. The petition, however, was filed after the period of limitation prescribed for applications for notice under Order XXI, rule 2, Civil Procedure Code had expired. The execution application was dismissed by the Court with the consent of the decree-holder. The decree-holder put in a fresh application for execution on 15th July 1914, after an intervening application which he allowed to be dismissed. The judgment-debtor objected that it was barred by reason of the Court's order on 12th November 1909. The decree-holder contended that his consent to the order was given by mistake and that as the defendant's petition was barred, the order of the Court, dated 12th November 1909, was a nullity:

Held, (1) that the order of the Court on 12th November 1909 was the record of an adjustment of the decree certified to the Court, which could be recognized under Order XXI, rule 2 (2), Civil Procedure Code; [p. 370, col. 2.]

(2) that if the decree-holder made a mistake in giving his consent to the order, it did not vitiate the order, though it was open to the decree-holder to have moved the Court by way of review; [p. 370, col. 1.]

(3) that, even if defendant's application setting forth the adjustment was out of time, the order passed thereon was not a nullity and the only course left to the decree-holder was to have appealed against the order and as he failed to do so, the order became final. [p. 370, col. 2.]

Mr. *Shaw*, for the Respondent.

JUDGMENT.—On 20th June 1907 the M. L. R. M. Firm got a decree for Rs. 1,024-12 and Rs. 119-8 costs against the appellants and Maung San Hlaw. Execution was taken out and San Hlaw paid up Rs. 200 and in execution for the balance Maung Tun Nyein was on 4th October 1907 committed to jail. He was released on 16th December 1907 on the request of the decree-holder, who stated that his relatives had promised to pay up the balance of the decretal amount. On 20th May 1908, a deed was executed whereby certain properties were transferred to the

decree-holder in full satisfaction of certain decrees against Maung San Hlaw, Maung Kyauk Lon and Maung Tun Nyein.

On the 18th September 1909, the decree-holder, through his Pleader Maung Po The, applied for further execution against Maung Tun Nyein, who on 12th November 1909 filed a petition, accompanied by a copy of the deed referred to above and stating that the decree sought to be executed had been fully satisfied by the deed. The Sub-Divisional Judge recorded the following order: –

"Case called. Maung Po The for applicant. Judgment-debtor Tun Nyein appears and states that he had discharged the debt. It must be a mistake on the part of the decree-holder as there are three judgment-debtors in the case. Case struck off at the request of Maung Po The. Case closed."

The next application for execution was on 5th August 1911, but notice was not then served on Tun Nyein. On 15th July 1914 M. M. P. L. Palaniappa Chetty filed an application for execution against Maung Tun Nyein, though the record does not show how he had any right to execute a decree in favour of M. L. R. M. Firm. The Sub-Divisional Court held that the order of 12th November 1909 precluded any further execution of the decree against Maung Tun Nyein, and dismissed the application. On appeal the Divisional Court reversed this decision, holding that there had been no adjustment certified to or recorded by the Court which could be recognized under Order XXI, rule 2 (2).

Maung Po Myaing, Maung Kyauk Lon and Maung Tun Nyein appeal, but the two first named appear to be unnecessary parties and their appeal must be dismissed.

In the case of Tun Nyein the question is whether the order of 12th November 1909 is the record of an adjustment of the decree certified to the Court, which can be recognized under the rule referred to above. That order was made, not only with the consent, but at the request of the decree-holder's Pleader. If the latter made a mistake in admitting that the deed of 20th May 1908 covered the decree then sought to be executed, that might have been a matter for an application for review.

It is true that the application of 12th November 1909 was not made within the period of limitation for applications for notice under Order XXI, rule 2 (2); but that, if not cured by the decree-holder's Pleader's consent, could have been made a ground of appeal against the order of 12th November 1909. The decree-holder took neither course and whether the order is right or wrong, it has become final and cannot be treated as a nullity. That it amounts to the record of an adjustment of the decree certified to the Court under Order XXI, rule 2, is, in my opinion, clear. The decree cannot be further executed against Maung Tun Nyein. His appeal is allowed with costs in all Courts.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 469 OF 1914.

June 14, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

MUKUNDA LAL CHAKRABARTY—PLAINTIFF—APPELLANT

versus

JOGESH CHANDRA CHAKRABARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law - Partition, suit for—Omission to specify some of the joint properties in plaint, effect of—Amendment—Civil Procedure Code (Act V of 1903), s. 153, O. VI, r. 17.

The plaint in a suit for partition of the properties of a joint Hindu family should set forth all the properties of the family. Should any, however, be omitted by inadvertance or mistake, the suit should not be dismissed but the plaint allowed to be amended by supplying the omission. [p. 371, col. 2.]

Srimohan Thakur v. *Macgregor*, 28 C. 769, followed.

Jogendra Nath Mukerji v. *Jugobundhu Mukerji*, 14 C. 122; *Jogendra Nath Rai* v. *Baldeo Das*, 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127, referred to.

The widest power of amendment is given, not only to the original but also to the Appellate Court to enable the Court to try all matters properly in dispute between the parties. [p. 371, col. 2; p. 372, cols. 1 & 2.]

Appeal from a decision of the Additional Subordinate Judge, Manbhum, dated the 27th July 1914.

Mr. *Lal Mohan Ganguli*, for the Appellant.

Messrs. *Naresh Chandra Sinha* and *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit for partition of moveable and immoveable property alleged to belong jointly to the plaintiff and the defendants. The plaintiff is the uncle of

the defendants. The property sought to be partitioned consists of a number of moveable and immoveable properties, the details of which are set forth in the schedules attached to the plaint. The defendants in their written statement took objection to the suit being maintained in the present form, inasmuch as all the joint properties of the family were not included in the schedule attached to the plaint. The defendants at that stage did not disclose the names or the nature of the properties said to have been omitted by the plaintiff. Apart from this objection the defendants also claim that most of the properties included in the schedule to the plaint were the self-acquired properties of their father, and that the plaintiff had no right to have the said properties partitioned. The learned Subordinate Judge in the Court below upon the pleadings of the parties framed the following issues for its determination:

No. 1. Is the suit maintainable in its present form?

No. 2. Did the plaintiff and the defendants live in joint mess, and are the properties described in the plaint joint properties of the parties?

No. 3. To what relief, if any, is the plaintiff entitled?

After evidence was given by the parties, the Court, by its judgment dated the 27th July 1914, dismissed the suit, solely upon the ground that the plaintiff had omitted five properties, two of which were immoveable and three moveable, from the list of joint properties attached to the plaint for partition. The learned Additional Subordinate Judge did not, however, try the other issues Nos. 2 and 3. The plaintiff has appealed and seeks to have the order of the Subordinate Judge reversed and also asks to be permitted to amend his plaint in such a manner as to include the properties that were omitted from the plaint originally, and which were found by the learned Subordinate Judge to be the joint property of the family, and to allow the original suit to proceed to final determination.

The learned Subordinate Judge was of opinion that the action brought by the plaintiff was not maintainable by reason of the omission of the specified properties from the suit and that as a consequence the suit must necessarily be dismissed; and that the plaintiff must institute a fresh suit including all the joint family property, if he desires to proceed and enforce a partition of the joint property. The learned Subordinate Judge relied upon the rulings quoted in the cases of *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1) and *Jogendra Nath Rai* v. *Baldeo Das* (2) in support of his decision. It is true that in a suit for partition of joint family property by a Hindu, all the properties must be included in the action, and the reason for this proposition is, to save the parties from multiplicity of proceedings. On the other hand, if by inadvertance, mistake or fraud of any of the parties, some of the joint properties are not partitioned by the institution of the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered. All that is required in a suit for partition is that all the properties that are known to be joint family properties at the time the suit for partition is instituted, must be included in the action for partition. But the question here is, whether or not the suit should have been dismissed, or the Court should have allowed the amendment of the plaint, *suo motu* or at the instance of the parties, so that the partition might be effected in this action; and that the plaintiff should not be forced unnecessarily to bring another action for the same relief, and thus to cause the same evidence, if not more, to be given at the second hearing, and delay the separate enjoyment of the properties by the parties according to their shares. In a case like the present one it was, I think, the obvious duty of the Court to have allowed the amendment of the plaint and as amended to allow the action to proceed, including all the properties that were found to be joint family properties. Such power of amendment is vested in the Court by the provisions of section 153 of the Code of Civil Procedure coupled with Order VI, rule 17. The latter rule enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just, whereas section 153 empowers the Court to make itself all necessary amendments for the purpose of determining

(1) 14 C. 122.
(2) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

the real questions or issues raised in the action. This power is vested both in the original as well as in the Appellate Court. This view was taken in the case of *Srimohan Thakur* v. *Macgregor* (3). I entirely concur with the view taken in that case, and I think that the learned Subordinate Judge should have allowed the amendment and proceeded to try the other issues in the case. It is not denied by the learned Vakil for the respondent that the Court had power to amend the plaint and that it would not have been improper to have done so in this case. His only objection to the amendment of the plaint is, that the respondent will be very much prejudiced if the plaint is allowed to be amended at this stage, when all the evidence has been given, whereas, if the suit is dismissed and a fresh suit is brought, he would be in a better position, for then he would be able to adduce fresh or additional evidence. I do not think that there is any substance in the contention of the learned Vakil for the respondent, or in the grievance that he complains of. The lower Court has only tried issue No. 1 and has dismissed the suit on the preliminary ground. The trial of the other issues, on the case being remanded, will proceed and the defendants will certainly be able to make any submission as regards those issues that they consider proper. We think, therefore, that the decree of the Subordinate Judge, as it stands, must be set aside and the case remanded to the lower Court to try the issues that were left by it undetermined, and to commence the inquiry at the stage at which it terminated by the order of the 27th of July 1914 on the plaint as amended, by the inclusion of the five denominations of properties that have been found by the learned Court below to be joint family properties.

Now, it remains to consider the terms upon which this order of remand must be made. It was entirely the fault of the plaintiff not having included all the properties in the suit for partition. The defendant-respondent was put to great expense and inconvenience in the lower Court in having to prove that the properties omitted from the plaint were joint properties, and I think that he is entitled to costs for all the trouble and expense he had to incur on account of his having to prove that the properties were joint. We assess these costs in the lower Court at a sum of Rs. 100. He is further entitled to the costs of this appeal, which again will be assessed at another Rs 100. The order of the Subordinate Judge is set aside, and the case remanded, on condition that the plaintiff-appellant pays to the defendant-respondent the sum of Rs. 200 as costs both in the lower Court and of this appeal.

(3) 28 C. 769.

ATKINSON, J.—I agree in the main with the views expressed by my learned brother. I only want to say one word on the legal aspect of the case. The learned Judge decided this case on the basis, that if a plaintiff in an action for partition of joint Hindu properties omits to include any item of the joint property in his list or in his schedule to his plaint, that then, *per se*, the action must be dismissed, and that no right of amendment exists, either in the Primary Court or in this Court, which would enable the error to be corrected and the action proceeded with in the ordinary way, and he relies upon the case reported as *Jogendra Nath Mukerji* v *Jugobundhu Mukerji* (1) in support of that view. In my opinion the widest power of amendment is given, not only to the Primary Court but to this Court, which enables the Court to try all matters properly in dispute between the parties. I think it would be a manifest injustice if the power of amendment did not exist in a case such as the present one. No doubt, the plaintiff must make compensation for the error. To avoid multiplicity of suits the law has endowed all Courts in all countries with just and most ample powers of amendment, and, in my opinion, this case is one in which the power of amendment should have been exercised by the learned Judge. In this view we are fortified by the decisions which have been cited, and by the admission made by the learned Vakil for the respondent on appeal, to the effect that he did not dispute that the right of amendment existed, not only in the lower Court, but also in this Court.

Accordingly we shall remit this case, subject to the amendment that the plaintiff be allowed to include in his schedule to the plaint of the joint properties the five denominations of properties omitted therefrom, as

found by the Judge. The case will be remanded and will proceed before the learned Judge as if he had proceeded with the trial on the 27th of July. I agree with my learned brother as to the question of costs.

Should any other property be discovered to be joint, Court will be at liberty to include it in the plaint for partition.

Appeal allowed; Case remanded.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEALS NOS. 205 AND 233 OF 1915.

July 3, 1916.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Twomey.

IN No. 205

MAUNG PO TE—DEFENDANT—APPELLANT

versus

MAUNG SHWE KO—PLAINTIFF—RESPONDENT.

IN No. 233

MAUNG SHWE KO—PLAINTIFF—APPELLANT

versus

MAUNG PO TE—DEFENDANT—RESPONDENT.

Vendor and purchaser—Contract, breach of—Agreement to sell property—Non-purchase by buyer within time specified—Vendor's failure to offer title-deeds for inspection—Covenant against incumbrance—Duty of purchaser—Auction sale without advertisement at place where property situate—Damages, assessment of—Receipt of payment of mortgage amount—Registration—Registration Act (XVI of 1908), *s.* 17—*Transfer of Property Act* (*IV of* 1882), *s.* 55, *sub-ss.* (1) *and* (5).

A breach for the purchase of a property, within a specified time, cannot be justified on the ground that the vendor did not offer the title-deeds for nspection. [p. 374, col. 1.]

The words 'on his request' in clause (*b*) of sub-section 1 of section 55 of the Transfer of Property Act, make it the duty of the seller to produce his documents of title for examination by the buyer only when the latter asks for them; if the buyer does not ask for them within the time fixed for the completion of the contract, he is not excused from the consequences of his failure to fulfil it by the plaintiff not having offered to show his documents of title. [p. 374, col. 1.]

A receipt of repayment of the mortgage money in full stating that the mortgage-deed is, therefore, returned, need not be registered as it does not on the face of it purport to extinguish the mortgage, such a document being exempted under clause 11 of sub-section 2 of section 17 of the Registration Act. [p. 374, col. 2.]

If a buyer acquires knowledge of any mortgages subsisting on the land contracted to be sold free from incumbrances, all that is open to him under clause (*b*) of sub-section (5) of section 55 of the Transfer of Property Act is to retain out of the purchase-money the amount due to the mortgagee; non-production of the registered release-deed does not absolve the buyer from liability for damages for refusal to purchase. [p. 374, col. 2.]

Ayesha Bee v. *Somasundram Iyer*, 11 Bur. L. R. 257 and *Compton* v. *Bagley*, (1892) 1 Ch. D. 313; 61 L. J. Ch. 113; 65 L. T. 706, referred to.

A seller, who puts up the property for sale on refusal by the party who contracted to purchase it, is bound to advertise the sale in the place where the property is situate. If the advertisement is inadequate, the buyer cannot be held liable for the difference between the contract price and the inadequate price realised at such sale. [p. 374, col. 2.]

Mr. *E. A. Villa*, for the Appellant.

Mr. *J. R. Das* (with him Mr. *S. M. Bose*), for the Respondent.

JUDGMENT.

FOX, C. J.—By a document dated the 1st October 1913, the defendant agreed to buy from the plaintiff some houses and the site on which they stood for Rs. 6,000. Rs. 250 was paid as earnest money. The sale was to be completed before the 17th November following. The only step taken by either party towards fulfilment of the contract before that date was the sending of a letter by the plaintiff's lawyers to the defendant on the 14th November calling on him to complete the contract on or before the date mentioned in it.

On the 21st November the plaintiff's lawyers again wrote to the defendant to the effect that as he had broken the contract the land would be put up to auction after 15 days, unless the matter was settled within that time, and the defendant would be held responsible for any loss which the plaintiff might incur.

On the 26th November the defendant's lawyers wrote taking up the line that the plaintiff had failed to furnish proof of a clear title to the property, and that he had not given inspection of his title-deeds and that he had suffered no loss and was not entitled to any damages beyond the expenses he had incurred.

The property was situate in Insein Town. The plaintiff had the property sold by auction in Rangoon after it had been advertised for sale in various newspapers during the course of a month. The proposed auction sale was

not advertised in Insein itself either by placard on the house or otherwise. It was sold on the 14th January 1914 and fetched Rs. 1,500 only, and from this Rs. 100 was deducted by the auctioneers for the cost of advertising and their commission so that the plaintiff realised Rs. 1,400 only. He sued the defendant for the Rs. 6,000 purchase-money plus Rs. 135 expenses incurred less Rs. 1,750, made up of the Rs. 250 earnest money and Rs. 1,500 the price realised at the auction sale. The purchaser at that sale was a connection of the plaintiff's, and he re-sold the land within a few days for Rs. 4,300. The District Court gave the plaintiff a decree for the amount he claimed. The Divisional Judge thought that a fair valuation of the property at the time would be Rs. 4,000 and assessed the plaintiff's damages at Rs. 2,000 from which he deducted the Rs. 250 earnest money, and gave the plaintiff a decree for Rs. 1,750. Both parties appeal. The defendant urges that he was justified in refusing to pay the balance of the purchase-money, because it was plaintiff's duty to hand him the title-deeds of the property for preparation of the deed of sale and transfer, and he had never done this or offered to do it.

This contention is based on some remarks in my judgment in *Ayesha Bee* v. *Somasundram Iyer* (1) which referred to the English system of conveyancing, the working of which can be gathered from *Comyton* v. *Bagley* (2). I regret that in my judgment in the case I have mentioned I overlooked the words "on his request" in clause (*b*) of sub-section 4 of section 55 of the Transfer of Property Act, and that the Act makes it the duty of the seller to produce his documents of title for examination by the buyer only when the latter asks for them. The defendant in the present case did not do this within the period fixed for the completion of the contract, consequently he was not excused from the consequences of his failure to fulfil it by the plaintiff not having offered to show his documents of title.

The *next* ground on which the defendant seeks to be free from such consequences is that the plaintiff could not show a clear title or, in other words, a title free from incumbrances. The contract of sale implied that the seller was selling the property free from incumbrances. Among the documents of title produced at the trial of the suit were three mortgages made by the plaintiff. The first is an English mortgage, the others are simple mortgages.

The English mortgage bears no endorsement acknowledging the repayment of the mortgage-money. The second bears such an acknowledgment, but it purports to be signed by an attorney of the mortgagee. The third has an endorsement of repayment in full, and there is also a separate receipt purporting to be signed by the mortgagee. It states that the amount due on the mortgage having been received in full the mortgagor returns the deed. It is argued that this receipt not being registered was inadmissible in evidence, but as it does not on its face purport to extinguish the mortgage registration was not necessary, such a document being exempted under clause 11 of sub-section 2 of section 17 of the Registration Act. No question as to any of the mortgages being still outstanding was raised before the suit was filed. If the defendant knew of any of them before the date for completion of the contract, all that was open to him under clause (*b*) of sub-section 5 of section 55 of the Transfer of Property Act was to retain out of the purchase-money the amount (if any) due to any mortgagee. The inability of the mortgagee to produce registered releases of the mortgages did not absolve the defendant from liability for damages for breach of the contract.

As regards the damages, the method of sale in Rangoon of property at Insein without giving any notice of the sale at the latter place was an inadequate method of attracting possible purchasers of house property in a Burmese quarter, and the defendant cannot be held liable for the difference between the contract price and the very inadequate price realised at such a sale. If the land was sold within a few days of the auction sale for Rs. 4,300, the value of the property must *prima facie* have been the same amount at the time of the auction sale. There does not appear to be any adequate reason for concluding that it was less by Rs. 300 at that time.

(1) 11 Bur. L. R. 257.
(2) (1892) 1 Ch. D. 313; 61 L. J. Ch. 113; 65 L. T. 706.

The proper assessment of damages works out as follows:—

Difference between the contract price Rs. 6,000 and Rs. 4,300=Rs. 1,700. Add Rs. 100 for expenses charged by the auctioneers. Total Rs. 1,800. Deduct Rs. 250, making Rs. 1,550 for which the decree should be. The Divisional Court's decree is altered accordingly.

The defendant gains only a trifle. He must pay the plaintiff's costs in Appeal No. 205. The plaintiff loses on his appeal: he must pay the defendant's costs in Appeal No. 233.

TWOMEY, J.—I concur.

Decree modified.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2419 OF 1915.

July 6, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

Babu BISHUN PERKASH NARAIN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MUHAMMAD SADIQUE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Entry of payment—Signature of party—Contract Act (IX of 1872), ss. 60, 61—Appropriation of payments by Court.

In order to save limitation under section 20 of the Limitation Act the person who made the payment should be the person who should sign the writing as evidence of payment. [p. 376, col. 1; p. 377, col. 1.]

Mukhi Haji Rahmuttulla v. *Coverji Bhuja*, 23 C. 646 (F. B.), applied

If the debtor does not appropriate payments of debt, then the creditor may appropriate such payments to any particular debt or to any particular portion of a running account. But if neither party appropriates, the Court is entitled under section 61 of the Contract Act to declare that such payment shall be appropriated in discharge of the debts in order of time. [p. 376, col. 1.]

Cory Brothers & Co. Ltd. v. *Owners of the Turkish Steamship "Mecca,"* (1897) A. C. 286; 66 L. J. P. 86; 76 L. T. 579; 45 W. R. 667, referred to.

Mr. *Harnarain Prasad*, for the Appellants.

Messrs. *Fakhruddin*, *Krishna Sahay*, *Amir Hussian* and *Baidya Nath Narain Singh*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This action is brought by the plaintiff to recover a sum of money alleged to be due for the payment of goods sold by the plaintiff to the defendants between the years 1908 and January 1914. The defendant filed a written statement but never appeared before the Court of the Subordinate Judge. A decree was passed against him *ex parte*. On appeal at the instance of the defendant, he raised for the first time the question of the Statute of Limitation. He had not, in his written statement, expressly pleaded that the action in whole or in part was barred by limitation, although one might imply from the words used in the written statement an expression of intention to show that the debt was barred. But the Statute was not expressly pleaded. On appeal he expressly raised the question of limitation, and the Judge decided the case on that basis.

Now the facts are very shortly as follows :—

The plaintiff sold goods to the defendant, and on foot of the account for the goods sold payments were made from time to time by the defendant. When the payments were made, there was no expression of intention as to what particular part of the account or item of the account the payment so made was to be added or appropriated to. The payments that were made on account vary in amounts through different years; in February 1909 Rs. 2[illegible], on the 21st March 1910 Rs. 200 on the 25th November 1910 Rs. 1,000, and so on. During the subsequent period from March 1911 to January 1914, Rs. 2,115 in all were paid by various part payments on foot of the general account.

The appellant's first point is, that under the provisions of section 20 of the Limitation Act, these part payments cannot be relied upon to take the case out of the operation of the Statute of Limitation, and that thus the debt due as calculated on the 4th March 1911 would have been barred before the institution of this suit, which was instituted on the 4th March 1914. And the defendant says, "although I made payments, I am not bound, because it is not shown that the person who made the payments wrote in his own handwriting the acknowledgment of the payment so made by him, within the proviso of section 20 in the Limitation Act."

The facts appear to be, as stated in the uncontradicted evidence of the plaintiff, that the defendant made the payments alleged from time to time and that the

entries of the payments that are in writing in the books of the plaintiff were made by the defendant's agent or *mukhtear*, and are in his handwriting. But it does not appear to be consistent with the evidence that the payment that was made was by the person who made the entry in the plaintiff's ledger. It is quite clear that the Statute requires that the person who made the payment should be the person who should sign the writing as evidence of the payment. We think that the law laid down in the Full Bench case reported as *Mukhi Haji Rahmuttulla* v. *Coverji Bhuja* (1) correctly interprets the legal construction to be given to section 20.

Thus, in this case we are satisfied that there was no writing by the person who made the payment, that is, by the defendant in this case, to satisfy the requirements of section 20. In that aspect of the case the debt due on the 4th March would apparently be Statute barred.

Mr. Fakhruddin, on behalf of the plaintiff, urges that his client has a right, under section 60 of the Contract Act, to appropriate the payments that were made to the earlier debts, even though those debts might be Statute barred. I think, when you come to read sections 60 and 61 of the Contract Act, a very simple code of procedure is provided for, analogous in all particulars to the law of appropriation that prevails in England. If the debtor does not appropriate, and he has the first right, then the creditor may appropriates, and he may appropriate to any particular debt or to any particular portion of a running account. But if neither party appropriates, section 61 is an enabling section, which entitles the Court to declare that such payments shall be appropriated in discharge of the debts in order of time.

I only refer to the case of *Cory Brothers & Co., Ltd.* v. *Owners of the Turkish Steamship "Mecca"* (2), for the purpose of showing that the law there laid down is in conformity in every respect with the enactments contained in sections 60 and 61 of the Indian Contract Act. Here in this case, there was undoubtedly a running account; payments were made extending over the entire period of that account from its inception to its end; and the question that arises now is, where neither party had made an express appropriation, whether we are to imply that the payments made shall be applied in discharge in the order of date in which the debts were contracted. We think that the plaintiff is so entitled, and I desire to refer to the case of *Hooper* v. *Keay* (3), to the decision of Mr. Justice Blackburn where he says: "The general rule is, that the party who pays the money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party which receives the money. But there is a third rule, *viz.*, that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In the present case the plaintiffs have blended the two accounts, and sent it in to Keay, striking a balance on the whole; consequently the subsequent payments of £10 and £28, which were made by the defendant Keay without appropriation by him, should be applied to the different items on the debit side of the account in order of date; and it follows that the whole of Draper's debt is paid off, and he is entitled to keep his verdict on the plea of payment."

Now, in this case, we think that the argument put forward for the plaintiff is right; there having been no express appropriation, all the payments that were made are to be applied in the order in which the debts were contracted. Section 61 directly supports that view.

Accordingly in the view we take we shall reverse the decision of the learned Judge. We allow the appeal and vary the judgment, and allow the plaintiff to have judgment for the sum of Rs. 2,820 without interest. The respondents are entitled to the costs of this appeal and to their costs in all the Courts below.

JWALA PRASAD, J.— I entirely concur with my learned brother both in point of law and facts. The plaintiff is entitled to the

(1) 23 C. 546 (F. B.).

(2) (1897) A. C. 286; 66 L. J. P. 86; 76 L. T. 579; 45 W. R. 667.

(3) (1 75) Q. B. D. 178; 34 L. T. 574; 24 W. R. 485.

price of the goods supplied to the defendant from March 1911 to the date of the suit. The payments made by the defendant during this period shall, under section 61 of the Contract Act, be appropriated towards the discharge of the debts antecedent to March 1911. The balance of any debt that may be due to the plaintiff prior to March 1911 is barred by limitation and is not saved by part payments from time to time of the debt, as the entries thereof are not in the handwriting of the person who made the payments, as required by the proviso to section 20 of the Limitation Act.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 3024 OF 1915.

February 16, 1916.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

ABDUL SAMAD—PLAINTIFF—APPELLANT

versus

MUNICIPAL COMMITTEE OF DELHI—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 189 (3) (i, (iii), 193, 195—Sanction conditional on leaving some land vacant—Condition, propriety of—Question whether Municipal Committee acted bona fide, if of fact—Appeal, second.

The plaintiff's application for leave to build a two-storied house was sanctioned by the Municipal Committee, subject to the condition that he must leave vacant seven feet of his land towards the west. It appeared that there was already an open space, about 5 feet 4 inches in width, on the west and the condition meant that he should not build within 2 feet of this open space. Plaintiff having built his house in contravention of this condition, the Municipal Committee served him with a notice under section 195 of the Punjab Municipal Act, calling upon him to demolish the upper storey of his building. Plaintiff then brought a suit for an injunction restraining the Committee from interfering with the upper storey of his house:

Held, (1) that the question whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two-storied house, was one of fact and having already been decided adversely to plaintiff by the Courts below could not be re-opened in second appeal; [p. 377, col. 2.]

(2) that *prima facie* there was nothing illegal, wanton, capricious or oppressive in a condition such as this, which was aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space, but was on the contrary eminently reasonable and conducive to sanitation, free circulation of air and ventilation within the meaning and for the purposes of section 189 (3) (*i*) and (*iii*) of the Punjab Municipal Act, read with section 193 thereof; [p. 378, col. 1.]

(3) that the Court was not concerned with the fact that compliance with the notice would entail heavy loss upon the plaintiff, who having acted defiantly and with his eyes open must bear the loss. [p. 378, col. 2.]

Second appeal from the decree of the District Judge, Delhi, dated the 5th August 1915.

Rai Sahib Lala *Moti Sagar*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.

RATTIGAN, J.—This is a second appeal from the decree of the District Judge, Delhi, dated 5th August 1915, and the sole question before us is whether the plaintiff was justified in building in contravention of the condition laid down by the Municipal Committee of Delhi in the written sanction, which was issued to him on the 24th February 1914 with reference to his application dated 5th January 19.4. The Subordinate Judge and the District Judge are agreed that the condition in question was not *ultra vires*, and that the action of the Municipal Committee was not *mala fide*, and on this finding they have dismissed plaintiff's suit in which he prayed for an injunction to restrain the Committee from interfering with the upper storey of the house which has been built.

It is not very easy to see on what ground plaintiff is entitled to prefer this second appeal, as the only question involved is whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two-storied house. That question is one *of fact* and it has already been decided adversely to plaintiff by the Courts below. The point has, however, been argued at length and we decided to deal with it on its merits, but we might in passing remark that ground (4 of the grounds of appeal to this Court has not been pressed before us, obviously for the very sufficient reason that if the conditional sanction granted by the Committee was *intra vires* and could not be shewn to be open to objection on such other grounds as the Courts can take into consideration in cases of this kind, the subsequent order of the Committee under section 195 of the Punjab Municipal Act, 1911, must clearly be held to be valid and lawful.

The question then is, whether the condition set forth in the written sanction issued by

the Committee to the plaintiff on the 24th February 1914 is open to objection and is such that the Courts can hold to be not binding on plaintiff. It is to the effect that plaintiff's application (to build a two-storied building) is granted but subject to the condition that he must leave vacant seven feet of his land towards the west. Before proceeding we may here point out that on this western side there is, as the boundary of plaintiff's estate, an open space, about 5 feet 4 inches in width, which is (according to the District Judge who inspected the spot) more in the nature of a surface-drain (*jhet*) than an alley. The written sanction was clearly intended to mean, and has so been understood by the plaintiff (see his plaint), the Committee and the Courts, that plaintiff should not build his wall within 2 feet of this open space, the object being that the said open space should hereafter be at least 7 feet in width.

Now *prima facie* there is nothing illegal, wanton, capricious or oppressive in a condition, such as this, which is aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space. On the contrary, it would seem to be eminently reasonable and conducive to sanitation, free circulation of air and ventilation, within the meaning and for the purposes of section 189 (3) (*i*) and (*iii*) of the Punjab Municipal Act, read with section 193 thereof. Plaintiff, however, complains that the Committee were not influenced by those reasons, but that by imposing this condition they wanted to deprive him of proprietary rights in his land to the extent of a strip two feet in width between his house and the said open space, and in support of this contention Mr. Moti Sagar, his learned Pleader, relies upon a note made by the Secretary to the Committee, when submitting the plaintiff's application to the General Committee, that before granting sanction plaintiff should be called upon to execute an agreement giving up his proprietary rights in seven feet of his land to the west. The Secretary undoubtedly made this suggestion, but we cannot see how that affects the present question.

What plaintiff had to look to was the written sanction issued to him and in that there is nothing said about his executing any such agreement or surrendering his proprietary rights in the land which was to be left vacant. All he had to do was to comply with the terms of this written sanction and had he done so, we fail to see how the Committee could possibly have thereafter contended that he had surrendered his ownership in the vacant land—which, as we have pointed out, was, to the knowledge of all parties, to comprise a strip two feet in width of plaintiff's land.

Mr. Moti Sagar admitted that the Committee were not actuated by any ill-feeling towards his client, but he suggested that their object was to coerce him into giving up his proprietary rights in this strip, so that they could widen the open space already existing and make the whole their own property. We do not feel justified in thus assuming *mala fides* on the part of the Committee, whose action was perfectly consistent with a legitimate desire on their part not to allow high buildings to be erected which would impede the circulation of air and prevent proper sanitation and ventilation in the immediate vicinity of a narrow alley or drain.

We might further add that it is good evidence that they had no such sinister design to acquire land in this illegal and high-handed manner, that even now all that they have called upon plaintiff to do is to demolish not his whole building, but merely the obnoxious upper storey. Plaintiff urges that compliance with this notice will entail heavy loss upon him but with that aspect of the question we have nothing to do. He acted defiantly and with his eyes open and he must bear the consequences.

The appeal is dismissed but we leave the parties to bear their own costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE SUPREME COURT OF CANADA.

April 27, 1915.

Present:—Lord Chancellor (Viscount Haldane), Lord Atkinson, Lord Parmoor, Sir George Farwell and Sir Arthur Channell.

EASTERN TRUST CO.—APPELLANTS

versus

MCKENZIE, MANN & CO., LTD.—RESPONDENTS.

Injunction, temporary—Executive Government, rights of—Order subsequently discharged—Contempt.

EASTERN TRUST CO. *v.* MCKENZIE, MANN AND CO., LTD.

The Executive Government is not free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of a Court. If there is any doubt the Executive should apply to the Court to determine the question [p. 382, cols. 1 & 2.]

An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts. [p. 383, col. 1.]

Obiter.—If a claimant to an inalienable Government pension succeeded in persuading the Court that he had a *prima facie* claim to it and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order. [p. 383, col. 1.]

The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive, in cases of doubt, to ascertain the law, in order to obey it, not to disregard it. [p. 382, cols. 1 & 2.]

Appeal by special leave from a judgment of the Supreme Court of Canada (Fitzpatrick, C. J., Idington, J., Anglin, J., and Brodeur, J.; Duff, J., dissenting), who had reversed a judgment of the Supreme Court of Nova Scotia (Townshend, C. J., Russell, J., and Ritchie, J.), varying the report of a referee in a reference for the purpose of taking the necessary accounts in the dissolution of a partnership, and disallowing certain payments.

Sir R. B. Finlay, K. C., Mr. *T. S. Rogers, K. C.* (of the Canadian Bar) and Mr. *Geoffrey Lawrence*, for the Appellants.

Mr. *P. O. Lawrence, K. C.*, Mr. *H. Mellish, K. C.* (of the Canadian Bar) and Mr. *T. T. Paine*, for the Respondents.

JUDGMENT.

SIR GEORGE FARWELL.—This is an appeal from a judgment of the Supreme Court of Canada (Mr. Justice Duff dissenting), which reversed the unanimous judgment of the Supreme Court of Nova Scotia, dated July 5, 1913, varying the report dated January 15, 1912, of the referee appointed by the Court in this action. The action is a partnership action between James Irvine, since deceased, as plaintiff, and Robert G. Hervey and others as defendants, and a decree was made therein by Mr. Justice Graham on March 13, 1905, whereby the partnership was dissolved, and certain accounts and enquiries were directed to be taken by a referee appointed by the Court. The respondents, McKenzie, Mann and Company, Limited, were made parties to the action under the following circumstances. In June 1902, the Hervey Trust and Guarantee Company, as agents for the partners, Irvine and R. G. Hervey, controlled all the capital, stock, and bonds of the Nova Scotia Southern Railway Company which had been formed by the partners, who were unable to complete its construction, and arrangements had been made whereby the railway was to be completed by the Halifax and South-Western Railway Company and Government subsidies were to be paid to that Company in respect of the Nova Scotia line, which would form part of the said Halifax and South-Western Railway when completed; and on June 13, 1902, an agreement was entered into between the trust Company, as agents for the two partners, of the one part and the respondents, McKenzie, Mann and Company Limted (therein and hereinafter called the contractors), of the other part, whereby the partners agreed to sell, and the contractors agreed to buy, all the stock and bonds of the said Nova Scotia Railway Company for 275,000 dollars, of which 75,000 dollars were to be paid in fully paid capital stock of the said Halifax Company at par, on an event which has happened, and the balance, 200,000 dollars, as follows: 5,000 dollars on execution, and the balance, 195,000 dollars, from time to time to the extent of 50 per cent. of the amounts paid by Government on account of loans or subsidies in respect of the said Nova Scotia line, as and when such amounts were paid, until the whole 195,000 dollars were paid, "Provided that if the 50 per cent. be not sufficient to pay the 195,000 dollars in full, the balance shall be paid when the said loans and subsidies have been all received by the said Company."

There is a further proviso which will be dealt with more conveniently later.

The sum payable by the contractors would form part of the assets of the partnership of which the Court had under-

taken the administration, and would be applicable, primarily, in discharging the debts of the firm, including their indebtedness to the Nova Scotia Company; and inasmuch as the contractors owned all the stock and shares of that Company, the discharge of the Company's debts would enure for their benefit by increasing the value of the Company's assets, and consequently of its stock, shares and securities. The substantial question in the case is the amounts payable under the contract by the contractors.

On January 29 1904, a Receiver was appointed of such assets, and an injunction was granted restraining the defendants, Hervey and the Hervey Trust Company, from receiving from the contractors or the provincial treasurer of the province all or any part of the 195,000 dollars.

When this appeal was open before their Lordships it was treated as common ground that by September 27, 1907, the total subsidy then paid by Government was 397,080 90 dollars: One half of this, 198,540·45 dollars, is a sum sufficient to pay more than the amount called for under the contract of June 13, 1902.

This subsidy was paid on mileage. The enquiry with regard to this matter is given in the order of November 24, 1908: 'What balance remains due and owing in respect of the consideration moneys payable under the said contract dated June 13, 1902, to the parties entitled under the said agreement or the persons, if any, who succeeded to their rights thereunder."

The case has throughout proceeded on the footing of ascertaining the exact amount due, but towards the end of his argument before their Lordships Counsel for the respondents took the point that nothing was due, because, according to his argument, the 195,000 dollars fell short by about 30,000 dollars, and that the enquiry should be answered accordingly. It may be questioned whether such an argument is now open to the respondents; but whether it is so or not, their Lordships are of opinion that it is untenable; the 5,000 dollars was undoubtedly payable and paid on the execution of the contract, and the balance from time to time, to the extent of 50 per cent. of the amounts, was payable and paid by Government on account of loans or subsidies. There is nothing to lend colour to the suggestion that the contractors are not bound to pay until the whole accounts have been settled up and shew no balance, even of a dollar, owing. The proviso points to the payment of the balance out of subsidies paid in respect of the residue over and above the 50 per cent., not to the payment of the entirety of the 50 per cent. of the subsidies as a condition precedent to a demand for payment of so much as has been paid, and an account of the amount of such payments.

Another objection was also taken by the respondents' Counsel, which may possibly have been taken in the Supreme Court of Canada, although the only reference to anything of the sort occurs in Mr. Justice Duff's dissenting judgment, where he says: "If it had been shewn that the plaintiff in the action of the Receiver was aware that such payments were being made to Hervey, then it is conceivable that a case of estoppel might have been made out. But there is no suggestion of anything of the kind."

The argument offered to their Lordships is that Hervey, in contempt of Court, got payment of some of the subsidy money to himself, and that a motion to commit him was made, which failed by reason of his disappearance from the colony. It appears to their Lordships that it is sufficient to state the point to shew its want of substance.

The real point, however, argued and dealt with in the Courts below is as follows. The contract of June 13, 1902, contained the following proviso referred to above: "It is part of this contract that the Government of Nova Scotia have the right to be satisfied that all claims for moneys due and owing by the said Nova Scotia Southern Railway Company, Limited, and its contractors in the province of Nova Scotia, for labour and supplies furnished in connection with the construction of the said Nova Scotia, Southern Railway Company's road, heretofore constructed, have been paid or satisfied, and the amounts of such claims may be paid out of the consideration moneys hereinbefore mentioned, and all sums paid in liquidation of such claims shall be considered payments on account of the said sum of 195,000 dollars."

The object of this proviso is to enable the Government of Nova Scotia, in whose jurisdiction labour had been done by working men, and materials supplied and used, on that

portion of the railway which had been made in the province, to compel payment therefor by the Nova Scotia Railway and its contractors; the persons to be paid are the labourers for their labour and the tradesmen for their goods: the persons who were bound to pay, whose default was to be cured by Government intervention, were the Railway Company and the contractors. There is no such provision with regard to any other work or material.

The contract is framed in accordance with the subsidy contract between the Nova Scotia Government and the Halifax and South-Western Railway Company, (in whom the undertaking of the Nova Scotia Company was vested by Chapter 3 of the Acts of Nova Scotia, 1903), confirmed by Chapter 1 of the Acts of Nova Scotia, 1902, which makes special provision for payment of all labour in the construction of the work or materials therefor, and in case of default in paying the men or in paying for materials on or before the 20th day of the month for all works performed, or materials delivered, before the first of that month, the Governor-in-Council has power to retain all money due to the Company and to apply it in paying the men their wages, or in paying for materials, and charge it as if paid to the Company on account of the subsidy. The Government undertook no personal liability for such payment, but took power to ascertain the sums due and the persons to whom they were due.

In June, 1903, the Goverment, under the statutory power given under Chapter 26 of the Acts of Nova Scotia, 1903, appointed a Commissioner, "to inquire into and report to the Governor-in-Council what claims for wages of the workmen employed in and for materials supplied for the construction or unfinished construction of the Nova Scotia Southern Railway are due and unpaid by any person, firm, or Corporation, and the particulars and amounts of such claims respectively, and also all other claims against the Company, construction company, or contractors engaged in the building of the said railway, the nature and particulars of the said claims, and the respective amounts thereof."

The Commissioner duly made his report, and the Government acted thereon, and made large payments to persons reported as entitled to payments out of the subsidy. The greater part of these payments reached the persons entitled thereto, and no objection is now raised in respect thereof. But before all the payments on account of the subsidy had been made—namely, on July 13, 1903—this action was commenced, and a Receiver was appointed by the Court of the assets of the plaintiff's business, and an injunction was granted until the final determination of the action restraining the defendants, R. G. Hervey and the Hervey Trust, from receiving from the Canadian Bank, or the contractors, or the provincial treasurer of Nova Scotia, or otherwise, and the said bank and the contractors were restrained from paying to the said defendants or to any persons other than the Receiver (*inter alia*), all or any part of the said 195,000 dollars. The provincial treasurer was dismissed from the action on the ground that the Court had no jurisdiction over him, and the Government, with full notice of the order, proceeded to distribute the subsidy without any regard to it. With regard to payments actually made by the Government under the statutory powers above referred to, the action of the Executive may be justifiable; but even so, the question whether any particular sums mentioned in the contract were or were not properly described for labour and supplies is a question of construction, and, therefore, of law, for the Courts. Their Lordships are unable to agree with the view of the Supreme Court as to the powers of the Government, and to the presumption which ought to be drawn as to the nature of the payments made.

It was further held, on the admission of the parties, that no injunction could be granted against the Crown, and, further, that no other party to the action was bound by the injunction or the appointment of a Receiver.

This decision raises a question of great importance. Mr. Justice Duff, in his dissenting judgment, puts the first point very clearly: "the parties were declaring that certain payments, made by the Government,

were to be deducted from the consideration moneys. These were such payments as the Government should be satisfied were due and owing in respect of claims for 'labour and supplies.' The deduction could 'only be made if two conditions were satisfied, *first*, that the claim was for labour and supplies; and *secondly*, that the Government was satisfied that it was due and owing.'"

In the present case the Government have not only made payments which by no latitude of construction can come within the words "labour and supplies," but have also paid a large sum to R. G. Hervey, who was directly restrained by the Court from receiving it. If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown, there is no ground for Mr. Justice Idington's proposition that the Government may fairly say that they were given such power by the Legislature over the subject-matter, and that the Courts have no ground for interfering at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion, or to support a decision which pronounces the Executive Government free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of the Court.

The *second* point taken by Mr. Justice Idington is equally untenable, and even more important. The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General, and a declaratory order obtained, as has been recently explained by the Court of Appeal in England in *Dyson* v. *Attorney-General* (1) and in *Burghes* v. *Attorney-General* (2). It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive, in cases of doubt, to ascertain the law, in order to obey it, not to disregard it. The proper course in the present case would have been, either to apply to the Court to determine the question of construction of the contract, and to pay accordingly, or to pay the whole amount over to the Receiver, and to obtain from the Court an order on the Receiver to pay the sums properly payable for labour and supplies, as to the construction of which their Lordships agree with the Supreme Court of Nova Scotia.

The duty of the Crown in such a case is well stated by Lord Abinger, Chief Baron, in *Deare* v. *Attorney-General* (3). After pointing out that the Crown always appears (in England) by the Attorney General in a Court of Justice—especially in a Court of Equity—where the interest of the Crown is concerned, even perhaps in a bill for discovery, he goes on to say, "it has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of Justice, where any real point of difficulty that requires judicial decision has occurred."

Further, their Lordships are unable to agree with the Supreme Court of Canada in their opinion of the injunction. Apart from the Crown, the Court had clear jurisdiction over all the parties to the action, to restrain them from doing any of the acts complained of; its order and injunction operates *in personam*, and compels the party forbidden to do any act, whether the receipt of money or the like, to refrain from doing it, whoever the other party may be, and whatever his rights may ultimately prove to be. The existence of such a jurisdiction has been part of the equitable jurisdiction of our Courts for centuries, and is necessary in a case like the present for the safe preservation of the subject-matter of the action until the rights of parties can be finally determined. It is

(1) (1911) 1 K. B. 410; 80 L. J. K. B. 531; 103 L. T. 707; 55 S. J. 168; 27 T. L. R. 143.

(2) (1912) 1 Ch. 173; 105 L. T. 758; 28 T. L. R. 72; 81 L. J. Ch. 105.

(3) (1835) 1 Y. & C. 197 at p. 208; 41 R. R. 237.

a misconception to speak of the order and injunction of the Court in such a case as this as only permissive; it was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged, and, although it could not bind the Government not to pay, or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt in no way cured by the payment by the Government. Their Lordships are unable to agree with the decision of the Supreme Court, which gives the Executive power to override the judgment of the Court.

Their Lordships, with all respect, differ entirely from the statement in Mr. Justice Idington's judgment, that an injunction, under which the hand giving may be innocent and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such injunction is, on the contrary, in accordance with ordinary practice and well-settled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the Court in this country that he had a *prima facie* claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

Their Lordships agree with the decision of the Supreme Court of Nova Scotia, and will humbly advise His Majesty to allow this appeal, discharge the order of the Supreme Court of Canada, and restore that of the Supreme Court of Nova Scotia of July 5, 1913.

But in remitting the report as directed by the last-mentioned order, there should be a direction to the referee that, in taking the accounts, all amounts paid by the Government of Nova Scotia to the creditors of the Nova Scotia Southern Railway Company ought to be set off against the amount payable by the respondents.

The respondents must pay all the costs in the Courts below and of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Paines, Blyth & Huxtable.*

Solicitors for the Respondents: Messrs. *Linklater, Addison & Brown.*

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 99 OF 1914.

April 16, 1916.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

LAL GAJENDRA NATH SAHI DEO AND OTHERS – PLAINTIFFS—APPELLANTS

versus

LAL MATHURLAL NATH SAHI DEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Impartible estate—Custom of primogeniture—Estate granted by Maharaja of Chota Nagpur—Badla estate—Putra putradi, *meaning of—Evidence—Custom, proof of.*

The Badla estate in the Chota Nagpur District is governed by a custom whereby it descends as an impartible estate to the eldest male heir by lineal descent. This custom prevails in all the estates granted by the Maharaja of Chota Nagpur to his relations. [p. 386, col. 2; p. 387, col. 1; 391, col 2.]

Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applies with equal force to another branch of the same family. [p. 387, col. 1.]

Garuradhwaja Prasad v. *Superundhwaja Prasad*, 23 A. 37; 27 I. A. 238; 5 C. W. N. 33 (P. C.), followed.

Per *Atkinson, J.*—The words *putra putradi* used in a grant convey an absolute perpetual estate in the lands descendible from generation to generation coupled with full power of alienation, though these words of limitation may be controlled by custom limiting their scope and operation. [p. 387, col. 2.]

Sitaramji v. *Jadunath Singh*, 24 Ind. Cas. 72; 1 O. L. J. 204, followed.

Custom conclusively proved and established can override or modify the ordinary law. [p. 387, col. 2.]

Per *Chapman, J.*—It is quite impossible to say that in 1765, before the arrival of the British jurisdiction in the forests of Chota Nagpur, the words *putra putradi* had acquired a technical significance; the Privy Council decisions dealing with this expression were in respect of Wills prior to 1868, by which time the expression acquired a technical significance. [p. 391, col. 1.]

First appeal from a decision of the Subordinate Judge, Ranchi, dated the 22nd December 1913.

Mr. *S. Sinha* (with him Mr. *Guru Saran Prasad*), for the Appellant.

Mr. *Jogesh Chandra Dey* (with him Mr. *Muhammad Fakhr-ud-din*), for the Respondents.

JUDGMENT.

ATKINSON, J.—This is an action brought by the plaintiffs for a declaration that they are entitled to an hereditary *jagirdari* right in one-half of the lands described and set forth in Schedule A to the plaint and that possession of the same may be awarded to them coupled with consequential relief. The plaintiffs' claim is based on the assumption that the lands set forth in Schedule A form part of a partible estate and that by virtue of a deed of the 8th September 1866, the plaintiff No. 1 is entitled to a half-share of such properties. The defendants Nos. 1, 2 and 3 who are really the chief defendants deny that the plaintiff No. 1 or any of the other plaintiffs are entitled to the relief they seek or to the possession of the lands and the defendants further contend that the lands set out in Schedule A to the plaint are old ancestral properties impartible in character and descendible by the rule of primogeniture according to the custom which prevails in Chota Nagpur; and that by reason thereof the defendant No. 1, being the eldest male heir in the lineal line of descent, is entitled to possession of all the properties enumerated in Schedule A to the exclusion of the plaintiff No. 1 or the plaintiffs Nos. 2 to 9. The plaintiff No. 1 claims a half share of the lands mentioned under the deed of the 8th September 1886; and the plaintiffs Nos. 2 to 9 represent portions of such half share which the plaintiff No. 1 assigned to them for value.

However, the main contest is between the plaintiff No. 1 and the defendant No. 1; and the main question for decision in this case is whether the properties set forth in Schedule A form an impartible estate governed by the rules of primogeniture according to the custom prevailing in Chota Nagpur; or, whether the estate is partible as ordinary joint Hindu property governed by the Mitakshara Law?

The main facts of the case are as follows :—

One Kharag Rai, the common ancestor of the plaintiff No. 1 and the defendant No. 1, came to the province of Chota Nagpur about the year 1760. He was a relation of the then Maharaja of Chota Nagpur, and in the year 1765, the Maharaja, by a *jagir pattah*, granted to him, his sons and grandsons one village *viz.*, *Mauza* Bansari and by a subsequent grant of the same kind the said Maharaja granted in the year 1769 to Kharag Rai 13 villages comprised in the *Pargannah* Pesrar. It will be necessary to notice the family tree in this case. Kharag Rai had two sons, Hari Sahi and Padam Sahi, and in the year 1786 the Maharaja granted one other village to Hari Sahi and Padam Sahi. Hari Sahi was the eldest son of Kharag Rai and Padam Sahi was the second son. The plaintiff No. 1 and the defendant No. 1 are the descendants of Padam Sahi in the direct line of succession, Hari Sahi's line having become extinguished on the death of his great-great-grandson Baij Nath, who died childless. The defendant No. 1 is the eldest male descendant of Gagarnath and the plaintiff No. 1 is the eldest male descendant of Srinath who was Gagarnath's second brother; the father of Gagar and Srinath being Lohra Sahi, the great-grandson of Padam Sahi. The properties comprised in the three grants, which I have mentioned, from their respective dates have descended without question to the eldest male heirs of the common ancestor, Kharag Rai, down to the year 1842, a period of 77 years. In Chota Nagpur the custom of primogeniture does prevail in the case of grants made by the Maharaja whereby the property so granted by him is deemed impartible and descends to the eldest male heir by lineal descent. This custom was recognized in the case reported as *Thakur Kopilnauth Sahi Deo* v. *Government* (1). This custom, which is recognized in the province in respect of grants of land made by the Maharaja, applies with greater force in the case of grants of property made between the Maharaja and his relations. In the report (1902-1910) on the Survey and Settlement of the District of Ranchi, compiled by Mr. J. Reid, I. C. S., a gentleman of high repute and authority, I find this custom to be well established and recognized. At page 110, paragraph 253, speaking of the very tenures

(1) 22 W. R. 17; 13 B. L. R. 445; 1 C. 142.

under which the property in this suit is held, he says as follows:—

"*Jagir* tenures are also impartible: the law of primogeniture is the rule in the Maharaja's family. The eldest son, therefore, succeeds to the estate, the younger brothers being entitled only to maintenance grants. This custom has always regulated the succession to landed property among the various *jagirdars* and other tenure-holders of one of the same family as the chief. Not only is this so, but nearly all the tenure-holders who are not of the same family have adopted the same custom of succession to the exclusion of the ordinary Hindu Law of inheritance. The antiquity of the usage is proved by the fact that it was recognized by the Legislature as far back as the year 1800." Again, I find that Col. Dalton in the year 1875 says, "the ordinary Hindu Law does not apply to these estates (*jagirs*) as by custom and under the provisions of a resolution passed in 1800, primogeniture is admittedly the *lex loci*," and on page 112 of Mr. Reid's report, in paragraph 256, he summarizes the general custom as to the tenure of all estates held from the Maharaja and says, "they, all follow the law of primogeniture: the eldest son manages the estate and the younger sons obtain *khorposh* grants. In some cases the latter pay a quit rent to the elder brother but they continue to hold the *khorposh* grants even if the estate is transferred by sale or otherwise alienated, but the *khorposh* grants revert to the estate in default of male heirs. I have found this to be the prevailing custom, and I can find no cases where an estate is divided even though there were three or four brothers in each generation."

This being then the recognized custom of the estate, let us examine the facts of this case for the purposes of seeing how obediently was this rule of custom followed and obeyed by the plaintiffs' ancestors in their dealings with the property now in question. From 1765 to 1842 all the granted properties passed from Kharag Rai to Hari Sahi, Moni Sahi and Jiban Sahi, each being in turn the eldest male heir in direct line of succession to their common ancestor Kharag Rai. Biju Sahi was the father of Baijnath. Biju died prior to 1842, leaving Baijnath his only surviving legitimate son, a minor, under the guardianship of his mother *Musammat* Suba Koer. At Biju's death all the granted properties were vested in him, as the holder thereof, save as to such, if any, which were granted to the junior members of the family by way of maintenance, and this was so, even though the grant of one *mauza*, namely, the village of Kena was made in the year 1786 to Hari Sahi and Padam Sahi jointly. Lohra Sahi, the great-grandson of Padam Sahi, being the descendant of the second son of Kharag Rai, challenged the right of succession by primogeniture to this estate in the year 1842 as between *Musammat* Suba Koer, the guardian of Baijnath, and himself. By an agreement, dated the 3rd September 1842, Lohra Sahi abandoned his claim and admitted that the estate was impartible by the custom of the family and descended according to the law of primogeniture and agreed, in lieu of his then alleged claim for partition, to take portions of the several *mauzas* mentioned in the *ekrarnama* of the 3rd September 1842 by way of a maintenance grant. Lohra Sahi was the great-grandfather of the plaintiff No. 1 and the defendant No. 1, and this admission made by him as to the custom prevailing in the family as to the impartibility of the estate, and its descent by the law of primogeniture, operates strongly in my opinion against the plaintiffs' contention that the estate is or was at any time partible. Khedan Rai, the brother of the original ancestor Kharag Rai, also received a six-annas share of the Badla estate as maintenance; each male holder for the time being of the estate as the eldest male acquired also by custom the title of *thakur*. This continuity of title began with Hari Sahi and followed uninterruptedly in the course of each male heir successively; and the defendant No. 1 now enjoys this title. Lachman Sahi was the illegitimate son of Biju Sahi, the father of Baijnath. He also acquired a portion of the property by way of grant for maintenance; and he possibly may have acquired a portion by wrongful possession or adverse title, but this is not clear. He never questioned the custom of descent prevailing in the family and possibly, being an illegitimate son having no rights under the Hindu Law, he did not

care to do so having nothing to gain thereby. The defendants Nos. 6 and 7 are his descendants and they are now in possession of the properties set out in Schedule B to the plaint. These properties really form part of the properties in Schedule A.

Baijnath died childless in 1862. It is alleged by the plaintiffs in paragraph 5 of their plaint that Baijnath's widow, on his death, took an estate of inheritance in all the several *mauzas* mentioned in Schedule A of the plaintiffs' claim, but the defendants Nos. 1, 2 and 3, in paragraph 14 of their written statement, deny that the widow acquired any estate of inheritance on the death of her husband; but as a special case was allowed to remain in possession of the ancestral property till her death. I find it stated in paragraph 3, page 249 of Mr. Reid's book to which I have already referred "when the estate is resumed in default of male heirs, the invariable custom is to make a *khorposh* grant to the widow for support during her lifetime." When Baijnath died there was no failure of male heirs—Gagarnath and Srinath, grandfathers of the plaintiff No. 1 and the defendant No. 1 were alive and in being—and the succession of the family estate, then, in the events that happened, passed to Gagarnath as the eldest male heir; and thus it appears clear that there was no failure of male heirs to warrant the Maharaja in claiming to resume possession of the property as if in default of heirs. I shall, however, revert to this aspect of the case at a later stage. I pass by also for the present the agreement of the 23rd January 1863, made between Gaganath, Srinath and *Musammat* Suba Koer. Between 1842 to 1862, a period of 20 years, no question arises as to the succession of these ancestral estates. In 1862 the widow of Baijnath seems to have been in possession of the ancestral property, not by virtue of any inheritable right, but by reason of some special license conferred upon her, and she remained in possession until her death. In 1874 Gagarnath the grandfather of the defendant No. 1, who was a party to the agreement of the 23rd January 1863, claimed to recover possession of the family property from the widow of Baijnath who was then in possession of the same. Relying on the estate being impartible and descendible by the rule of primogeniture, the Judicial Commissioner, Mr. Davis, in his judgment, dated the 22nd May 1874, held that the estate sought to be recovered was impartible; he denied Gagarnath's relief in that action because he held that Gagarnath was bound by the agreement of the 23rd January 1863, and that as against him, the male heir, the widow was rightfully and lawfully in possession of the property under the provisions of that agreement. This judgment is of vital importance, and though it cannot operate in any sense as *res judicata*, we are entitled to attach considerable weight to its authority, being the judgment of a Court of competent jurisdiction which has never been impugned. The widow died in 1907, and she was predeceased by Gagarnath and Srinath, and, on her death, the eldest male issue in the lineal line entitled to succeed to the property as the heir of Baijnath was the defendant No. 1. The defendant No. 1 entered into possession of the property as the male heir; and claims that he is entitled to hold the entire estate that is left after the portions assigned by way of maintenance grants have been deducted, and he assumes the right and title of *thakur*. Thus from 1765 to 1907, there has been only one attempt to challenge the impartibility of this estate and its method of succession by the rule of primogeniture; and this attempt failed in 1842. As against this the question as to impartibility of the estate and the custom of descent were established by the judgment of 1874 of the Judicial Commissioner of Chota Nagpur. The line of descent by primogeniture, coupled with the impartibility of the estate, has continued from 1765 to 1907, a period of 142 years. The widow's period of possession does not operate to defeat this conclusion. She was put into possession by the male heir for her life; and never, from 1862 to the death of the widow in 1907, was there any question that the estate was not by custom impartible and did not follow the line of succession by primogeniture; save in 1874 when these two questions were firmly established by the judgment of Mr. Davis. The documents and the admitted facts coupled with the oral evidence satisfy me beyond doubt that this estate is by custom impartible and follows the line of succession by primogeniture. In my

opinion the custom alleged in this case by the defendant No. 1 has been proved to my satisfaction to be a custom invariable, certain, continuous and ancient. The oral evidence is conflicting, but on a full consideration of all the evidence I incline to the opinion that the oral testimony adduced by the defendant No. 1 is more reliable and trustworthy and consistent with the facts and the history of this case than the evidence adduced by the plaintiffs. The onus is on the defendant to prove the custom he relies on. I think he has done so; and the Privy Council have laid it down that where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family, *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (2). I think the custom alleged in this case prevails in all estates granted by the Maharaja of Chota Nagpur; and every authority I have been able to refer to recognizes this custom, not only as a family custom prevailing in the Maharaja's family but also as the *lex loci* custom of Chota Nagpur.

As to the agreement of the 23rd January 1863 made between the widow, *Musammat* Suba Koer, and Gagarnath and Srinath, I am satisfied it had no binding force or legal effect whatsoever which could destroy or invalidate the nature and quality of the ancestral property or modify or control its mode of succession. The alleged right jointly claimed in 1862 by Gagarnath and Srinath to be entitled jointly to succeed to the property on the death of Baijnath had no foundation in fact or law. The agreement of the 23rd January 1863 was only, so far as Gagarnath and Srinath were concerned, an arrangement to make provision for the maintenance of the widow during her life: it conferred upon her no interest or estate which she had not otherwise acquired. Srinath had nothing to bargain with; he was not the male heir entitled to succeed—he had at best only a *spes successionis* in this property. His claim to be jointly entitled to succeed with Gagarnath was, as I have stated, by custom of the family unsustainable. If this agreement had any vitality it could only bind the parties to it and could not affect or fetter the rights of the reversioners. The agreement of the 23rd January 1863 has, therefore, no operative legal effect to alter or vary the impartible character of this property or to change its method of devolution; and so far as it is relied on by the plaintiff to support the theory of partibility of the estate, it is valueless, being grounded on mistake; or alternatively at best as an admission by persons whose admissions cannot bind or defeat the legal and legitimate interest of reversioners, whether in existence at the time or thereafter to be born.

The next question that arises is as to the grant of the 8th September 1866 made by the Maharaja to Gagarnath and Srinath jointly of all the same lands contained in and granted by the three original grants of 1765, 1769 and 1786. After the death of Baijnath childless, the Maharaja contended that by the custom prevailing in his estate the interests granted by the three original grants lapsed to him by reason of the failure of male heirs and that consequently he, the Maharaja, became entitled to resume possession of all the property granted under the several grants of 1765, 1769 and 1786. The form of words used in the several original grants limiting or specifying the measure of the estate or the interest to be taken thereunder is "*putra putradi*", that is, to sons and grandsons. These words have been held by the Privy Council to convey an absolute perpetual estate in the lands descendible from generation to generation coupled with full power of alienation [*Sitaramji* v. *Jadunath Singh* (3)]. Authority, however, is to be found that these words of limitation may be controlled by custom limiting their scope and operation; and it is stated that in Chota Nagpur custom ascribes to these words the meaning, "so long as there are lineal male descendants entitled to inherit", *Perkash Lal* v. *Rameshwar Nath Singh* (4). Custom conclusively proved and established can override or modify the ordinary law. Whether the case of *Perkash Lal* v. *Rameshwar Nath Singh* (4) be good or bad law it is immaterial to consider in the present case; but assuming that the words of limitation are controlled in

(2) 23 A. 37; 27 I. A.238; 5 C. W. N. 33 (P. C.).

(3) 24 Ind. Cas. 72; 1 O. L. J. 204.
(4) 31 C. 569.

Chota Nagpur by the custom alleged to exist there, in my opinion there was no failure of heirs within the meaning of that custom to warrant or justify the Maharaja's right of resumption. There was a lineal heir in existence entitled to succeed to the ancestral estates, on the determination of the estate of inheritance vested in Baijnath, in the person of Gagarnath, the grandfather of the defendant No. 1. Manifestly there was no failure of heirs in 1863 or 1866 to justify any legal right on the part of the Maharaja to resume possession of the property in dispute, because there were then in existence lineal male heirs entitled to succeed to the ancestral estates in accordance with the custom which we find to have been so conclusively established.

It, therefore, becomes unnecessary for us to decide the question as to whether or not the widow of Baijnath on his death became entitled to an estate of inheritance in this property. This issue is not raised directly by the pleadings; and I deprecate deciding points not raised, and unnecessary for the purposes of the decision of the particular case before us. I, therefore, refrain from considering the applicability of the decision of the Privy Council in the case of *Thakurani Tara Kumari* v. *Chaturbhuj Narayan Singh* (5) and for the reasons given, it is unnecessary to do so.

In my view the prior existing grants of 1765, 1769 and 1786 were in 1866 subsisting, valid, legal grants; and that the re-grant dated the 8th September 1866 was a mere nullity. If, however, the grant of 1866 had any legal force or efficacy I am of opinion it would operate as a graft upon the prior existing right and interest; and that the grantees thereunder, Gagarnath and Srinath, would be constructively trustees for the lineal male heir or heirs of Baijnath.

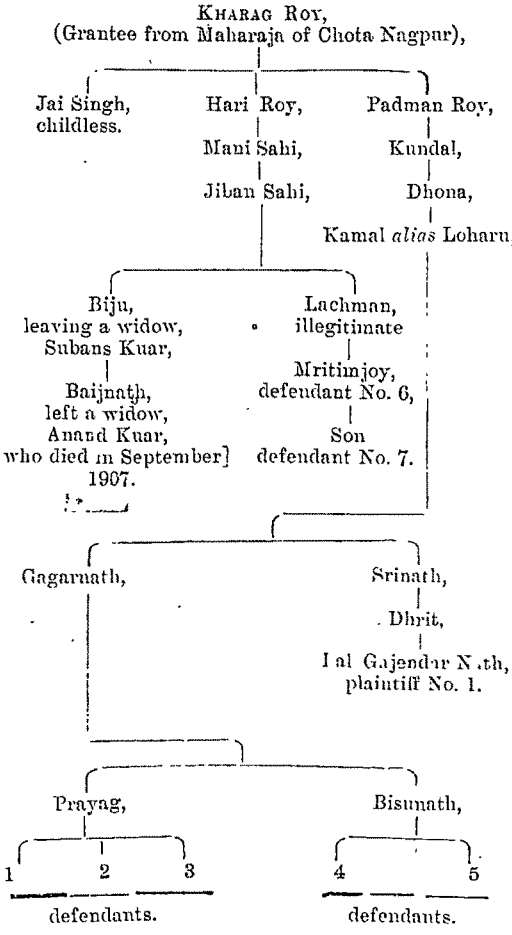
The plaintiffs' case is entirely based on this document of the 8th September 1866.

In my view that document is in law and on the facts of this case a nullity and thus it follows that the plaintiffs' case must fail. The question as to whether the *waguzahst* re-grant of 1866 could be supported on the principle recognized by the Courts of Law and Equity as a settlement by way of family compromise so as to bind the reversioners was not argued before us, or even pressed by the plaintiffs' Counsel in this Court, or before the Subordinate Judge. If my view as to the legal validity of the re-grant of 1866 be correct, then there was no legal or substantial claim capable of being in dispute between the parties at the time upon which any settlement by way of a compromise could operate; and in addition no such claim is suggested directly or indirectly in any part of the plaintiffs' plaint. The plaintiff No. 1 has elected to stand on the re-grant of 1866 as forming the basis of his claim and by that election he must now stand or fall. One word as to the lease of the 15th April 1908 to Mr. Ambler. Reliance is placed on the recitals therein contained "we the declarants as heirs according to the Mitakshara Law" and "members of a joint Hindu family". These recitals are not inconsistent with the estate being impartible. They were relied upon to prove that the estate by admission was partible, but an impartible estate may be and often is joint as the junior members of the family have a right of maintenance therein, even though the property passes to the eldest male heir as the legal owner of the property. As to the claim of plaintiff No. 1 to recover the property set forth in Schedule B to the plaint from the defendants Nos. 6 and 7, I am clearly of opinion that he has failed to establish the charges of fraud that he has made or to establish in any sense his right to these properties or any part thereof. Consequently, in my opinion, the plaintiffs' claim in this action should be dismissed with costs in all Courts.

CHAPMAN, J.—This is an appeal by the plaintiffs. The principal plaintiff is Lal Gajendra Nath Shahdeo. The other plaintiffs are transferees from him of portions of the interest claimed in the suit. The plaintiffs claimed a half share of certain properties originally granted by the Maharaja of Chota Nagpur to Kharag Roy, and prayed for a partition and for mesne profits. The suit has been dismissed by the first Court upon the ground that the properties formed part of an impartible estate, and that under the rule of primogeniture, which it was found governed the succession, Lal Gajendra Nath, plaintiff

(5) 30 Ind. Cas. 833; 19 C. W. N. 1119; 29 M. L. J. 371; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1034; 17 Bom. L. R. 1012; 22 C. L. J. 498 (1915) M. W. N. 717; 42 C. 1179; 48 I. A. 192.

No. 1, was not entitled to any share in the property, inasmuch as he is descended from a younger son of the junior branch of the family of Kharag Roy. In order to understand the facts of the case it is necessary to set out a portion of the genealogy of the family:—



The facts are as follows :—

In the middle of the eighteenth century Kharag Roy came with his father and brothers to Chota Nagpur, and in the year 1765 a '*birt patta*' of a village in Chota Nagpur was executed in his favour by the Maharaja of Chota Nagpur, to whom he was related. The property was leased to Kharag with his son, grandsons, *etc.*, "*putra putradi*" (Exhibit C-1). In 1768 he was given another *birt patta* by the Maharaja (Exhibit C) of 13 villages, and here again it was recited that his son and grandsons should enjoy the property. In 1786 a further grant (Exhibit C-2) was made by the Maharaja to the then surviving sons of Kharag Roy, Hari Roy and Padman Roy, and it was recited again that their son and grandsons should enjoy the property. A reference to the genealogical table will show that Baijnath is the 4th in direct male succession from Hari Roy, the elder son of Kharag Roy. Baijnath died in December 1862 childless, leaving a widow named Anand Kuar. The properties, with the exception of certain properties which had been alienated for maintenance, came into the possession of the widow Anand Kuar. The Maharaja of Chota Nagpur then asserted the right to resume the property upon the ground, no doubt, of the failure of the senior male line of succession. At the same time, the two brothers Gagarnath and Srinath, who were descended from Hari Roy's younger brother Padman Roy, claimed to succeed to the property. These disputes resulted in the execution of two deeds, one Exhibit 8, dated the 20th January 1863, by Gagarnath and Srinath to the effect that they had agreed with the widow Anand Kuar that she should hold possession of the property as long as she lived, upon payment of rent by her to the Maharaja, and that they should take possession of the villages after her death. The other deed (Exhibit 23) was executed by the Maharaja of Chota Nagpur upon the 8th September 1866. The deed is called a "*waguzasht sanad*" and recites that on receipt of a thousand rupees the Maharaja releases the properties in favour of Gagarnath and Srinath, half and half. The plaintiff No. 1 in the present suit is descended from Srinath. He claims Srinath's half share of the properties under this grant by the Maharaja of the year 1866, and also by reason of the right of inheritance. Defendants Nos. 1 to 3 are sons of Gagarnath's elder son, and defendants Nos. 4 and 5 are descendants of Gagarnath's younger son. Defendants Nos. 6 and 7 are the son and grandson, respectively, of an illegitimate son of Jiban Sahi, the grandson of Hari Roy. Defendants Nos. 6 and 7 claim certain of the properties

partly upon the ground of long possession, partly upon the ground of a *mukararri* grant, and partly upon the ground that they were allowed to retain the properties for their maintenance. As I have said, the suit was dismissed mainly upon the ground that the estate was impartible and that the rule of primogeniture prevailed in the family, so that, in any event, the plaintiff No. 1, who is descended from a younger son of the junior branch of the family, inherited no title to any share of the property.

The plaint alleges that the properties sued for were the hereditary *jagirs* of Baijnath Sahi. The plaintiff says in his evidence that the entire property belonged to Baijnath. The plaintiff further alleges that Gagarnath and Srinath became entitled to the estate on the death of Baijnath. There is an allegation in the plaint that Anand Kuar, the widow of Baijnath, became possessed of the properties by right of inheritance, but the later allegation that Gagarnath and Srinath were entitled to succeed is inconsistent with this. It is in fact essential to the plaintiff's claim to a half-share by right of inheritance to say that the widow did not inherit, for Gagarnath and Srinath died in the widow's lifetime, and the plaintiffs claim through Srinath.

The written statement of defendants Nos. 1 to 3 also alleges that the entire estate was inherited by Baijnath, and that, as a special case, his widow was allowed to remain in possession until her death, but that the succession in fact remained in abeyance. These defendants say that after the death of Baijnath's widow, defendant No. 1, the eldest male heir of the senior branch of Gagarnath's family, entered into possession.

Defendants Nos. 4 and 5 did not contest and defendants Nos. 6 and 7 support defendants Nos. 1, 2 and 3.

The only possible inference from the pleadings of both parties and the evidence of plaintiff No. 1 is that the entire estate (saving certain alienations made by way of maintenance from time to time) descended to Hari's son and son's sons and that on failure of male issue in the direct line from Hari, the property went to the then existing male issue in the direct line from Padman, the younger son of Kharag.

It follows that the Maharaja of Chota Nagpur had no right to resume on the death of Baijnath, for there had not been any failure of heirs male to the grantee Kharag. The plaint in fact states that the endeavour to resume was improper. In so far, therefore, as the plaintiffs' claim is based upon the *waguzasht sanad* by the Maharaja in favour of Gagarnath and Srinath in September 1866, the plaintiffs' case must fail, for the Maharaja, not having any right to resume, had no right to make that grant.

It remains to consider whether the plaintiffs can succeed by reason of right of inheritance. The plaintiffs' case on this alternative ground appears to be that on Baijnath's death Gagarnath and Srinath both at once inherited each a half share, and that the plaintiff No. 1 succeeded to Srinath's half share by representation. I assume that the widow did not inherit, for otherwise the plaintiffs' case must fail. The first question to consider thus is, whether, when the new line of succession opened upon the death of Baijnath, Gagarnath had the right to succeed to the exclusion of Srinath, or whether both Gagarnath and Srinath inherited each a half share. I proceed to consider the evidence in favour of the plaintiffs' contention that Gagarnath and Srinath both inherited. If they did not both inherit, the plaintiffs who claim through Srinath have, of course, no case by right of inheritance. The appellants' Counsel relied, in the first place, on the terms of the leases of 1765 to 1786. The lease is given in each case to the lessee and his son and grandsons, *etc.*, (*putra putradi*). It has been held by the Privy Council that a modern Hindu Will executed in these terms in Bengal would now create an absolute estate unconditioned and unlimited. If this were the case here, the plaintiffs, as members of an undivided *Mitakshara* family, would be entitled to a share, though not to half share. But none of the Wills dealt with by the Privy Council are earlier than the year 1868. The ground of the decisions appears to have been that the words "*putra putradi*" had by that time, 1868, acquired a technical significance. Our documents are nearly a hundred years prior to 1868, and were executed in a very backward part of the

country. It is quite impossible to say that in 1765, before the arrival of our jurisdiction, in the forests of Chota Nagpur the words "*putra putradi*" had acquired a technical significance. As I have said, it is not the case of either party that the estate was governed by the ordinary rule of survivorship in the Mitakshara, as it would have been if the interpretation given to the words "*putra putradi*" by the Privy Council were held to prevail, and *optimus interpres rerum usus*. The family have for several generations interpreted the words "*putra putradi*" in the present case to mean, what in fact they literally mean, son and son's sons. The next point in favour of the plaintiffs' contention is the fact that Gagarnath and Srinath executed the joint deed in favour of Baijnath's widow in 1863, and subsequently accepted a joint *sanad* from the Maharaja. But it must be remembered that even according to the defendants' case Srinath would have succeeded in the event of Gagarnath's death without male issue. It may be that it was with this in view and in order to save future trouble that Srinath's name was joined with Gagarnath's in these deeds. It is common ground that in spite of the joint grant of some property to the two brothers Hari and Padman in 1786, the elder brother's (Hari's) son succeeded in preference to Padman's. There is further the fact that these deeds of 1863 and 1866 were entered into under the pressure of a threat by the Maharaja to resume the estate. This is stated both in the plaint and in the written statement of defendants Nos. 1, 2 and 3. The plaintiffs next rely upon the fact that defendants Nos. 1, 2, 3 entered into certain transactions in the year 1908 (Exhibit 2J) in which they described themselves as heirs under the Mitakshara Law. The expression was probably imperfectly understood, and in any case, it does not involve any clear admission that Srinath's family had any title to the property. A stronger inference in favour of the plaintiffs can be drawn from the fact that in this transaction defendants Nos. 1, 2 and 3 allowed to be joined with them as co-lessor defendant No. 6, who derived his title to that particular property from a lease from plaintiff No. 1. That is the sum of the main evidence in support of the plaintiffs' case.

On the other hand, in favour of the opposite contention that Gagarnath succeeded to the exclusion of Srinath is the fact that Gagarnath put this claim to exclusive succession forward so far back as the year 1874 before the Judicial Commissioner of Chota Nagpur. His claim was held to be good (Exhibit D); his suit, which was for recovery from the widow Anand Kuar, being defeated only upon the ground that he had entered into the agreement with her in 1863. The learned Subordinate Judge is wrong where he says that Srinath appeared in that suit, but the fact that Srinath did not appear does not do away with the evidence that Gagarnath then successfully asserted a right to succeed to the exclusion of Srinath. As to the value of the oral evidence I see no reason to differ from the appreciation of it expressed by the learned Subordinate Judge. The other documents put forward have also been rightly estimated by him, for it must not be forgotten that Srinath had a right to succeed upon the death of Gagarnath without male issue, and that, therefore, it was not unnatural for Srinath to join with Gagarnath in signing papers and executing deeds. He was joint in mess with Gagarnath. I have found that Hari's son succeeded to Kharag's estate in preference to Hari's younger brother Padman's son. This was without objection. It is, therefore, probable that Gagarnath's family had the right to succeed to the exclusion of Srinath's, and that this was so, is supported by a substantial preponderance of evidence. Moreover they are in possession. I, therefore, hold that the plaintiffs' claim by right of inheritance must fail.

I have carefully considered whether the plaintiffs could succeed upon the ground that the *waguzasht sanad* of 1866 was the result of a family arrangement which could be upheld upon the principle for which *Stapilton* v. *Stapilton* (6) is the leading authority. The story told in the judgment of the Judicial Commissioner in 1874 suggests that upon the death of Baijnath the Maharaja claimed the right to resume, and went so far as to attach the property. All the members of the family assembled and protested, but the Maharaja declined to make any con-

(6) (1739) 1 Wh. & Tu. 3 3 (7th Ed.); 8th Ed., 234; 1 Atk. 2.

cession further than a grant to the widow for her life. The result was that the brothers agreed to allow the widow to remain in possession for her life, and subsequently took a re-grant from the Maharaja, the terms of which were drawn so as to avoid any recognition of any title in the widow while at the same time it discharged the Maharaja from the duty of maintaining her. But no such case was distinctly made in the plaint and I have with reluctance decided that the plaintiffs should not be allowed to make it now. Indeed, their Counsel did not respond very readily to my suggestion that he should be permitted to do so. And I have not been uninfluenced by the indications that this litigation is a mere speculative indulgence on the part of plaintiffs Nos. 2 to 9, to whom plaintiff No. 1 has sold half his interest.

I have scrupulously avoided deciding any question the decision of which did not appear to be absolutely necessary upon a proper interpretation of the pleadings. I have not, for instance, decided the question of the right of the widow to succeed. The pleadings and the evidence seem to suggest that the widow had no right to succeed, for both parties appear to plead that the grant was limited and conditioned, and the words '*putra putradi*,' if they are words of limitation at all, would exclude the widow. I note that in the case before the Judicial Commissioner in 1874 the widow indirectly conceded that if her husband had not obtained a separate share by partition she had no right to succeed. But I express no opinion on the question, for it was not fought out. It is, in my view, important to avoid so far as possible making judicial pronouncements which are not absolutely necessary for the determination of a case as set out by the pleadings of the parties, more especially as such pronouncements tend in any event to precipitate and to fossilise legal conceptions which, in the case of Chota Nagpur at any rate, are probably transitional and temporary. There is also a peril of an opposite but equally serious kind, I mean the danger of antedating modern ideas.

The case has not been well conducted on behalf of the plaintiffs at any stage. I would dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1916.

July 6, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

RAM CHARAN MAHATO—PLAINTIFF—APPELLANT

versus

HARIHAR MAHATO—DEFENDANT—RESPONDENT.

Chota Nagpur estate—Primogeniture and impartibility, existence of—Trial Court, conclusions of fact by—Wrong application of law—Appellate Court, duty of.

In the estate of Maharaja of Chota Nagpur and in his family the custom of impartibility and primogeniture exists. [p. 393, col. 2.]

A Court of Appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is and applies wrong legal principles to the facts of the case so stated by him, then in such cases the Appellate Court will intervene and correct the erroneous principles of law which the Judge has applied and remand the case for a re-hearing with a correct exposition of the law. [p. 393, col. 1.]

Second appeal from a decision of the Judicial Commissioner, Chota Nagpur, dated the 11th December 1915.

Mr. *Atul Krishna Ray*, for the Appellant.

Messrs. *Dhirendra Nath Dutt* and *Sarat Chandra Mukherjee*, for the Respondent.

JUDGMENT.

ATKINSON, J.—This case comes before us on appeal from the Judicial Commissioner of Ranchi, and the appeal is brought by the plaintiff, who seeks a partition of joint family property. The defendant is his eldest brother, and the defendant alleges that the custom of primogeniture prevails in their family in Chota Nagpur, and that consequently the joint family property is incapable of partition and descends to him, the defendant, as the eldest male heir of their common ancestor.

The case was very exhaustively heard by the Subordinate Judge and also by Mr. Kingsford sitting as Judicial Commissioner. The question that was considered was, whether proof of the custom alleged had been given, sufficient in law to satisfy the requirements of legal proof of custom. Mr. Justice Kingsford in considering the case originally admitted in evidence a report of the Settlement Officer, Mr. Roy. The learned Judge, under what he believed

to be the authority of a section of an Act of Parliament, relied upon that document as being conclusive evidence of the custom alleged in this case.

On second appeal the High Court of Calcutta expressed its opinion that the learned Judge was wrong, and remanded the case to him for determination, as to whether or not the custom alleged had been proved, with a direction to disregard and attach no weight to the Assistant Settlement Officer's report which the Judge had relied on so strongly in the previous trial.

Mr. Justice Kingsford then applied himself to the evidence as given before him, and to the documents on the record, and satisfied himself that the custom alleged did prevail. He says in his judgment, "Upon the evidence on the record I am satisfied that the custom of primogeniture prevails in the family to which the parties belong, and accordingly I allow the appeal".

Mr. Ray has very properly argued and contended before us, that the judgment of the learned Judge is not satisfactory, inasmuch as the Judicial Commissioner does not show by his judgment that he has applied legal principles in testing the value of the evidence in proof of the custom alleged. Mr. Ray says that he, the Commissioner, should have found that the custom was invariable, that it was ancient, certain, unambiguous and continuous; and he says, that because he has not separately found each one of these issues, therefore, it cannot be said that he has applied legal principles to the evidence given before him.

In my opinion a Court of Appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is, and applies wrong legal principles to the facts of the case so stated by him, then in such cases the Courts have held that the Judge has misdirected himself, and that, therefore, the High Court on appeal intervenes and corrects the erroneous principles of law which the Judge has applied, and remands the case for re-hearing with a correct exposition of the law.

Taking the Subordinate Judge's judgment in this case, which was before Mr. Justice Kingsford, and his own judgment in the case, I am perfectly satisfied that all the legal elements constituting proof of custom were fully present to Mr. Kingsford's mind, and with this knowledge he decided the facts against the plaintiff and in favour of the defendant, who was seeking to establish proof of custom. I am strongly fortified in the view I hold in this case, inasmuch as in the recent number of the Patna Law Journal in the case reported at page 109, Vol. I, for the month of June [*Lal Gajendra Nath Sahi Deo* v. *Lal Mathurlal Nath Sahi Deo*(1)] Mr. Justice Chapman and myself had to consider the question as to whether the rule of primogeniture was a custom recognized and established in the Province of Chota Nagpur. We were both satisfied beyond all doubt, that on the Maharaja's estates and in his family the custom of impartibility and primogeniture was established in all cases. I went a little further and held that it was the *lex loci* of the Province; I may have been right or I may have been wrong; but in the present case the parties hold their estate and family property under the Maharaja; therefore, if the decision which we gave and to which I have referred, is right, it follows obviously that the family property in question was subject to the custom which we have held to be established.

For all these reasons we are of opinion that there is no ground for setting aside the learned Judge's judgment. We accordingly refuse the appeal but without costs.

JWALA PRASAD, J.—I entirely agree with my learned brother that the judgment of the learned Judicial Commissioner is quite right. His finding upon custom is based upon legal and sufficient evidence in the case. The learned Vakil for the appellant has failed to show that the learned Judicial Commissioner disregarded any evidence material in the case as to the proof of the custom, or has acted upon any illegal evidence.

Appeal dismissed.

(1) 35 Ind. Cas. 383; 1 P. L. J. 109; 20 C. W. N. 876.

MAUNG THA TE *v.* KO SHWE BYAN.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 13 OF 1915.

February 14, 1916.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Twomey.

MAUNG THA TE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KO SHWE BYAN DECEASED'S LEGAL REPRESENTATIVES—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *s.* 26 -*Right to discharge surplus water—Easement—Natural right—Right to obstruct, acquisition of, by prescription—Nature of proof.*

A plaintiff seeking to enforce a right to discharge surplus water through a watercourse on the existence of an easement must prove the acquisition of the easement under section 26 of the Limitation Act. He will not, however, be precluded from urging as an alternative case that he has, apart from the easement, a natural right to the discharge, provided the matter was brought before the Trial Court in some form, in which case, on proof of the right, it is open to the defendant to establish the acquisition of a right to dam the flow under the said section. [p. 394, col. 2; p. 395, col. 1.]

Subramaniya Ayyar v. *Ramchandra Rau*, 1 M. 335; *Khetturnath Ghose* v. *Prosunno Gowalah*, 17 W. R. 498 and *Kopil Pooree* v. *Manick Sahoo*, 20 W. R. 287, referred to.

Mr. *Shaw*, for the Appellants.

Mr. *May Oung*, for the Respondents.

JUDGMENT.

TWOMEY, J.—The three plaintiffs and the defendant Ko Shwe Byan, who died while the suit was pending, were neighbouring holders of paddy lands. The holdings of the plaintiffs are west of the defendant's holding. The 3rd plaintiff, Ma Le Yaik's lands actually adjoin the defendant's land but the land of the 2nd plaintiff is separated from it by other holdings. A "*yo*" or watercourse called Sabochaungbya. divides the defendant's holding on the south from the holding of one Maung Ba Pe on the north. This "*yo*" extends as far as Tha Te's land on the west and on the east is connected through the Peikswe creek and the Kanaungto creek with the Rangoon river. The three plaintiffs claimed the right of draining their lands through the Sabochaungbya. They alleged in their plaint that they enjoyed this right for over 30 years; that the defendant had interfered with this right by damming up the "*yo*" so that the three plaintiffs' lands were flooded. They asked for a declaration that their lands are dominant tenements and have the easement of discharging their surplus water into the said watercourse and that the plaintiffs have the right of ingress and egress along the watercourse, and they asked also for an injunction prohibiting the defendant from damming up the watercourse and claimed damages Rs. 6,400.

The plaintiffs' claim was expressly based on the existence of an easement and they were accordingly required to prove their right to discharge surplus water as an easement and as of right without interruption for 20 years under section 26 of the Limitation Act. The defendant denied the alleged easement and pleaded that the dam was erected 25 years ago to keep out salt-water and that the natural drainage of the plaintiffs' lands is not in that direction at all but by watercourses flowing in other directions. The defendant further alleged that any damage to the plaintiffs' fields caused by flooding was due to the closing of these other watercourses and not to the damming up of the Sabochaungbya watercourse. The District Court found that the plaintiffs had failed entirely to prove the alleged easement. The 1st plaintiff, Maung Tha Te, admitted that defendant dammed up the "*yo*" 5 or 6 years before the suit. The plaintiffs' witness Tha Yauk said that the *bund* or dam was made 24 years ago to keep out salt-water from the defendant's land. Maung Lu Nyo, a tenant of the plaintiff Ma Le Yauk, admitted that the dam was in existence over 6 years including the year of suit. Other witnesses of the plaintiffs admitted that the "*yo*" was dammed up 6 years or more before the suit. Ko Maung Gyi (10 W. P.) said he had noticed it 12 or 13 years before. Maung Tha Te, the 1st plaintiff, said that it was only in the year of the suit that the defendant refused to make an opening in the dam for surplus water to flow out and that previously the defendant had always opened it when he was asked to do so. But he offered no evidence of his ever asking defendant to make an opening in the dam. His witness Maung Lu Nyo said, "Since the creek has been closed it has never been opened. No outlet for water has ever been made".

There can be no doubt at all that on the

evidence the District Court was right in holding that the plaintiffs failed to establish their right to an easement under section 26 of the Limitation Act.

On appealing to this Court the plaintiffs changed their ground and it is urged on their behalf that the question is, not whether plaintiffs established the easement alleged in the plaint, but that they are entitled apart from any question of easement to discharge their surplus water by the watercourse in question as a natural right; that it is for the defendant to prove that he has a prescriptive right under section 26 to dam up the "*yo*" and so interfere with this natural right. In illustration of this natural right the Madras case, *Subramaniya Ayyar* v. *Ramchandra Rau* (1), has been cited. In that case the defendants blocked up a stream by which the plaintiff's fields had been drained from time immemorial and it was held that defendants could only justify their action if they had acquired an easement negativing the immemorial user. The defendants had interfered with the accustomed course of things and with the right of property which the plaintiff had to the accustomed flow of the stream, a right which goes by the name of rights *ex jure naturæ*. It was held that plaintiff had a clear right of action.

The same kind of right was recognised in the case of *Khetturnath Ghose* v. *Prosunno Ghose Gowalah* (2) and in the case of *Kopil Pooree* v. *Manick Sahoo* (3).

This aspect of the present case was not specially dealt with in the District Court's judgment although an issue had been raised on it, *viz.*, the 3rd issue, Has the *bund* been so long in existence that the defendant has a prescriptive right to it? The evidence on the record is sufficient to dispose of this point. The evidence of the defendant's witnesses goes to show that the dam was erected over 20 years ago to keep out salt-water from the defendant's land and the adjoining lands, and that without this dam cultivation would be very difficult, if not impossible. This evidence is strongly corroborated by the plaintiffs' own witness Maung Tha Yauk. Moreover there is no sufficient reason to believe that the watercourse in question is the natural outlet for the drainage of the plaintiffs' fields, while there is a good deal of evidence to the contrary effect. Maung Tha Yauk says that when he worked the land now occupied by Maung Ba Pe, there was no "*yo*" between his holding and the defendant's land but there was a "*taman*" or high field *bund*. It would appear, therefore, that the Sabochaungbya has gradually eaten its way from east by tidal action up to the eastern boundary of the plaintiff, Maung Tha Te's land. The defendant's land is admittedly higher than Maung Tha Te's land, which would indicate that the natural course of drainage is not in the direction of the defendant's land at all. Finally, there are several admissions by the plaintiffs' witnesses as to other watercourses flowing westward and southward, and it seems likely that these watercourses are the natural means of drainage of the plaintiffs' lands.

It should, therefore, be held, in my opinion, that the plaintiffs had no right of immemorial or customary user in respect of the Sabochaungbya, and even if they had such a right the defendant has established his prescriptive right under section 26 of the Indian Limitation Act to dam up the "*yo*." I would, therefore, dismiss this appeal with costs.

FOX, C. J.—I concur.

Appeal dismissed.

(1) 1 M. 335.
(2) 7 W. R. 498.
(3) 20 W. R. 287.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 23 OF 1913.

June 12, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

NISAR HUSAIN *alias* MUNNE AND OTHERS —DEFENDANTS NOS. 1, 2, 3 AND 5— APPELLANTS

versus

Musammat ASHRAF-UN-NISSA— PLAINTIFF—RESPONDENT.

Pardanashin *lady—Deed of gift—Presumption of undue influence—Burden of proving* bona fides—*Possession not delivered—Declaratory suit, whether maintainable—Specific Relief Act (I of* 1877), *s.* 42.

Undue influence will be presumed in the case of transactions with *pardanashin* women; that is to say it will be for the party who in such circumstances affirms the *bona fides* of a transaction to substantiate his affirmation. [p. 398, col. 2.]

NISAR HUSAIN *v.* ASHRAF-UN-NISSA.

Kali Bakhsh Singh v. *Ram Gopal Singh*, 21 Ind. Cas. 985; 36 A. 81; 18 C. W. N. 282; (1914) M. W. N. 112; 16 O. C. 378; 1 O. L. J. 67; 15 M. L. T. 130; 26 M. L. J. 121; 12 A. L. J. 115; 19 C. L. J. 172; 16 Bom. L. R. 147 (P.C.), referred to.

A knowledge of letters and of figures and a capacity of dealing at first hand to some extent with her tenants will not convert a *pardanashin* woman into a woman of the world so as to rebut the presumption of undue influence in the case of transactions with such a woman. [p. 403, col. 1.]

Plaintiff sued for a declaration that she was the absolute owner of the properties in suit. The defendants contended that she had voluntarily executed a deed of gift in favour of her brother (their father) and got it registered and had at the same time put the donee in possession. They further alleged that no deception or misrepresentation of any kind had been resorted to. The plaintiff admitted her signature on the deed in question, but pleaded that as she had completely trusted *A. H.*, the alleged donee, she had signed whatever was put before her without knowing its contents and without asking what the document contained and that *A. H.* had concealed from her the fact that she was signing a deed of gift in his favour. In his endorsement on the alleged deed of gift the Sub-Registrar made no note to the effect that its contents were explained to her and in his evidence also declined to swear that anything in the nature of an explanation was attempted, while the other witnesses produced by the defendants were discrepant among themselves as to the manner in which this warning had been conveyed to her. It appeared further that moneys from the estate had been paid in just in the same manner before as after the date of the deed of gift; while all the entries in the books of account showed the money expended, both in payment of revenue and otherwise, as the money of the plaintiff. The evidence also showed that collections had continued to be made on behalf of the lady after as before the deed of gift:

Held, (1) that although the plaintiff did execute the deed, she did not appreciate the full significance thereof, or that it was to operate as a complete devolution *in praesenti* of all her property; [p. 399, col. 2.]

(2) that possession did not pass from her to *A. H.*, the alleged donee, as a result of the execution of this deed and that since she took immediate steps to place her position beyond doubt as soon as she discovered the full result of her action, her suit having been brought within the period of limitation from that time was not time-barred; [p. 399, col. 2.]

(3) that as possession had not passed, the plaintiff's claim for a declaration was not barred by section 42 of the Specific Relief Act. [p. 404, col. 1.]

Appeal against the order of the Sub-Judge, Gonda, dated the 12th February 1913.

Messrs. *Wazir Hasan*, *Ali Muhammad* and *Samiullah Beg*, for the Appellant.

Messrs. *Muhammad Nasim*, *Muhammad Wasim*, *Niamatullah* and *Muhammad Beg*, for the Respondents.

JUDGMENT.—This is an appeal against a decree of the Subordinate Judge of Gonda declaring the respondent to be the absolute owner of certain property and cancelling a deed of gift dated 9th August 1906. The appellants, five in number, are the representatives-in-interest of one Ata Husain *alias* Achche Mian, the brother of the respondent against whom the suit was originally directed. The claim was valued at Rs. 30,000.

The allegations of the respondent in her plaint were that she was possessed of certain property, part of which she obtained under a gift from her husband, and part by purchase in her name during the lifetime of her husband; that after the death of her husband she placed entire reliance upon Ata Husain, her brother, and the supervision of her entire property was left to him; that she removed him in September 1910 on account of various undefined misdemeanours, and that in January 1911 some trouble occurred owing to his interference which led her to prefer a complaint to the Deputy Commissioner. She added that about that time she came to know that the defendant's interference purported to be made on the basis of an alleged deed of gift, in connection with which she learnt that mutation in his favour had already been effected. She denied having executed any deed, by way of a deed of gift or transfer, so as to be divested of her entire property. She added that in July 1911 Ata Husain had instituted five suits for arrears of rent against several tenants in some of the villages which belonged to her, setting himself up as owner in possession. She alleged in paragraph 9 of her plaint that she was *pardanashin*, rustic, and illiterate, 70 years old, in 1906, and that she had not the capacity of understanding a transaction or the purport of a deed, that she had completely fallen under the influence of the defendant and used to believe everything the defendant told her, and that it was possible that he might have obtained her signature on some deed by misrepresentation and fraud. She, therefore, alleged that if her signature had been obtained on any such document, it was void as having been obtained by fraud and misrepresentation without her having been made acquainted with the real import and contents

thereof, that she did not take the legal advice of any person, nor had any opportunity of doing so, and that she all along remained herself the owner in possession and enjoyment of the property, possession never having passed to the defendant. She, therefore, prayed for a declaration of her absolute ownership in the property which she specified in the list attached to the plaint; and prayed, in addition, that if by reason of mutation of name having been effected the Court was unable to grant her a simple declaration, then a decree for possession of the said property might be passed, or any other relief granted which was warranted by the facts of the case. She did not, it will be noticed, in set terms pray for cancellation of the deed of gift. Ata Husain died before the written statement came to be filed and it was filed by the present appellants. It was there alleged that a dispute had arisen between Ata Hussain and one Hazari Lal who was the *mukhtar* of the lady and that he had this present suit instituted. It was alleged that the plaintiff had voluntarily executed the deed of gift on 9th August 1906 and got it registered after fully understanding it, and that she had at the same time put the donee in possession. It was also alleged that she was fifty-five years old and not seventy at the time of the execution of the deed of gift and very well understood her affairs, and that no deception or misrepresentation of any kind was resorted to. The additional pleas set out that there was no one besides Ata Husain who could have inherited the plaintiff-respondent's property, and that for this reason and because she was so pleased with him on account of his obedience and the way he managed her affairs, she after mature consideration executed the deed of gift and made possession over to him; and it was pointed out that in the course of the mutation proceedings, and also at a later occasion, the plaintiff had expressly admitted execution and completion of the deed of gift. The plaintiff-respondent's possession was also denied. The lower Court framed the following issues:—

1. Whether the plaintiff executed the deed of gift dated 9th August 1906 in favour of the deceased Ata Hussain under undue influence of the said Ata Husain?

2. Whether the donee or the plaintiff is in possession of the disputed property?

3. Whether the plaintiff is bound to get the deed cancelled?

4. If so, is the cancellation barred?

5. Whether the plaintiff learnt of the deed of gift only on the 19th July 1911?

The lower Court found that the respondent did not come to know of the deed of gift until the 19th of July 1911. It found on the second issue that the plaintiff-respondent had been in possession all along. It found the first issue in favour of the plaintiff, that is to say, that the deed of gift was executed owing to the undue influence of Qazi Ata Husain, and it found the third and fourth issues against the defendants, presumably thereby finding that the plaintiff was not bound to get the deed cancelled and that the cancellation of it was not barred. On these findings it decreed the plaintiff's claim for a declaration with costs and ordered that the deed of gift be cancelled.

In the grounds of appeal the appellants plead that the suit is barred by 3 years' rule of limitation, that the relief for declaration is barred by section 42 of the Specific Relief Act, that the lower Court has misunderstood the pleadings and has made out an entirely new case for the plaintiff-respondent, who could not be allowed to set up a case of undue influence, when she denied the execution of the deed of gift in question. The appellants further plead that the plaintiff failed to prove that the execution of the deed in dispute was due to any undue influence and that the plaintiff was not in possession of the property in dispute, and that certain evidence which the appellants desired to give in proof of payment of land revenue was improperly rejected.

It is first important to come to a definite understanding as to what the case of the respondent in the lower Court was. She denied the execution of the deed of gift, or an intelligent execution of it with a knowledge of its nature and effect. Her plaint was drafted at a time when she had not, according to her allegation, seen the deed of gift. The lower Court before framing issues not only put certain questions to the lady's Pleader who represented her, but also examined her briefly on commission. Her learned Pleader stated that it was not

her case that any misrepresentation took place, and that the fraud of which she complained in her plaint was that, if she had been persuaded to sign any deed, Ata Husain had concealed from her the fact that she was signing a deed of gift in his favour. When the lower Court was proposing to frame the first issue in the words in which it was subsequently framed, an application was filed on behalf of the plaintiff-respondent on the 2nd September 1912 stating that it was not her case that she came to execute the deed owing to undue influence or unlawful pressure (*dabao najaiz*) and suggesting in the form of certain issues that Ata Husain was her *mukhtar* and trusted manager at the time the document was signed, that he took undue advantage of his position and acted in bad faith, and that her signatures were taken without the meaning of the document and the results that would arise from it being clearly explained to her. When the plaintiff-respondent came to be examined on commission she very expressly admitted her signatures in five places on the deed of gift in question. She alleged that, as she trusted Ata Husain completely, she signed whatever was put before her without knowing its contents; and without asking what the document contained; and that it was only later that she came to know that what she had signed was a deed of gift. It must, therefore, be taken that her plea and the finding of the lower Court on the 1st issue amounted to this that the plaintiff-respondent signed the document, Exhibit A, owing to the confidence she reposed in Ata Husain who was her trusted manager and that confidence was betrayed, and fraud consequently committed, by Ata Husain, in that he concealed from her the purport of the document; and that she signed it without any knowledge of its contents and without any intention of executing it as a deed of gift in Ata Husain's favour and which was operating to entirely and immediately divest her of the property.

We are thus able to start on a consideration of this appeal with the admitted fact that the respondent, *Musammat* Ashraf-un-nissa, did sign the deed of gift in question. If she signed, fully appreciating its contents and the results which would arise from it, then evidently her claim would be barred by the law of limitation; and this is the main contention of the appellants.

A good deal has been said on the question of the burden of proof, and our attention has been drawn to a number of authorities, both of the English as well as of the Indian Courts, on the principle of fiduciary relationship, especially with reference to *pardanashin* women; and it has been pressed upon us for the appellants that although much affection may have existed between Ata Husain and Ashraf-un-nissa, no such fiduciary relationship existed as would justify laying the burden of proof upon the appellants. Our attention has been drawn to a ruling, *Coomber In re, Coomber* v. *Coomber* (1), where the Judges have laid down that fiduciary relationship is not alone sufficient to raise a presumption against a deed of gift. This is doubtless true in ordinary cases; but there are certain positions in which the existence of undue influence will be presumed; that is to say, it will be for the party who in such circumstances affirms the *bona fides* of a transaction to substantiate his affirmation. In transactions *inter vivos* between trustee and beneficiary, guardian and ward, legal adviser and client, medical adviser and patient, among others, such undue influence will be presumed; and it is unnecessary for us to quote authorities to justify us in adding that in Indian law the same presumption will be made in the case of transactions with *pardanashin* women. Particularly our attention has been directed to the recent ruling of their Lordships of the Privy Council in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (2) where they lay down: "Much as their Lordships support and approve of the protection given by law to a *pardanashin* lady, they cannot transmute such a legal protection into a legal disability." This ruling indeed sounds a wholesome note of warning to those who would exploit the protection of the *pardanashin* too far; but it does not in any way derogate from the general principle which we have quoted above.

(1) (1911) 1 Ch. 174, on appeal page 723; 80 L. J. Ch. 399; 104 L. T. 517.

(2) 21 Ind. Cas. 985; 36 A. 81; 18 C. W. N. 282; (1914) M. W. N. 112; 16 O. C. 378; 1 O. L. J. 67; 15 M. L. T. 130; 26 M. L. J. 121; 12 A. L. J. 115; 19 C. L. J. 172; 16 Bom. L. R. 147 (P. C.).

Indeed the appellants have not in their grounds of appeal complained that the burden of proof was unfairly laid upon them by the lower Court. Their Counsel admitted in the Court below that the burden lay on them, and though a reference to the issues framed by that Court will show that as a matter of fact the burden of proof on the first issue was laid originally on the plaintiff, the lower Court in its judgment treated the evidence as if the burden of proof had been upon the defendants. Each party in this case had been content to rely upon the weakness of the case of the other party, and the strength of its own case; and it has, therefore, not been necessary for us to determine whether the onus has been properly laid, whether it has been discharged, or whether, if one party appeared not to have discharged the onus that lay upon it, the Court ought to consider, or not to consider, the affirmative evidence produced by the other party. The extent of the confidence which existed between Ata Husain and *Musammat* Ashraf-un-nissa we shall have to consider in its bearing upon the credibility of evidence, and upon the presumptions arising upon that evidence; and it is really in this connection, rather than on the question of the burden of proof, that the subject has been elaborated.

Rightly or wrongly then, the burden of proof on the 1st issue was laid upon the respondent. She set out to prove that she had been continuously in possession. It was emphasised for her that, owing to the fiduciary relationship which existed between her and her brother, the whole transaction must be scrutinized with great care. It was pointed out for her that the property was not in immediate danger, and, therefore, no motive existed to take such a sudden and far-reaching action in respect of it, so many years after her husband's death; and that had she desired to secure the succession to Ata Husain she could, if it were necessary, have secured it by Will; and that the question of promoting the welfare of Ata Husain, without acting to the detriment of her own welfare, was one in which she would have required assistance and independent advice. The appellants set out to prove the circumstances attendant upon the execution and registration of the deed of gift, and the unequivocal admissions of the lady at later dates that she had surrendered possession to Ata Husain. They also sought to substantiate their own possession by direct evidence and they endeavoured to show that the lady was neither helpless nor illiterate, but was a capable managing woman, who could look after her own affairs.

The case has been put before us with great care and the evidence thoroughly scrutinized; and a very large number of precedents have been quoted and commented upon.

The judgment of the Subordinate Judge is spasmodic, his findings particularly sketchy, and his handwriting so reprehensibly illegible that our labours, and those of the learned Counsel who appeared in this Court, have been thereby appreciably enhanced. We find that the lady did execute the deed, but that she did not appreciate the full significance thereof, or that it was to operate as a complete devolution *in præsenti* of all her property, but that rather she believed that her proprietary title and her possession thereunder was not thereby to be disturbed during her lifetime. We find that possession did not pass from her to Ata Husain as a result of the execution of this deed, and that, as soon as she discovered the full result of her action, which was sometime between May and the end of September 1910, she took immediate steps to place her position beyond doubt and brought this suit within the period of limitation from that time.

[After setting out the material portions of the deed of gift and the genealogical tree of the parties, the learned Additional Judicial Commissioners proceed to consider the defendants' evidence.]

Firstly, they produced the deed of gift, and they summoned all the witnesses thereto, the scribe and the Sub-Registrar. From some of them they also sought to establish that the lady was educated and competent. They produced certain tenants, mainly of Jagannathpur, to prove payment of rent in recent years to Ata Husain; and one person who would prove payment of a *quota* of land revenue to him by Ata Husain in respect of a share in Domipur. Their other witnesses are called to prove the documentary evidence.

Wazir Ali, the Sub-Registrar, happens to be distantly connected with Ata Husain's wife, as the genealogical tree will show. He is a

man who has since been dismissed from Government service. It is objected for the respondent that as some of the property gifted lay in the Basti District, the Sub-Registrar of Basti might have been called instead of Wazir Ali, who is the Sub-Registrar of the Utraulla Tahsil in the Gonda District where the rest of the property is situate. This is an argument of no importance when we consider that practically the whole of the property is in the Gonda District, and also the residential house. The Sub-Registrar recorded upon the document, as we have noted, that it was read to the lady; but he made no further note to the effect that its contents were explained to her, which he should have done, had he followed the instructions laid down for the guidance of Sub-Registrars in the Registration Manual. In his evidence also he declined to go any further than this. He declined to swear that anything in the nature of explanation was attempted. The other witnesses, however, described in varied language the Sub-Registrar as pointing out to her that she was by her action divesting herself at once of these properties; and one even goes so far as to say that she replied to the effect that she still had money left. The witnesses are discrepant among themselves as to the manner in which this warning was conveyed to her; and they and the Sub-Registrar are discrepant as to many of the attendant circumstances, particularly as to the time when the draft of this document was prepared and as to who prepared it. None of these persons, as the lower Court has pertinently pointed out, bear any such relation to the lady as would be consistent with her appearing before them; yet, while all professed that she does appear before them, some even pretended that they visited her a few days before (the scribe says a day before) and that she unbosomed her thoughts to them, and told them that she had decided to execute a deed of gift because, when she was ill a few months before, Imdad Husain and Muhammad Askari, who are relations of her deceased husband Tajammul Husain, had commenced to give trouble. One witness Abdul Qadir pretended that he used to visit the lady and used to read Taubut-ul-Nasuh, a present day novel, to her. The daughters of this man's cousin are married to the two sons of Ata Husain, and his maternal grandmother's grandfather was the great-grandfather of Ata Husain's wife. This is the extent of his relationship to the respondent. Ghaffar Husain the next witness is Abdul Qadir's cousin, and father of the wives of Ata Husain's sons. Shukrulla the scribe of the document is a distant cousin of this Ghaffar Husain, a resident of the Fyzabad District with a profession of *zemindari*. It is suggested that Ghaffar Husain mentioned him to *Musammat* Ashraf-un-nissa because he wrote a good hand, though as a matter of fact he had never written any document before. Shukrullah too pretended that the respondent appears before him, and that one day before the deed was executed she gave him full instructions as to what should be entered therein and also confided to him the reasons which prompted her to execute it! Within a very short time of the execution of the deed of gift these three persons Abdul Qadir, Ghaffar Husain and Shukrullah were granted general powers of attorney on Ata Husain's behalf! Another attesting witness was Gul Muhammad, who is admittedly a dependant of Abdul Qadir and Ghaffar Husain, and whose father was a peon in the service of Tajammul Husain. The last witness was the Hindu *patwari* of Jagannathpur who was, he says, summoned by Ata Husain to witness the deed. The *patwari* of Tikar, be it noted, where the residential house is situate, and the transferred share in which village is valued in the deed of gift at Rs. 12,000, and the *patwari* of Agya, which is therein valued at Rs. 27,450, were not called. Considering the above circumstances we are entirely unable to believe that *Musammat* Ashraf-un-nissa appeared before these persons at all; or that the deed of gift was executed with anything approaching the formality which they endeavoured to prove; and it appears likely that they have been prepared to give evidence in the case by some persons who had studied the rulings on the subject of gift by *pardanashin* women. For one of them adds, by way of emphasising the delivery of actual possession over the house property, that Ata Husain's wife and children were at once called for from Jagannathpur where he lived, and taken into residence at Tikar. That they witnessed the deed, and that the scribe wrote it. We

believe; but we are convinced that the transaction took place entirely without the *zanana*, and in the manner described by Hazari Lal, to whose evidence we shall refer; and we have no doubt that their continued complacence was secured by the *mukhtarnama* executed in their favour.

The oral evidence of the few tenants, unsupported by any receipts, is of negligible value, and we need spend no time in discussing it in detail. We shall have occasion to refer to it again when reviewing the evidence for the respondent.

One Imdad Ali *lambardar* of Domipur is produced to prove that this estate includes a share in that *mahal* of Domipur of which he is the *lambardar*; and that, during the last six years, he has taken from Ata Husain the land revenue appertaining to that share. This statement is a mere *ipse dixit*, and there is none to say him nay. This witness used to be a *mukhtar*, that is to say, general attorney, of Ata Husain's mother-in-law, and his son is in the service of Ata Husain at Rs. 4 a month. As we shall show later on, the land revenue *dakhilas* Nos. 37, 40 and 43, filed by the respondent, show payments of land revenue in respect of this *mahal* of Domipur, (Imdad Ali *lambardar*), direct into the Tahsil by Muhammad Askari, on behalf of *Musammat* Ashraf-un-nissa in May 1910, September 1910 and May 1911.

We are not, therefore, satisfied from the oral evidence that the document was read and explained to the lady or that there was any witness to her signature thereon, though, of course, the fact of signature is not denied. It is argued strenuously for the appellants that as this document is a deed of gift and very simple in its provisions no particular explanation was required. The necessity of explaining the contents of a document to a *pardanashin* lady has formed the basis of comment in many precedents to which our attention was drawn; but the appellants would point out that in those cases for the most part the document was of such a nature that explanation at the time of execution was called for; and in particular the appellants rely upon the ruling to which we have already referred, *Kali Bakhsh Singh* v. *Ram Gopal Singh* (2), where their Lordships lay down that there is no rule of law to the effect that a gift by a *pardanashin* cannot stand unless it is proved that the lady had independent advice. The presence of independent advice or the absence of it, their Lordships note, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue; and they add that if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand. In the present case, however, there is no question of setting aside a complete and perfect transaction; and the absence of careful explanation to the lady, at the time of the execution of the deed of gift, of the full results of her action, is rather to be taken as indicating the probability of the correctness of, and, therefore, corroborative of, her statement, which we are finding to be a true one, that possession was not transferred to Ata Husain.

[After dealing with the documentary evidence of the defendants-appellants the judgment proceeds:—]

As to possession of the three houses which are mentioned in the sale-deed the appellants, in proof of their possession, point to the statement, which we have above discredited, that the wife and children of Ata Husain were, on the day the sale-deed was executed, called for from Jagannathpur and put into residence at Tikar. Beyond that there is only some very sketchy evidence given by the appellants' witnesses Nos. 1, 6 and 14 that possession of these houses was taken by his servants: whereas had, as a matter of fact, possession been taken formally by Ata Husain there must have been some good evidence available. It is clear that the above oral evidence in no way suffices to prove any transfer or possession of the houses. The appellants, however, chiefly rely upon certain rulings; and pray the Court to hold that when an estate of this kind is transferred by gift to a member of the family, a transfer of possession of houses should be taken to follow upon the transfer of possession of *zemindari*. They rely chiefly upon *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* (3), where the learned Judges remarked that a

(3) 29 B. 468; 7 Bom. L. R. 413.

complete bouleversement is not to be expected in transactions among members of the same family. They rely upon a recent ruling of one of us, *Musammat Munifa Bibi* v. *Fateh Ali* (4), but this deals with the gift of one house, pure and simple; and it is a ruling on the question of constructive possession, and is in no way in point. They further rely upon *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (5), where the donor was not in possession of the whole of what she gifted, but surrendered what possession she had. It was there ruled that sufficient possession had been taken to render the gift effectual. This ruling too is not on all fours with the present case. But it is not necessary for us to do more than to refer in passing to this part of the appellants' case; for, as we do not find that possession of the *zemindari* property was transferred, these arguments, even if on consideration they appeared to be worthy of acceptance, could not avail.

The appellants also filed copies of several documents to show that purchases had been made and mortgages entered into by *Musammat* Ashraf-un-nissa at a date subsequent to the deed of gift; and these they utilised to argue that she had not pauperised herself when she entered into the transaction in question. They totalled up the amount paid in connection with these transfers, and compared it with the total net profits of the *zemindari*; and showed that these net profits could not have sufficed to meet these payments; and from this they argued that these payments were, therefore, not made out of income from the *zemindari*. But, even if these figures be correct, and if they do indicate that *Musammat* Ashraf-un-nissa had some cash in hand available, that does not, for an instant, prove that the whole of the payments required were made from that cash in hand, or that a considerable portion thereof was not paid over from accumulations of the income of the estate.

[The learned Additional Judicial Commissioners after summarising the evidence led by the plaintiff-respondent go on to say :—]

On the above review of the evidence we find that the estate books point decidedly to a continuation of the old practice of managing the estate, and that they bear no indication of a transfer of possession of any kind. They prove regular collections from a large number of tenants, and continued payment of moneys for expenses connected with the estate, and for land revenue to be paid into the Tahsil, (all such issues of money being signed by the respondent herself); and they cover the period from the deed of gift to the rupture in May 1910; and from that time, in addition to the evidence of these books, there is a good deal of evidence of a large number of tenants, corroborated by these books and by the tenants' receipts, and the counterfoils thereof; and there are the *dakhilas*, official receipts for payment of land revenue deposited by Muhammad Askari on behalf of *Musammat* Ashraf-un-nissa *lambardar*, and on behalf of Ashraf-un-nissa in the *mahal* of Domipur of which Imdad Ali was the *lambardar*. These books certainly do betray a certain attention to business of the respondent here and her ability to sign her name. All that the appellants can produce as against this, beyond the extremely questionable evidence as to the circumstances attendant upon the execution of the deed of gift, is the evidence of certain tenants, who spoke vaguely, with no written receipt, of payments to Ata Husain, and the evidence of the Domipur *lambardar*, spoken without fear of contradiction, but to some extent contradicted by the entries in *jama kharch* Exhibit 15 and the *dakhilas* Exhibits 37, 40 and 43. But the appellants argued that the respondent being literate and capable of managing her affairs the ordinary *pardanashin* presumption cannot arise, and that as she executed the deed of gift and therein admitted to have surrendered possession, that should be held sufficient; and that possession should be taken to have passed from that time; and that the suit should, therefore, be held barred by limitation. They referred to the case reported as *Jaiwanti Kumri* v. *Gajadhar Upadhya* (6) in which, however, the circumstances were quite different. Though we disbelieve Abdul Qadir as to the extent of her education, we recognise that she can write her name both in Urdu and Hindi, and perhaps cypher also in Hindi. We find

(4) 23 Ind. Cas. 453; 17 O. C. 60; 1 O. L. J. 133.
(5) 11 A. 460; 16 I. A. 205; 5 Sar. P. C. J. 433.
(6) 10 Ind. Cas. 334; 38 C. 783; 14 C. L. J. 226; 15 C. W. N. 676.

it proved from the evidence of both parties that she did communicate with tenants and others on business matters, through the medium of a maid servant, and the entries in the Siahas prove that she kept what she must have considered a strict hand over the expenditure. But a knowledge of her letters and of figures, and a capacity of dealing at first hand to some extent with her tenants, will not convert a *pardanashin* woman into a woman of the world. Her life will still be to a great extent circumscribed by the four walls of the *zanana* and her mind will still be open to the plausible representations of dear and intimate friends. To such a person the adage is surely appropriate, "a little knowledge is a dangerous thing." It is shown from her own statement that she recognised no other heir to her estate. She repudiated Imdad Husain and his brother as sons of a kept woman. She described how she had brought up Ata Husain since he was six years old, and Ghaffar Husain said that she also arranged Ata Husain's marriage; and she said that since her husband's death none was so dear to her as Achche Mian. Ata Husain, who died before he could be examined in this case, stated in his evidence, in the suits which he brought in the Rent Courts, about her, " *aur koi aziz nahin hai* " (she has no other friend, or we may better put it, she has no other near and dear relation). Now what does she purport to have done? She purports to have divested herself *in præsenti* of the whole of her real property, houses, and land, and that at a time when no pressing emergency had supervened but rather when she actually had in her mind the endowment of her Rs. 18,000 mosque. It is needless for us to elaborate the authorities which have commented upon the situation of a lady in such a position. Where there is undue influence, open coercion or open fraud patent to all, the Court will have no difficulty in declaring against the setting aside of a transfer; but it is in cases where there is no such open coercion or such open fraud that the Courts have to walk warily and have to scrutinize the transaction in all its lights. As Lindley, L.J., remarked in *Allcard* v. *Skinner* (7): "The Courts have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going to this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible." In the present case it has been proved by evidence that *Musammat* Ashraf-un-nissa did not surrender possession when she executed the deed of gift, whatever may have been set out therein, and whatever she may have stated on her examination in the mutation proceedings. That statement itself is indicative either of her imperfect comprehension of the contents of the deed, or of some subtle influence prevailing over her at the time that she made it. We cannot, therefore, find that her assertions at the time of mutation, coupled with the allegations set out in the deed, are sufficient to constitute in themselves a complete delivery of possession, and that the transaction ought not to be criticized. It has also been pressed upon us by the appellants that her desire to benefit Ata Husain was but a natural one, and that no member of the family was excluded who would naturally have been expected to be present; and that the absence of Imdad Husain and other relations of Tajammul Husain, who firstly, were not heirs, and who secondly, would be disappointed at the failure of any hopes they might have had, is of no importance; for they naturally would not have been invited to attend. The ruling reported as *Mahommed Buksh Khan* v. *Hosseini Bibi* (8) has been quoted in this connection. But this, and the many similar rulings which we have seen, have very little bearing upon the present case where the deed of gift was not perfected and completed by possession, and where the object of the suit is not to set it aside, but to ignore it. Had we found that the respondent did execute the deed of gift with full knowledge of its effect, and did complete the transaction of the delivery of possession, the probability of the exercise of undue influence would have then to be considered as operating to overpower her volition without convincing her judgment.

(7) (1887) 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251.

(8) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175.

JAHNAVI PRASAD SINGH v. GHARBARAN DUBEY.

The result of our findings upon the grounds of appeal is, therefore, that the suit is not barred by the law of limitation, and that as possession had not passed the respondent's claim for a declaration is not barred by section 42 of the Specific Relief Act. Neither the lower Court nor this Court has made out an entirely new case for the plaintiff-respondent, who did plead in her plaint the exercise of undue influence, not that undue influence of which the constituent element is coercion, but that undue influence of which the constituent element is fraud. The respondent has proved to our satisfaction that the execution, that is to say, the signing of the deed in dispute, was due to the trust reposed by her in the good will of Ata Husain; that she continued in possession of the property in dispute; and that Ata Husain betrayed that trust by obtaining a deed of immediate gift in his favour and by, on the strength of it, asserting his own title and seeking to oust her from the property in suit.

For the above reasons we dismiss the appeal. The respondent shall have her costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 76 OF 1913.

May 25, 1916.

Present:—Mr. Justice Mullick and Mr. Justice Kingsford.

JAHNAVI PRASAD SINGH—PLAINTIFF—APPELLANT

versus

GHARBARAN DUBEY—DEFENDANT—RESPONDENT.

Mortgage—Decree absolute for sale against father—Suit by sons for possession—Right of sons to redeem—Mortgagor's right to redeem first mortgage after sale of equity of redemption in execution of decree based on second mortgage—Limitation Act (XV of 1877), Sch. II, Arts. 12, 95, applicability of—Civil Procedure Code (Act XIV of 1882), s. 578—Guardian ad litem's *appointment—Notice—Irregularity.*

Where in a suit on a mortgage a decree absolute for sale has been obtained against a deceased mortgagor without substituting or mentioning his sons as his heirs and a sale has taken place, the sons cannot challenge the sale. [p. 408, col. 1.]

Phulchand Ram v. *Nursingh Pershad Misser*, 28 C. 73, referred to.

Sons under the Mitakshara Law have no right to redeem the self-acquired property of their father sold in execution of a mortgage-decree obtained against the latter. [p. 409, col. 2.]

Balwant Singh v. *Rani Kishori*, 20 A. 267; 25 I. A. 54; 2 C. W. N. 273; 7 Sar. P. C. J. 279, referred to.

In a suit for possession of property sold in execution of a decree on the basis that the sale was a nullity, it is not necessary to set aside the sale. [p. 410, col. 1.]

Ram Taran Goswami v. *Rameswar Malia*, 11 C. W. N. 1078; 6 C. L. J. 719, dissented from.

Bangsa Das v. *Genalal Jha*, 12 Ind. Cas. 155; 14 C. L. J. 530, followed.

After an equity of redemption has been sold away in execution of a decree on a second mortgage, it is not open to the mortgagor to sue for redemption of the first mortgage. [p. 409, col. 2.]

Kinnaird v. *Trollope*, (1888) 39 Ch. D. 636; 51 L. J. Ch. 905; 59 L. T. 433; 37 W. R. 234, distinguished.

Articles 12 and 95 of Schedule II of the Limitation Act, 1877, do not apply to a suit for redemption, as in such a suit it is not necessary to set aside the decree or the sale. [p 410, col. 2.]

If in fact the Court has allowed a party to appear as the guardian of a minor and to conduct proceedings in his behalf the mere circumstance that notice was not issued to the guardian is immaterial and is curable as an irregularity under section 578 of the Code of 1882. [p. 407, col. 2.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021, 30 I A. 182; 7 C. W. N. 774; 5 Bom. L.R. 822, referred to.

Appeal from a decision of the Subordinate Judge, Chapra, dated the 27th November, 1912.

Mr. *G. D. Sinha*, for the Appellant.

Messrs. *Mustafa Khan* and *Harnarain Prasad*, for the Respondent.

JUDGMENT.

MULLICK, J.—This litigation arises out of a mortgage-decree obtained by one Ramadhin Dube against Debi Prasad Singh, *Musammat* Debi Koer, widow of deceased defendant No. 2 in that suit, Jadunandan Singh, *Musammat* Lachminia Koer, widow of a deceased defendant Lachmi Singh, Sowdagar Singh, Pertab Singh, Ram Nihora Singh, *Musammat* Manrup Koer, and *Musammat* Pardipa Koer. The suit, was brought upon a mortgage executed on 25th May 1887 by Debi Prasad Singh, Lachmi Singh and Jadunandan in respect of a 5-anna *pucca* share corresponding to a 10-anna *kutcha* share in *Mauza* Koini. The suit was instituted on the 19th of April 1897. On the 28th of June 1897 *Musammat* Pardipa and *Musammat* Lachminia were substituted in place of their husbands Jadunandan and Lachmi. On the 27th of July 1897 an *ex parte* decree was

passed in favour of the plaintiff and the decree was signed on the 13th of August 1897. Apparently nothing further was done till the 3rd of September 1898, or at any rate if anything was done there is no trace on the order-sheet of it. The records of the case excepting the order-sheet have all been destroyed and it is no longer possible to say with certainty whether the parties took any steps other than the steps which appear on the order-sheet. On the 3rd of September 1898 an application for an order absolute was made by the plaintiff. Notices were issued to the defendants and on the 13th of December 1898 the order absolute under section 89 of Act IV of 1882 was duly made. Execution was applied for on the 16th of January 1899. On the 8th of May 1899 the mortgaged property was sold at auction and purchased by the decree-holder for Rs. 7,430-10-9. The sale was confirmed on the 6th of July 1899 and the sale certificate was issued on the 25th of October 1899. It is important to notice that in this certificate the names of Jahnavi Prasad and Maheshri Prasad, plaintiffs Nos. 1 and 2 in the present suit, and of Lalita Prasad appear as the sons and representatives of Debi Prasad.

The present suit was brought by Jahnavi and Maheshri on the 25th of October 1911 and the first six defendants impleaded are the heirs of Ramadhin, the auction-purchaser in the suit of 1897. The other two defendants are Pardipa Koer and Lachminia, widows of Jadunandan and Lachmi.

The plaintiffs claim declaration of title to and recovery of possession of the property sold at auction on the 5th of May 1899, on the ground that the sale was fraudulent, collusive, invalid and illegal. In the alternative, by an amendment of the plaint made on the 20th of September 1912, the plaintiffs ask that if the mortgage-bond dated the 25th of May 1887 is found to be genuine and binding upon the plaintiffs, then it may be adjudged by the Court that the plaintiffs have a right to redeem the property.

Written statements were filed by defendants Nos. 1 to 6.

The learned Subordinate Judge has found that the decree of the 27th of July 1897 was a valid and operative decree, that it is binding upon the present plaintiffs and that the plaintiffs have no cause of action. Apart from this the learned Court also finds that the plaintiffs cannot either recover the property or redeem it. He has accordingly dismissed the whole suit. Hence the present appeal before us by the plaintiffs.

The first and main question that arises in the case is whether Debi Prasad was alive at the time of the preliminary decree of 1897.

According to the plaintiffs he died on the 5th of *Magh* 1304, corresponding to the 12th of January 1897. According to the defendants he died on the 3rd or 4th of August 1897 corresponding to the 20th *Sraban* 1304. The onus of proving that Debi Prasad died on the 5th of *Magh* 1304, or at any rate that he died before the preliminary decree of the 27th of July 1897, lies heavily upon the plaintiffs, and, in my opinion, they have completely failed to discharge that onus.

The learned Vakil who appears in their behalf before us has not thought fit to rely very greatly upon the oral evidence adduced as to the date of Debi Prasad's death. After the lapse of 12 years one would naturally not expect the witnesses, who come to depose upon this point, to have any very clear memory as to the exact date.

The first of these witnesses is Panchanand Ojha, an alleged family priest. He deposes that Debi Prasad died in *Magh* 1304; that the *sradh* took place in Gaya and that he was present at that *sradh*. He can give no reason for remembering the date of this particular death and he confesses that he notes the dates of births and deaths in a paper, but he has not produced that paper before the Court. It is clear from his cross-examination that he was not in a position to remember the date of Debi Prasad's death at all. He does not remember the dates of any of Debi Prasad's three marriages.

The next witness is Deonarain Lal, who is the *patwari* of a village belonging to Debi Singh's second son Lalita. He deposes that Debi Prasad died at Sowhani in *Magh* 1304 and that the body was taken away for cremation in his presence, but that the *sradh* was performed not at Sowhani, but at Gaya. He says that there are accounts showing the expenses of the *sradh* but these accounts are not produced. He does not

remember the dates of the births of his own sons and cannot give any satisfactory reason for remembering the date of Debi Prasad's death. I cannot place any reliance upon the evidence of the witness.

The 3rd witness is Bujhavan Tewari, who deposes that Debi Prasad died in 1324 in which year the Survey and Record of Rights took place. That would be a good reason for remembering the year, but the witness does not explain how he remembers the month, which in the case before us is the important point.

The 4th witness is Sew Charan, a barber, who says he was taken from Basantpur, which is the ancestral home of Debi Prasad, to Gaya by the plaintiffs to officiate at the funeral ceremony. He deposes that Debi Prasad died in *Magh* 16 years previously. That would make Debi Prasad's death either in 1896 or in 1897. He says that with the exception of Debi Prasad's death he cannot state the date of the death of any other persons of his family, and that he does not remember in which years his own children were born. His evidence is of the same kind as that of the preceding witnesses and does not impress me at all.

The next witness is Kunj Behari Singh of Khami who does not live either at Basantpur, the ancestral home of Debi Prasad, or at Sowhani, where he died, but he nevertheless deposes that Debi Prasad died 14-15 years previously. His evidence is inconclusive.

The next witness is Shadavan Thakur, who is a cultivator at Sowhani and deposes that Debi Prasad died in *Magh* 1304. He was a servant of Debi Parsad and is now a servant of Lalit on a salary of Rs. 26 per annum. He did not take any note of the date of Debi's death and cannot give the dates of the deaths of any other member of the family. I am not impressed by his evidence.

The next witness is Hara Prasad Singh, who is a member of the family and was the guardian of Lalita Prasad. He deposes that Debi died seven or eight months before his appointment as guardian, which was in *Bhadra* or *Aswin* 1304-05. In cross-examination he admits that he lives 40 miles away from Sowhani and he only heard of Debi's death when he went to Sowhani. This witness's knowledge is based on hearsay and cannot be relied upon.

But the learned Vakil for the appellants, while admitting that the above evidence is not conclusive, relies upon a sale-deed executed by the plaintiff No. 1 Jahnavi Prasad on the 14th of January 1898 in favour of his brother-in-law Rajendra Prasad. In that sale-deed it is recited that Jahnavi is selling to Rajendra a piece of ancestral property for Rs. 999, and the reason assigned for borrowing the money is that he had to pay off two previous loans taken on a *chitti* for Rs. 528 from one Lakshman Lal Roy and for Rs. 324-4-9 from Oojagir Singh respectively. It is recited in the *kobala* that this latter *chitti* was dated the 10th of *Sraban* 1304 and was on account of a loan taken for the *sradh* of Jahnavi's father. The plaintiffs argue from this that this document, executed 14 years before the present suit when there was no necessity to make a false statement with regard to the death of Debi, is strong evidence of the fact that Debi must have died earlier than 10th of *Sraban* 1304, *i. e.*, before the 24th of July 1897. That would at all events show that he was dead on the day when the preliminary decree in the mortgage suit of Ramadhin was made.

Now with regard to this document it is to be observed that the statement as to the date of Oojagir's *chitti* is at best only an admission made by the plaintiff No. 1 himself and is evidence only if it can be held that it was made in the *kobala* in the ordinary course of business. I very much doubt whether it was necessary for the purpose of the *kobala* to recite in it the date of the previous *chitti*, and I am fortified in this view by the fact that in respect of the *chitti* given to Lakshman Lal no date is recited. I would be inclined to hold that the recital of the date was not made in the ordinary course of business and, therefore, the recital would not be admissible in evidence under section 32, clause 2, of the Evidence Act: but the defendants in the Court of the Subordinate Judge raised no objection to the admissibility of the document and it is possible that they took the view that the recital was made in the ordinary course of business. I will in these circumstances not rule that the document was inadmissible, but accepting the document as evidence in the case I think very little weight is to be attached to it. The *chitti* itself is not produced. I

would be the best evidence of the date on which it was executed. In these circumstances the recital in the *kobala* of the date of the *chitti* is only second hand evidence and, having regard to the other evidence in the case, I agree with the learned Subordinate Judge that we cannot accept it to be correct. On the other hand, the defendants have produced two account books which show that presents were sent to the family house of Debi at Basantpur on the occasion of his *sradh*. The first of these entries dated 11th of August 1897, corresponding to the 25th of *Sraban* 1304, shows that Debi could not have died earlier than the 27th of July 1897. The second of these shows that he could not have died earlier than the 3rd of August 1897. It is true that these account books were produced from the custody of a relative of Debi Prasad's, but that is not a sufficient reason for assuming that they come from a family that is hostile to Debi; at any rate no enmity has been established by the evidence. The entries in the account books have been proved by Sewsaran Lal, a servant of the family which sent the *sradh* presents, and I agree with the learned Subordinate Judge that there is no reason for distrusting them.

The plaintiffs in the lower Court also produced a *chowkidar's* note book showing the death of Debi on the 12th of January 1897. From the appearance of the document I am satisfied that the entry is an interpolation. The book appears to have come from the custody of the *chowkidar* himself and was written by one Ram Khelawan. The *chowkidar* is no longer in the service of Government and it is not shown why he has preserved all the books in which the deaths in his village were recorded. He was not officially required to keep any such books and the proper registers which the plaintiffs should have produced were the registers kept at the Police Station. I am unable, therefore, to rely upon the documentary evidence produced by the plaintiffs. I have already said that the oral evidence does not impress me favourably. It is a suspicious circumstance that only two witnesses are called who were present at the *sradh* ceremony. It is suggested by the learned Vakil for the respondent that Debi's *sradh* was in fact performed at Basantpur and that it is now placed at Gaya, which is over 80 miles away, so as to explain the absence of neighbours and members of the family.

On a review of the whole evidence I am satisfied that Debi died as alleged by the defendants on the 3rd or 4th of August 1897. He was, therefore, alive at the time of the preliminary decree.

As regards the order absolute, which was made on the 13th of December 1898, the defendants allege that plaintiff No. 1 was substituted in his own behalf as an adult and as guardian of his minor brother, plaintiff No. 2. It is contended by the appellants that no substitution was made at all, but there is nothing whatever to support this. The record having been destroyed with the exception of the order-sheet it is not possible for the defendants to ascertain the truth by reference to the record. But, on the other hand, the onus is upon the plaintiffs heavily to show that their statement is correct. We do know that the two plaintiffs were substituted in the execution proceedings and in the sale certificate dated the 25th October 1899. There is no reason for holding that the necessary substitution was not also made in the order absolute. The omission of any order for substitution in the order-sheet does not prove that no substitution was in fact made. Then it is alleged that no notice was served upon the plaintiff No. 1 informing him that he was appointed guardian of his minor brother. The reply to this also is that in the absence of the record it is not possible to say that the notice was not served. The omission of any entry in the order-sheet showing issue of notice is immaterial.

On the subject of the notice it is also necessary to observe that the proceedings were held under the old Civil Procedure Code and the case of *Walian* v. *Banke Behari Pershad Singh* (1) is authority for the proposition that if in fact the Court has allowed a party to appear as the guardian of a minor and to conduct the proceedings in his behalf, the mere circumstance that a notice was not issued to the guardian is immaterial and is curable as an irregularity under section 578 of the old Civil Procedure Code. In other words, if there was in the

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822.

order absolute and in the execution proceedings any irregularity by reason of non-service of notice upon plaintiff No. 1 as guardian of his minor brother plaintiff No. 2, it is no longer open to the plaintiffs after the sale has been held to challenge the sale and to declare it void on the ground of that irregularity.

With regard to the order absolute it has been submitted by the learned Vakil for the respondent that while the present law makes it necessary for the Court to draw up a decree, the former, Transfer of Property Act (Act IV of 1882), requires that only an order should be drawn up and that even where the Court had without drawing up an order caused a sale to take place, the omission to draw up the order was held to be at most an irregularity. It is contended, therefore, on the authority of *Phul Chand Ram* v. *Nursingh Pershad Misser*(2), that even if the plaintiffs were not substituted or mentioned in the order absolute as the heirs of their father Debi Singh, still as the sale has already taken place they are no longer competent to challenge that sale.

I think this contention is well-founded. The learned Vakil for the appellant next contends that even if the plaintiffs were brought upon the record for the order absolute and execution proceedings, the plaintiff No. 1 was a minor at that time and, therefore, could represent neither himself nor his brother whose guardian he is alleged to have been in those proceedings. Now for this purpose evidence was given in the Court below of the age of plaintiff No. 1. According to the horoscope filed by the plaintiff himself he was born on the 12th of *Magh* 1803 *Sakha*, which corresponds to the 16th of January 1882. According to the plaintiff's history of services recorded by Government in whose employ the plaintiff is now serving, his birth took place in June 1881 and according to the admission book in the Patna College where he was educated his birth took place on the 21st of March 1877. In this state of affairs the learned Subordinate Judge has accepted the testimony of the Head Master of the school, who produces the admission book and swears that it is kept in due course of business. I agree with the learned Subordinate Judge and find upon a consideration of all the evidence in the case that the plaintiff was born on the 21st of March 1877. Therefore he was properly described as an adult in the execution proceedings. To sum up, I find that Debi Singh died on the 3rd or 4th August 1897; that plaintiffs Nos. 1 and 2 were properly brought upon the record before the order absolute was made; that notice appointing plaintiff No. 1 to be guardian *ad litem* for plaintiff No. 2 was duly served upon the plaintiff No. 1 and that he was of due age to act as such guardian, that even if there was any defect by reason of omission to serve him with notice of guardianship either in the proceedings connected with the order absolute or the sale, the plaintiffs are no longer competent to plead that the order absolute and the sale are void.

In view of these findings it would seem unnecessary to consider any of the other points raised in the Court below except that of limitation; because the decree would then be operative and binding on them and their right of redemption would be extinguished by the order absolute. But as these points have been pressed on us at some length, I think it is desirable that I should shortly discuss them.

The plaintiffs contend that the decree of 1897 was a complete nullity, not only on the ground that Debi died before it, but also on the ground that the widows of Jadunandan and Lachmi against whom the decree was obtained had no interest in the property of their deceased husbands, and that by survivorship the plaintiffs had the right to be substituted instead of these ladies. With regard to the date of Debi's death I have already dealt with it, but the other point is one which must be considered. It is quite clear from the contention of the plaintiffs that the 5-annas share in *Mauza* Koini which was sold in execution of Ramadhin's decree was not joint ancestral property.

Eight annas of the *mauza* were inherited by Lachmi from his maternal grandfather. There was then litigation with the other members of his grandfather's family in which Lachmi was assisted by Debi Prasad, Ishri and Jadunandan and being successful in the end in that litigation Lachmi made a gift, by an *ikrarnama* dated 26th of August 1881, of 1 anna to Debi Prasad, 1 anna to

(2) 28 C. 73.

Jadunandan, 3 annas to Ishri Prasad and kept the balance of 3 annas for himself. There is nothing whatever to show that at the time when this *ikrarnama* was executed there was any joint family in existence. I agree with the learned Subordinate Judge that these shares must be treated as the separate self-acquired properties of the grantees of the deed of the 26th of August 1891. That being so, the widows of Jadunandan and Lachmi were properly made parties to the suit and the present plaintiffs had no right to be joined at all as survivors.

I will next deal with the question of redemption.

Upon the view of the facts which I have taken, it would seem that the plaintiffs have no right of redemption subsisting but the learned Vakil for the respondent has supported the decision of the lower Court on two further grounds. The first of these is that on the date of the suit there was no subsisting right of redemption in the plaintiffs by reason of certain mortgage-decrees obtained against them by subsequent mortgagees. It is admitted that the second mortgagees sued upon their mortgages and in execution purchased the right of redemption; so that when the first mortgagee Ramadhin brought his suit it would appear that the mortgagors had no equity of redemption left. But the learned Vakil for the appellants replies that the equity of redemption was not completely extinguished so far as the first mortgagee was concerned, and he relies upon the case of *Kinnaird* v. *Trollope* (3) to show that when a mortgagee sues a mortgagor who has assigned away his equity of redemption, the mortgagor is entitled even after the assignment to redeem. In other words, the right of redemption, which is a reciprocal right, revives as soon as the mortgagee brings the mortgagor upon the record. That case, however, is not this case. In this case there is no mortgagee suing a mortgagor whose equity of redemption has been extinguished by a second mortgagee. The learned Vakil admits that he has been unable to find any authority in the Indian Courts to support the proposition that after a mortgagor's equity of redemption has been sold away in execution of a decree obtained by a second mortgagee, it is still open for the mortgagor to bring a suit for redemption against the first mortgagee. In my opinion there is no foundation for a proposition of this kind and I agree with the learned Vakil for the respondent that on the day of the present suit the plaintiffs had no equity of redemption left in them.

The next ground on which the learned Vakil for the appellants relies is that being the sons of Debi, the plaintiffs had a right of redemption jointly with Debi on the date of the preliminary decree of the 27th of July 1897 and that not having been made parties to that decree they are now entitled to redeem. if not the whole, at least Debi's own one-anna share.

The prayer to redeem the whole is sought to be founded on the principle that one co-sharer mortgagor can always redeem the shares of his other co-sharers. But the reply to this is that the plaintiffs' claim is based on their status as Mitakshara sons, who ought to have been joined as co-defendants with Debi because by their birth they became entitled to a share in the mortgaged property. That status, however, would confer no right to redeem the shares of Debi's co-sharers which formed no part of Debi's ancestral property. The learned Vakil appearing in their behalf does not press this point, but he urges that the plaintiffs are certainly entitled to redeem Debi's 1-anna share. But, in my opinion, they cannot even do this, for the simple reason that the plaintiffs were not members of a joint undivided Hindu family with their father in respect of the property which they seek to redeem. The property was the self-acquired property of their father and by their birth they acquired no rights in it. The only rights which they could have claimed would be that of inheritance after Debi's death; but in the suit against Debi they had no right of redemption by reason of their being Mitakshara sons. The case of *Balwant Singh* v. *Rani Kishori* (4) is sufficient authority for this proposition.

The learned Subordinate Judge has relied upon the case of *Ram Turan Goswami* v.

(3) (1888) 39 Ch. D. 636; 57 L. J. Ch. 905; 59 L. T. 433; 37 W. R. 234.

(4) 20 A. 267; 25 I. A. 54; 2 C. W. N. 273; 7 Sar. P. C. J. 279.

Rameswar Malia (5) for the purpose of showing that it is necessary for the plaintiffs first of all to set aside the sale, but the case of *Bangsa Das* v. *Genalal Jha* (6) is clear authority to the contrary. It is not necessary for the plaintiffs to set aside the sale. I hold, however, that they are not entitled to redeem the share of their father because they had no interest in the property at the time of the decree against him.

Finally there remains the question of limitation. This question is independent of the validity of the decree and the sale. The learned Subordinate Judge has found that the dispossession of the plaintiffs commenced on the 25th of October 1899, that is, the date of Ramadhin's sale certificate; that period of limitation expired on the 24th of October 1911 and as the Courts were closed on that day the suit was properly brought on the 25th of October 1911. The learned Vakil for the respondent has addressed to us an elaborate argument for the purpose of showing that long before the 25th of October 1899 Debi had been dispossessed by Partap and Sowdagar purchasers in execution of second mortgages upon the property.

These sales were held in execution of the mortgage-decree of one Lal Bahadur. It appears that the names of Partap and Sowdagar were registered in the Collector's register on 6th of June 1895 in respect of Lachmi's 8-annas share in the *mauza*. It also appears that Mahadeo, Mahendro and Baijnath purchased the 3-annas share of Ishri, included within the said 8 annas, in execution of decrees obtained on the 20th of June 1895 and on the 14th of January 1896 and obtained an order from the Deputy Collector to register their names in respect of 3 annas and the names of Sowdagar and Partap in respect of 3 annas.

On the 10th of April 1897 a separate account was opened by Mahadeo, Mahendro and Baijnath for their 3-annas *pucca* share. Subsequently Partap and Sowdagar defaulted in the payment of Government revenue and one Oojagir purchased their share at auction-sale, but subsequently transferred that share to the wives of Partap and Sowdagar who got their names registered on the 23rd of September 1898 in respect of a 5-annas *pucca* share. But, in my opinion, these transactions, although some evidence of possession, are not conclusive.

The oral evidence called by the defendants to prove actual physical possession is altogether unsatisfactory. A number of tenants have been called to depose as to payment of rent to Partap and Sowdagar, but not a single rent receipt or other document is produced to corroborate their story. I agree with the learned Subordinate Judge that Debi at least was in joint possession till the date of the sale certificate. That being so, the suit was within time.

Then the learned Vakil for the respondent urges that Articles 12 and 95 of Schedule II of the Limitation Act apply to this case and that it is necessary for the plaintiffs first of all to set aside the decree and then the sale. In my opinion it was not necessary for the plaintiffs in a suit for redemption to set aside the decree and the sale at all. Much less was it necessary to set aside the sale if the mortgage-decree was a nullity. I, therefore, think that this suit is not barred by limitation. Nevertheless the extraordinary delay made by the plaintiffs in bringing this suit gives substance to the accusation that they knew that their equity of redemption was extinguished long ago and that they had no chance of success.

The result is that the appeal fails and is dismissed with costs.

KINGSFORD, J.—I agree.

Appeal rejected.

(5) 11 C. W. N. 1078; 6 C. L. J. 719.
(6) 12 Ind. Cas. 155; 14 C. L. J. 530.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 1 OF 1916.

May 24, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

MOHAMED ALI—PETITIONER—APPELLANT

versus

Babu MAHABIR PRASAD AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Sale, application to set aside—Irregularity, material, what is not.

An omission to state in the proclamation of sale the precise amount of claims received from other decree-holders subsequently to the order directing the sale of the property is not a material irregularity, nor is the absence from the sale proclamation of a valuation of the property ordered to be sold a material irregularity when it has not a deterrent effect on the minds of the intending or possible bidders. [p. 412, col. 1.]

In a case where a bidder intends to bid for a number of lots and is allowed by the sale officer to deposit his one-fourth share of the purchase-money as soon as the sales have all been concluded, instead of at the conclusion of the bidding for each particular lot, though the sale officer is guilty of an irregularity, it is for the judgment-debtor to show that the irregularity committed was material in that it caused him substantial loss and in the absence of such evidence the sale cannot be set aside. [p. 414, col. 1.]

First appeal from the order of the Subordinate Judge of the Gorakhpur, dated the 16th December 1915.

Mr. *Yusuf Hassan* (with him Mr. *Abdul Raoof*), for the Appellant.

Messrs. *Agarwala*, *Haribans Sahay* and *Ishwar Saran*, for the Respondents.

JUDGMENT.—This is a judgment-debtor's appeal in an execution case. The appellant's application in the Court below was to have the sale of certain immoveable property, which had been held in execution of a decree against him and others, set aside under the provisions of Order XXI, rule 90, of the Code of Civil Procedure. It was for the appellant to satisfy the Court that there had been some material irregularity in the publishing or in the conducting of the auction sale, and further that he had sustained substantial injury by reason of such irregularity. With regard to the publication of the sale it was contended that two irregularities had been committed, *viz.*, that the sale proclamation did not state the amount for the recovery of which the sale was ordered and *secondly*, that it did not state the approximate value of the property. In connection with this point the following facts are material. The sale had originally been fixed for the 10th of May 1915; the judgment-debtors came into Court on that date and by making certain representations obtained a postponement of the sale to the 30th of June 1915. A sale proclamation had been duly issued for the 10th of May and a fresh proclamation was issued for the 30th of June. On the latter date, however, the judgment-debtors again came into Court asking for a further postponement. This very unusual indulgence was granted by the Court, but it was granted on the express condition that the judgment-debtors waived their right to the issue of any fresh sale proclamation for the sale, which was ordered to be held on the 2nd of August 1915. The learned Subordinate Judge has remarked that, in view of this undertaking given by the judgment-debtors, they ought not to be permitted to raise objections on matters of form to the sale proclamation, which had actually been issued for the two previous dates. There is certainly room for the argument that, if the judgment-debtors were of opinion that the sale proclamations previously issued were materially defective, they ought to have brought that matter to the notice of the Court and that by waiving the necessity for the issue of any fresh proclamation they had in substance expressed themselves as satisfied with the proclamations previously issued. It is not, however, necessary to decide the question on this point alone. The alleged irregularities in the proclamations of sale, if they can be called irregularities at all, were not in this instance material. As a matter of fact the sale proclamations issued for the 10th of May and for the 30th of June did state the amount for the recovery of which the sale had been ordered. What happened was that before the sale could actually be held, a number of other creditors holding decrees against the judgment-debtors came in and asked for rateable distribution; if the judgment-debtors had insisted on the issue of a fresh sale proclamation, they might not unreasonably have asked the Court to state clearly in such fresh proclamation the total amount of the decrees which were intended to be satisfied, if possible, by means of the proposed sale,

Under the circumstances the omission to state in the proclamations issued for the 10th of May and for the 30th of June the precise amount of claims received from other decree-holders, subsequently to the order directing the sale of the property, can scarcely be called an irregularity at all. It was certainly not material as bearing on the proceedings at the sale actually held. With reference to those proceedings a further point is taken which has to do with the sum required to be realized under the sale: this will be dealt with in its proper place. It is true that neither of the sale proclamations issued attempted to give any estimate of the value of the property to be sold. The property in question consisted of 14 different lots, mostly house property in the town of Gorakhpur, but including a house situated in a garden at some little distance from the town. The judgment-debtors had had due notice of the date fixed for the preparation of the sale proclamation. It has been admitted by the present appellant, while under cross-examination, that all the items of property ordered to be sold, with the exception of three, had been acquired by himself or by other judgment-debtors. It is obvious, therefore, that the judgment-debtors were in a far better position to lay before the Court correct information as to the value of the property sought to be sold than were the decree-holders. The judgment-debtors declined to avail themselves of the opportunity offered them for supplying the Court with all necessary information before the sale proclamation was drawn up. Under the circumstances the decree-holders can scarcely be blamed for not having ventured to put forward any estimate of their own as to the value of property so difficult of valuation as that in question. In any case if there was any irregularity in this matter, there is not a tittle of evidence to suggest the inference that the absence from the sale proclamation of a valuation of the property ordered to be sold had a deterrent effect on the mind of a single intending or possible bidder. It is clear, therefore, that there was no material irregularity so far as the sale proclamation was concerned.

We now come to the manner in which the sale was conducted. The Court bailiff, Syed Ghulam Haidar, seems to have been an official of experience. He says he had worked for 16 years as an *amin*, and for 6 of these years in the city of Gorakhpur. His orders were to sell these 14 lots of house property, or as many of them as it might be necessary to sell, on the 2nd of August 1915. We are satisfied, and it has not been contested on behalf of the appellant, that it was practically impossible to complete in one day the sale of all these items of property. The sale officer, therefore, availed himself of the powers he undoubtedly possessed of postponing the sale from day to day. What the appellant alleges is that when he postponed the sale of an item of property commenced for instance on the 3rd of August, he did not inform any intending or possible purchaser of the date on which he proposed to resume that sale. This is an issue of fact which the Court below has determined against the appellant. There were six witnesses examined for the appellant, partly to prove the value of the property and partly to prove irregularity in the conduct of the sale on the part of the Court bailiff. These witnesses have been adversely criticised by the learned Subordinate Judge. We have been taken through their evidence in detail and are content to say that we regard that evidence as fully open to the criticisms pointed out by the learned Subordinate Judge. The statements of one or two of the witnesses, such as Thakur and Ganesh Prasad, are of no practical importance, *i. e.*, that they might substantially be accepted without proving any irregularity in the conduct of the sale. The witness Wazir, who makes very definite allegations against the sale officer, is discredited in cross-examination, and we agree with the Court below in holding that he was not speaking the truth. With regard to the witnesses Mahomed Salim, Ram Charittar and Munni Maharaj, it might be said that portions of their evidence could be accepted without their materially affecting the case, while as regards other portions the learned Subordinate Judge has given good reasons for considering their evidence unreliable. The *amin*, Syed Ghulam Haidar, was tendered for examination: he was examined and cross-examined at length. The report sent in by him had been prepared, and was in the hands of the Court, before these objections to his proceedings were put forward

by the appellant. It bears out in the main the evidence given by the *amin*, though it does seem to be true that in one or two instances the *amin*, when postponing the sale of a particular item of property from the 3rd or 4th of August to the 6th of August, does not appear to have distinctly stated the hour at which he would resume the sale. His evidence shows that he gave a general notice that he would resume the work of selling these items of property at noon on each successive day, and we think we may take it that, with regard to those items of property in respect of which he did not specify a later hour of the afternoon as the hour for the resumption of the sale, he intended it to be understood, and the purchasers did in fact understand, that the work would be resumed at noon, or as soon after as practicable. It may be noted that most of the items of property concerned are situated within a distance of one furlong, although one piece of property is situated at a greater distance. So far as giving the intending purchasers reasonable notice of the date and hour at which the sales would proceed is concerned we think that, if there was any irregularity in the proceedings of the *amin*, it was not such as to deserve to be called a material irregularity.

Two further points were raised, apart from the manner in which the sales were conducted.

1. It has already been explained that this was a case in which a number of decree-holders were claiming for rateable distribution. Shortly before the date of the adjourned sale the decree-holders jointly petitioned the Court. Their object was to have it made quite clear that the sale of the attached property was not to be limited to the extent necessary in order to bring in the sum of Rs. 9,121, which was the amount stated in the sale proclamation issued for the 30th of June as the amount for the recovery of which the sale had been ordered. The decree-holders did not submit, and were not asked to submit, a detailed schedule of their claims, but they stated that the total amount required to satisfy all of them might be estimated at approximately Rs. 24,000. On this the Court below passed an order directing the sale officer to proceed with the sale of the attached property, lot by lot, until he had realized money enough to secure payment to the decree-holders as a body of a sum of about Rs. 24,000. As a matter of fact the *amin* actually sold 13 out of the 14 lots under attachment, and he realized in all a sum of Rs. 29,890. On looking into this matter in detail, we find that the *amin* has in fact complied with the directions given him by the Court. By the evening of the 7th of August he had sold 12 lots of property bringing in a total sum of Rs. 24,040 only. If from this the expenses of the sale be deducted, it is obvious that he had not in hand a sum sufficient to leave a net balance of Rs. 24,000 for distribution amongst the decree-holders. There were two lots left to be sold, *viz.*, Nos. 2 and 13. No cause has been shown, either in this Court or in the Court below, why the *amin* should have been held bound to proceed by preference to the sale of lot No. 2 rather than the sale of No. 13. As a matter of fact he actually sold lot No. 2 completing the sale on the 8th of August 1915, and realizing thereby a sum of Rs. 5,850. This is how he came to realize a sum in excess of the limit of Rs. 24,000 laid down in his instructions. But in the absence of anything to show that the *amin* was in error in selling lot No. 2 rather than lot No. 13, it cannot be said that he was guilty of any irregularity in the matter.

2. The last objection taken to the proceedings of the sale officer has to do with the disposal of six lots of property which were knocked down to one Syed Wajid Ali Shah. One of these lots was knocked down to this purchaser on the 5th of August. The others were purchased by him on the 6th, 7th and 8th of August. Strictly speaking, according to the rules, Wajid Ali Shah ought to have been required to deposit one-fourth of the purchase-money for each lot as it was knocked down to him. He seems, however, to have represented to the sale officer that he intended to bid for a number of lots and he asked to be allowed to deposit his one-fourth share of the purchase-money as soon as the sales had all been concluded, instead of at the conclusion of the bidding for each particular lot. The sale officer took it upon himself to grant this permission and Wajid Ali Shah in fact deposited his one-fourth share of the total purchase-money for the six lots bought by him on August the 8th, 1915, after he had become the auction-purchaser of lot No. 2 sold on that date. It is

contended for the appellant that this procedure on the part of the sale officer is something even worse than a material irregularity and is sufficient in itself to vitiate the sales concluded in favour of this particular purchaser. Authority for this proposition is sought in the case of *Intizam Ali Khan* v. *Narain Singh* (1). We find that the decision in that case was expressly overruled by a Bench of this Court in *Ahmad Bakhsh* v. *Lalta Prasad* (2). The view there taken was that subsequent decisions of the Privy Council had made it clear that the decision in *Intizam Ali Khan's* case (1) could no longer be regarded as good law. On behalf of the appellant, however, our attention has been called to a still later case *viz*, *Amir Begam* v. *Bank of Upper India, Limited* (3). It is certainly curious to note that the learned Judges who decided this case, held themselves obliged, apparently with reluctance, to follow the principle laid down in *Intizam Ali Khan's* case (1) and to apply that principle to the facts before them. Their attention was not drawn to the ruling in the case of *Ahmad Bakhsh* v. *Lalta Prasad* (2), and it is difficult to say what their decision might have been if their attention had been so drawn. At any rate, for the purposes of the present case it is sufficient to point out that the facts before the Court in *Amir Begam* v. *Bank of Upper India, Limited* (3) were materially different from those now before us and that the point which the Court had actually to determine was not the same. We consider, therefore, that in so far as we are bound by authority, it is the ruling in *Ahmad Bakhsh* v. *Lalta Prasad* (2) which we ought to accept as the latest exposition of the views of this Court on the point. Moreover, we find ourselves in agreement with the views there expressed. We are of opinion, therefore, that though the sale officer in the present case was guilty of irregularity in his dealings with the purchaser, Syed Wajid Ali Shah, this circumstance alone does not necessitate a decision in favour of the present appellant. It is for the appellant to satisfy us that the irregularity thus committed was material, in that it caused him substantial loss. There is not the slightest reason for supposing that any injury resulted from this particular irregularity. If the sale officer had informed Wajid Ali Shah at once that he would be required to comply strictly with the rules on the subject of the deposit of 25 per cent. of the purchase-money, it is probable that Wajid Ali Shah would have made arrangements so to comply. If he had not done so, the natural result would have been the withdrawal from the scene of one bidder who seems, so far as we have been able to judge, to have benefited the judgment-debtors by forcing up to an appreciable extent the prices of those items of the attached property which were purchased by him after his first purchase, which was concluded on the 5th of August.

We have said enough to justify the conclusion we have arrived at that the appellant has failed to make out his case. We may, however, profitably add a few words on the general question, *i. e.*, whether as a matter of fact any substantial injury is proved to have been suffered by the judgment-debtors as a result of this auction-sale. The judgment-debtors have throughout been extremely vague in their valuations of the attached property. Even when raising the point in their application to have the sale set aside, they did not produce their own purchase-deeds in respect of any of the houses in question, or offer any direct evidence as to the sums expended by them on those purchases. They contented themselves with a somewhat elastic valuation of each of the items of the property, put forward by the appellant in his deposition, and partially corroborated by statements made by one or two of his witnesses such as Ram Charittar and Muhammad Salim. Then, according to the appellant himself, the property as a whole sold for about 66 per cent. of its market value; which in the case of forced sale is not so low a proportion as to raise any overwhelming presumption of material injury to the owners of the property. It has been sought to concentrate the attention of the Court particularly on one or two items such for example as item No. 14. The learned Subordinate Judge, as pointed out in his judgment, gave satisfactory reasons why this particular item should have fetched, at auction, an amount considerably below the estimate

(1) 5 A. 316; A. W. N. (1883) 38.
(2) 28 A. 238; A. W. N. (1905) 263.
(3) 30 A. 278; A. W. N. (1908) 107; 5 A. L. J. 336.

of its value put forward by the appellant and his witnesses. On this part of the case as a whole, we feel no hesitation in remarking that the evidence for the appellant does not satisfy us that the property in question sold for substantially less than its fair market value, or, at any rate, for less than it might reasonably have been expected to fetch on a sale held under the orders of the Court.

It is worth while to remark in this connection that the two postponements of the sale obtained by the appellant on the 10th of May and on the 30th of June were obtained by him, on the plea that he hoped to dispose of the property in question by private treaty in a manner advantageous to himself. It is clear that any negotiations which the judgment-debtors may have entered into for this purpose must have broken down, and this circumstance alone suggests the inference that the value of the property in question in the open market was not materially greater than the total amount of the decrees which the judgment-debtors were under the necessity of satisfying. If this is the case, the realization of Rs. 29,890 by auction sale of 13 out of 14 items of the attached property would seem, on the face of it, to be a result distinctly favourable to the judgment-debtors.

For these reasons we are of opinion that there is no force in this appeal, and we dismiss it accordingly with costs, including fees on the higher scale. The costs awarded in favour of the respondents will be distributed amongst them in proportion to their respective interests in the subject-matter.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 364 OF 1916.

June 16, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

SASHISHI MOHAN SHAHA AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

KUMUD KUMAR BISWAS AND OTHERS— DEFENDANTS—OPPOSITE PARTIES.

Stamp Act (II of 1899), s. 33—Jurisdiction of Court to impound document—Impounding documents in bound book not relating to claim—'Produced in the performance of his functions', meaning of—Civil Procedure Code (Act V of 1908), O. VII, r. 14—Plaint.

In a suit for recovery of money due on a *hat-chita*, the plaintiffs, when presenting their plaint, produced in Court under Order VII, rule 14, the *hat-chita* bound in a volume which contained many other *hat-chitas*, with a prayer that the *hat-chita* on which their claim was founded should be detached and placed on the record and the remainder of the volume should be returned to them. The Munsif on examination of the volume, finding that none of the *hat-chitas* was properly stamped, proceeded to impound all of them under section 33 of the Stamp Act:

Held, that the Munsif had no jurisdiction to impound the *hat-chitas* other than the one which formed the basis of the plaintiffs' claim, as they were not produced nor came before him in the performance of his functions. [p. 416, col. 1.]

King-Emperor v. *Balu Kuppayyan*, 25 M. 528; 2 Weir 670, distinguished.

Rule against the order of the Munsif, 2nd Court, Alipore, in Suit No. 273 of 1916.

Babus *Dwarka Nath Chakravarty* and *Troylokha Nath Ghose*, for the Petitioners.

Babu *Ram Charan Mitra*, for the Secretary of State.

JUDGMENT.—This Rule calls upon the Secretary of State for India in Council to show cause why an order made under section 33 of the Stamp Act, in circumstances to be presently stated, should not be set aside or modified.

On the 27th March 1916 the petitioners instituted a suit in the Court of the second Munsif at Alipore for recovery of money due on a *hat-chita*. Under rule 14 of Order VII of the Code of Civil Procedure, the plaintiffs were bound to produce the *hat-chita* in Court when the plaint was presented. The *hat-chita* was in a bound volume which contained a large number of *hat-chitas* executed by other persons in favour of the plaintiffs. The entire volume was brought into Court when the plaint was filed. The plaintiffs prayed that the particular *hat-chita*, whereon their claim was founded, should be detached and placed on the record, and the remainder of the volume should be returned to them. An examination of the *hat-chita*, which was the foundation of the suit, disclosed that it was not properly stamped. The Munsif examined the other *hat-chitas* in the volume and came to the conclusion that the other documents were not properly stamped. He

accordingly proceeded to impound all the *hat-chitas* under section 33 of the Stamp Act. The question in controversy is, whether the Munsif was competent to impound the *hat-chitas* on which the claim of the plaintiffs was not founded.

The first sub-section of section 33 of the Stamp Act provides that every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of Police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same. Before action can be taken under this sub-section, it must be established that the instrument in question was produced or came before the officer in the performance of his function. The case for the petitioners is that they did not produce before the officer any *hat-chita* other than the one upon which their claim was founded. The Munsif took action at a stage, when there was no material to enable him to question the correctness of this allegation Consequently, the case is not covered by the first of the two alternatives mentioned in section 33. Nor can we say that the other *hat-chitas* came before the Munsif in the performance of his functions. In the performance of his functions as a Judicial Officer the only *hat-chita* which came before him at that stage was the *hat-chita* whereon the claim was founded. We cannot speculate whether if the trial had proceeded, the plaintiffs might not have possibly relied upon the other *hat-chitas* in support of their case. If they had done so, it could well be maintained that those *hat-chitas* were produced before the Munsif or came before him in the performance of his functions. But that stage was never reached. In our opinion, on the materials before us, it is impossible to say that the Munsif had jurisdiction to impound the *hat-chitas* other than the one which formed the basis of the claim. Reference has been made by the Senior Government Pleader to the case of *King-Emperor* v. *Balu Kuppayyan* (1), which is clearly distinguishable. There a search warrant was issued by a Magistrate with a view to the discovery of a register kept by the accused, containing documents not stamped in accordance with the provisions of the Stamp Act. The register was seized in the course of the search and brought in the Court. It is clear that the register was produced before the Magistrate or came before him in the performance of his functions as a Magistrate.

The Rule must consequently be made absolute in part and the order of the Court below set aside in respect of all the *hat-chitas* other than that which forms the basis of the claim. The pages containing the *hat-chita* in question will be taken out of the volume and kept in the record; the remainder of the volume will be returned to the petitioners.

Rule made partly absolute.

(1) 25 M. 525; 2 Weir 670.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 512 OF 1913.

June 27, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Kingsford.

Musammat MAHASUNDER KUER AND ANOTHER—OBJECTORS—APPELLANTS

versus

RAM RATAN PRASAD SAHI—PETITIONER—RESPONDENT.

Will—Probate proceedings—Adoption, determination of—Jurisdiction.

It is not within the province of a Probate Court to inquire into the title of a testator to the properties covered by his Will. The question whether or not a person was adopted by a testator is not a matter which could be decided in a Probate proceeding. [p. 417, col. 2.]

Reference by the Collector and Superintendent of Stamps, Bombay, 20 B. 210, distinguished.

Appeal from the decision of the District Judge, Saran, dated the 18th September 1913.

Mr. *Ganesh Dutt Singh*, for the Appellants.

Messrs. *S. P. Sinha* and *Rajendra Prasad*, for the Respondent.

JUDGMENT.

KINGSFORD, J.—This appeal arises out of a Will executed by one Ram Bhunjan in the year 1893. The contest lies between one Ram Ratan, the respondent, who propounds the Will, and three daughters of Ram Bhunjan, who are the appellants before us. Ram

Ratan appears to have been an adopted son of Ram Bhanjan, and he propounds the Will in question as legatee and devisee thereunder. The Will was executed on the 6th September 1893, and it was registered at the village of the executant three days later in the presence of the Sub-Registrar, whose endorsement is upon the document. It appears that on the 14th September 1893, Umrao Kumar, the wife of the testator, filed an application for registration of her name in the Collectorate. Ram Bhanjan died a month later. On the 3rd February 1894 Umrao's name was registered in respect of the properties. On the 23rd June 1897 she applied for Letters of Administration, which were granted to her accordingly six months later. Umrao appears to have died in the year 1912, and after her death the appellants filed an application for revocation of those Letters. That application was granted in March 1913. Shortly afterwards the respondent Ram Ratan applied for Probate. The appellants entered a caveat, but Probate was granted on the 18th September 1913. The present appeal is from that order.

The *first* contention raised before us by the learned Vakil for the appellants is, that the document is not a Will. The document states that Ram Ratan is the adopted son of the testator, and provides that after the testators's death Ram Ratan is to have possession of the properties, and that he is to manage them in consultation with the testator's wife, Umrao, during her lifetime, and that nothing done by Ram Ratan without Umrao's permission is to be valid. After the death of Umrao it is provided that the Will shall operate solely in favour of Ram Ratan. We were referred to page 24 of Mozumdar's "Hindu Wills", and our attention was called to three tests applicable to a Will. I do not think it was seriously contended that the Will in question was not a revocable document; and certainly it cannot be said that it does not contain a disposition of property. It was, however, contended that there was no existence of any intention in the testator's mind, that the Will should take effect after his death. As I have already indicated, an application was made for the registration of Umrao's name before Ram Bhanjan's death, and in the application filed by Umrao it is stated, that a petition was also filed by Ram Bhanjan assenting to her application. I am not prepared to hold that these circumstances are any indication that Ram Bhanjan intended that the Will, so far as the respondent was concerned, should take effect before his death. We were referred to the ruling in a *Reference by the Collector and Superintendent of Stamps, Bombay* (1). The circumstances of that case are clearly distinguishable; for the document there considered was not a Will at all; it was merely a trust-deed which was contemplated to operate during and beyond the lifetime of the executant. It cannot be said that that description is applicable to the document in the present case.

A *further* contention was, that as the respondent had been adopted in Dattaka form by Ram Bhanjan, he became a co-parcener in the joint family property, and as such was entitled to that property upon the testator's death, and, therefore, there was no power in the testator to bequeath to Ram Ratan property to which the latter was already entitled to succeed. Now this argument raises the question as to the title of Ram Bhanjan to the property which the Will purports to devise. There is a long series of rulings, to which reference is made at page 762 of Mozumdar's work, the effect of which clearly is, that it is not within the province of a Probate Court to inquire into the title of the testator in the properties covered by the Will. That being so, I am of opinion that the learned District Judge was perfectly right in ruling that the question, whether or not Ram Ratan was adopted by Ram Bhanjan, was not a matter which he could decide in the present suit. It is, in fact, not open to us to consider the matter at all.

The *next* contention was, that the Will was not properly proved. It appears that the document was attested by two witnesses named Mangal Prasad and Sheoraj Misser, both of whom are since dead. It was also attested by a third man, Mathura Rai, whose signature was attached to it by the above Mangal Prasad. Mathura Rai has given evidence in the present case. It seems that he was illiterate at the time of the execution of the Will, but he has since learnt to write. He states that the Will was duly executed by Ram Bhanjan, and that it was duly attested

(1) 20 B. 210.

by Mangal Prasad and Sheoraj Misser. He has no doubt that the document shewn to him in Court is the actual Will which he saw so executed and attested. I am unable to find any reasons for discrediting the evidence of this witness, or for finding that it does not amount to sufficient proof of attestation.

The *third* contention was that the signature of Ram Bhanjan upon the Will was a forgery. It is said that there are some documents which contain his genuine signature, and that if these documents, which are not actually before us, were compared with the signature on the Will, they would shew that the latter is not genuine. I do not think it is necessary for us to give the appellants any further opportunity of producing those documents before us, because, in my opinion, the question whether or not the signature is genuine is set at rest by the endorsement of the Sub-Registrar upon the deed. That endorsement is to the effect, that execution was admitted by Ram Bhanjan in the presence of the Sub-Registrar, and this, as I have already said, took place three days after the actual execution.

In my opinion, therefore, there are no circumstances which would entitle us to interfere with the grant of Probate. This was a valid Will executed by a competent testator, and I would, therefore, dismiss the appeal with costs measuring the hearing fee at 8 gold *mohurs*.

ATKINSON, J.—I entirely concur with the judgment of my learned colleague.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1958 OF 1913.

April 27, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

NARNA, MINOR, BY FATHER AND GUARDIAN VITTAPPA SHANBHOGA—PLAINTIFF'S LEGAL REPRESENTATIVE—APPELLANT

versus

AMMANI AMMA—DEFENDANT No. 2—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 132—Suit on mortgage—Deed providing for payment of principal on fixed date and annual payment of interest—Further stipulation for payment of principal and interest in case of default—Right of action, when accrues—Debtor, whether can avail himself of benefit secured to creditor—Interpretation of Statutes.

In a suit by the assignee of a widow on a mortgage executed in her favour, it was found that the widow could assign away the interest that remained due on the date of the assignment and not the principal of the mortgage debt. The mortgage which was dated the 1st November 1888, provided for the payment of principal on the 1st November 1899 and for the annual payment of interest at 6¼ per cent. per annum. There was a further stipulation for the payment of the principal together with interest at 12 per cent. per annum from the date of default in the payment of interest "without raising the plea of future instalment on the liability of the mortgage property." Interest not having been paid as provided for, it was contended that the suit was barred by limitation:

Held, (1) that the mortgagee was not bound to take advantage of the default clause, and that the right of action did not accrue until the date provided for the payment of the principal arrived; [p. 420, cols. 1 & 2.]

(2) that the suit was governed by Article 132 of the Limitation Act and was not time-barred. [p. 420, col. 1; p. 421, col. 1.]

Gaya Din v. *Jhuman Lal*, 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510, dissented from.

No one is obliged to take advantage of a forfeiture clause and a benefit secured to a creditor should not be availed of by a debtor when the creditor does not want it. [p. 420, col. 1.]

Astley v. *Earl of Essex*, 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620; *Magdalen Hospital* v. *Knotts*, (1876) W. N. 296; 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T 466; 27 W. R. 602, followed.

It would not be in consonance with the ordinary rule of interpretation of Statutes to regard a specific provision in one of the Articles of an Act as containing a general rule of law applicable to claims under other Articles. The proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other Articles in their natural sense. [p. 421, col. 1.]

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 76 of 1912, preferred against that of the District Munsif of Puttur, in Original Suit No. 553 of 1911.

Messrs. *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

This second appeal coming on for hearing on the 2nd August 1915, the Court delivered the following

JUDGMENT.—The suit was instituted by a widow on a mortgage. Her suit was dismissed by the District Munsif. She pre-

ferred an appeal. During the pendency of the appeal she assigned her rights in the mortgage to the present appellant. She then died and the appellant was allowed to continue the appeal. The appeal was also dismissed. This second appeal was preferred by the assignee. A preliminary objection is taken by Mr. Sitarama Rao for the respondent to the competency of the appeal, on the ground that as the widow sued for property belonging to her husband, she was not entitled to make a gift of that interest in favour of the appellant.

Before deciding the point, we think it desirable to call for a finding on the question whether the original plaintiff had any interest of her own in the subject-matter of the litigation which she was competent to transfer to the plaintiff.

Fresh evidence may be taken. The finding will be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Canara submitted the following

FINDING.—I have been directed to return a finding on the question whether the original plaintiff, Bhagirathi Amma, had any interest of her own in the subject-matter of the litigation, which she was competent to transfer to the appellant.

2. Appellant has examined two witnesses and respondent's Vakil has stated that he has no instructions.

3. Appellant's case is that the property transferred to him was acquired by Bhagirathi Amma with her savings from the income of her husband's property. It is probable enough that she was able to make large savings as the income is said to have been Rs. 10,000, but the mortgage to which the suit relates was executed in discharge of a prior mortgage in favour of Bhagirathi Amma's husband. So far as the principal is concerned, I do not think she had any interest of her own which she was competent to transfer, but she could dispose of the interest, which was so much accumulated income, and that is my finding.

This second appeal coming on for final hearing on the 17th April 1916, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The suit is by the assignee of a widow on a mortgage executed in her favour. On the last occasion, we called for a finding whether the widow had any assignable interest in the debt transferred to the plaintiff. The finding returned is that the widow was competent to assign away the interest that remained due on the date of the assignment and not the principal of the mortgage-debt. We accept the finding.

Mr. Sitarama Rao, however, raised the question that the claim is barred by limitation. The mortgage is dated the 1st November 1888. It provides for the payment of the principal on the 1st of November 1899, and for annual payment of interest at 6¼ per cent. per annum. There is a further stipulation in the document which is in these terms: "If I, without paying the interest on the due date and also the principal and interest on the respective due dates according to the aforesaid conditions, allow the same to fall into arrears, I shall pay the principal sum together with interest at 12 per cent. from the date of default till the date of payment without raising the plea of future instalment on the liability of the mortgage property." We read this clause as entitling the mortgagee to the original rate of interest only, if he does not desire to enforce the clause for enhanced interest, but that should he claim the higher interest on account of the default in the punctual payment of the ordinary rate, he shall be entitled to sue for the principal sum also without waiting for the due date. In other words, an option is reserved, by the clause above referred to, to the mortgagee to anticipate the due date. It is not disputed that the interest was not paid as provided for. The question, therefore, is, is the mortgagee bound to take advantage of the default clause, and whether limitation begins to run against him from the date of the first default? Under very similar circumstances two learned Judges of the Allahabad High Court held that the cause of action accrued on the date of the first default, whereas Banerjee, J.,

held that the right to sue did not accrue until the date provided for the payment of the principal arrived. *Gaya Din* v. *Jhuman Lal* (1). We are inclined to agree with the view taken in the dissenting judgment. The Article applicable to the suit is 132 and not 75. There is no warrant for importing into the former the words of the latter. Can it be said that the money sued for became due when the first default was made, if the mortgagee wants only the principal and the original rate of interest? If the claim is for the enhanced interest, it can well be argued that that became due when the first default was committed. When the creditor chooses to exercise the option which limits his claim to the ordinary interest, it would be straining the language of Article 132 to hold that his right of action accrued when the benefit which he does not choose to avail himself of might have been enforced by him.

It is a well-settled principle of law that no one is obliged to take advantage of a forfeiture: section 4, of 3 and 4, William IV, Chapter 27. This rule has been applied to cases providing a right of entry on a forfeiture; and it has been held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it: *Astley* v. *Earl of Essex* (2). In a later case, Sir George Jessel, M. R., who decided the case just quoted, used some very forcible language against the contention to accelerate limitation. In *Magdalen Hospital* v. *Knotts* (3) the learned Master of the Rolls says: "The mere statement of such a proposition was shocking to one's intellectual perception when one considered for what objects the Statute of Elizabeth was enacted." It was also pointed out that a benefit secured to the creditor should not be availed of by the debtor when the former does not want it. No doubt, in the cases of *Reeves* v. *Butcher*(4) and *Hemp* v. *Garland*(5) a different view was taken. Lord Denman, C. J., says in the latter case: "If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it." The Statute of Limitation runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the Statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitation. It is most probable that the language of Article 75 of the Limitation Act was borrowed from this judgment. Banning on Limitation points out that this decision does not consider the principle that no one ought to be forced to take advantage of a forfeiture. Whatever may be the effect of the learned Chief Justice's view regarding the construction of Article 75 of the Limitation Act, we see no reason for not giving the language of Article 132 its plain and natural significance. As pointed out by Banerjee, J., the Judicial Committee in *Juneswar Dass* v. *Mahabeer Singh* (6) seem to indicate that the creditor is not compellable to take advantage of a defeasance clause.

There have been numerous cases under Article 75. We are not concerned with them. There are two cases in this Court dealing with Article 132. In *Perumal Ayyan* v. *Alagirisami Bhagavathar* (7) the default clause did not reserve any option to the mortgagee. On the other hand in *Nettakaruppa Goundan* v. *Kumarasami Goundan*(8), when the mortgagee was given the option of claiming the whole amount "when he required it", the learned

(1) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.
(2) 18 Eq. 290; 43 L. J. Ch. 817; 30 L. T. 485; 22 W. R. 620.
(3) (1876) W. N. 296; 4 App. Cas. 324; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602.
(4) (1891) 2 Q. B. 509; 65 L. T. 329; 39 W. R. 626; 60 L. J. Q. B. 619.
(5) 4 Q. B. 519; 12 L. J. Q. B. 134; 7 Jur. 302; 3 G. & D. 402; 62 R. R. 423; 114 E. R. 994.
(6) 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222.
(7) 20 M. 245; 7 M. L. J. 222.
(8) 22 M. 20; 8 M. L. J. 167.

Judges held that the cause of action did not accrue on the date of the first default.

The case of *Sitab Chand Nahar* v. *Hyder Malla* (9) follows *Hemp* v. *Garland* (5). In all the above cases, it seems to have been taken for granted that the words of Article 75 should be imported into Article 132. We are of opinion that it would not be in consonance with the ordinary rules of interpretation of Statutes to regard a specific provision in one of the Articles of an Act as containing a general rule of law applicable to claims under other Articles. We think the proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other Articles in their natural sense. Our conclusion is that the claim is not barred by limitation and that the plaintiff is entitled to recover the sum of Rs. 150, which represents the interest due on the mortgage at 6¼ per cent. The decrees of the Courts below must be reversed and a decree should be given to the plaintiff for Rs. 150 with further interest thereon at 6 per cent. per annum from the date of the plaint. The parties will pay and receive proportionate costs.

Appeal allowed; *Suit decreed.*

V.R.P.

(9) 24 C. 281; 1 C. W. N. 229.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2156 OF 1914.

April 18, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

LAXMIPATHAYA—PLAINTIFF—APPELLANT

versus

RAMACHENDRA—DEFENDANT No. 1—RESPONDENT.

Landlord and tenant—Ejectment, suit for—Previous suit for possession dismissed on account of insufficiency of notice—Res judicata—*Plea to be strictly construed—Title by prescription—Limitation Act (IX of 1908), Sch. I, Art.* 144—*Evidence Act (I of 1872), s.* 114, *ill.* (e), *scope of—Appellate Court, duties of.*

In a suit for ejectment brought by the plaintiff, as *moktesor* of a temple, the defendant contended that he was a *mulgeni* tenant and not liable to be evicted. It appeared that the plaintiff had, on a previous occasion, sued the defendant to recover possession, which had been decreed in the Courts below on the ground that the defendant was a *chalgeni* tenant but the decree had, on second appeal, been reversed by the High Court on the ground of insufficiency of notice:

Held, (1) that the defendant's plea was not barred by the rule of *res judicata*, as the finding as to the insufficiency of notice did not necessarily involve a finding that the defendant was a *chalgeni* tenant; [p. 422, col. 1.]

Nundo Lall Bhuttacharjee v. *Bidhoo Mookhy Debee*, 13 C. 17; *Thakur Nagundeo* v. *Thakur Mahadeo Singh*, 18 C. 647, followed.

(2) that in consequence of the disturbance of possession brought about by the decree of the Court below in the previous suit, the continuous possession for 12 years which the defendant was bound to have proved was broken and, therefore, he did not acquire title by prescription and was bound to be ejected. [p. 423, col. 2.]

The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed. [p. 422, col. 1.]

Illustration (*e*) to section 114 of the Evidence Act is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business. [p. 423, col. 1.]

Narendra Lal Khan v. *Jogi Hari*, 32 C. 1107; 2 C. L. J. 107, referred to.

When once a tenant commences as a *chalgeni* tenant and then holds over, he is considered as a lessee from year to year and he can claim title by prescription as *mulgeni* tenant only from the date on which he set up that right. [p. 423, col. 1.]

Where, therefore, the tenant asserted that he was a *mulgeni* tenant in 1894, and in a suit brought to eject him in 1903 by a trustee, the latter got into possession though that decree was subsequently reversed:

Held, in a subsequent suit brought in 1909, that there was no continuous possession for twelve years by the tenant and, therefore, no acquisition of title by prescription. [p. 423, cols. 1 & 2.]

When an Appellate Court reverses a finding of fact, it ought to apply its mind to the consideration of the whole of the evidence in the case. [p. 422, col. 2.]

Second appeal against the decree of the District Court, South Canara, in Appeal Suit No. 377 of 1913, preferred against that of the District Munsif, Kasaragode, in Original Suit No. 294 of 1909.

Messrs. *M. O. Parthasarathy Aiyangar*, *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellant.

Messrs. *K. Ramanatha Shenai* and *B. Sita Rama Rao*, for the Respondent.

This second appeal coming on for hearing on the 20th December 1915 and having stood over for consideration till the 21st December 1915, the Court delivered the following

JUDGMENT.—The plaintiff as *moktesor* of a temple sues to eject the 1st defendant. Among other pleas the defendant contended that he is a *mulgeni* tenant and is not liable

to be ejected. He also denied that his defence was barred by *res judicata*. To understand this last contention, it is necessary to state that the present plaintiff sued the present 1st defendant and others on a previous occasion to recover possession. The District Munsif and the District Judge held that the 1st defendant was only a *chalgeni* tenant and must surrender possession (Original Suit No. 77 of 1903 and Appeal Suit No. 274 of 1905) In second appeal (Second Appeal No. 155 of 1906) the High Court held that the notice determining the tenancy was insufficient and refused to decree possession. Hence the plea of *res judicata*.

The District Munsif in the present case has come to the conclusion that the 1st defendant was only a *chalgeni* tenant and gave a decree to the plaintiff. On appeal both on the merits and on the plea of *res judicata*, the District Judge has disagreed with the Court of first instance.

In second appeal, Mr. M. O. Parthasarathy Aiyangar contends that the decision in Second Appeal No. 155 of 1906 is *res judicata* against the 1st defendant, as the decision as to the sufficiency of the notice necessarily involves the finding that the tenant had no occupancy right, and relies on *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (1) and *Muthammal* v. *Secretary of State for India* (2). After careful consideration, we are unable to agree with the learned Counsel on this point. The plea af *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed. The judgment of the learned Judges of this Court in second appeal lends itself to two possible constructions :—

(*a*) that they accepted the finding that the defendant was holding only as a *chalgeni* tenant but held that the notice to quit was insufficient, or

(*b*) that they assumed without deciding that the defendant had only the *chalgeni* tenure, but held that even on that assumption he was not liable to be evicted as there was no proper notice.

(1) 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 23 M. L. J. 543, (1913) M. W. N. 1.

(2) 26 Ind. Cas. 817; 27 M. L. J. 529; 16 M. L. T. 432.

We think that the defendants are entitled to claim the latter alternative. This view is in accordance with the decision of the Calcutta High Court in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (4). We, therefore, hold that the defendants are not barred by *res judicata*.

On the merits, we are unable to uphold the judgment of the District Judge. The major portion of it is devoted to canvassing the reasons given by two of the District Munsifs who heard the case (the first at the original trial and the second after remand). A large number of documents have been filed and there is a considerable body of oral evidence. Especially when the Appellate Court reverses a finding of fact, it ought to apply its mind to the consideration of the whole of the evidence in the case. Moreover, it is doubtful whether the District Judge is right in holding that the burden was on the plaintiff to show that the direction of the Collector in Exhibit CCC was actually communicated to the ancestor of the defendants. The presumption is that official acts have been performed in the usual course ; and when we find that the Collector directed his immediate subordinate in specific terms that he should communicate to the applicants that he is not granting them a *mulgeni* lease, the presumption is that the direction was carried out. The judgment of the District Judge is vitiated by this initial conclusion regarding the origin of the possession. For all these reasons, we must reverse his finding on the merits and direct him to record a revised finding on Issues Nos. II, IV and V.

The finding should be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Canara submitted on issues Nos. II, IV and V the following

FINDINGS.

Issue II:—The defendant's predecessor acquired no more than a *chalgeni* interest in the suit property.

Issue IV:—The plaintiff's claim is not barred by adverse possession on the part of the defendant.

(3) 13 C. 17.

(4) 18 C. 647.

Issue V:—The parties agree that the improvements may be valued at Rs. 207-8 0, as found by the lower Court.

This second appeal coming on for final hearing this day, after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT. The finding is that the order of the Collector cancelling the *mulgeni* lease was communicated to the defendant's predecessor. Mr. Sitarama Rao contends that illustration (*e*) to section 114 of the Indian Evidence Act, can have no application to orders like the one in question and relies on *Narendra Lal Khan* v. *Jogi Hari* (5). With reference to this argument it is enough to point out that illustration (*e*) is not exhaustive and that the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business. The section and illustration (*f*) support the view taken by the District Judge. We must, therefore, hold that the defendant did not come as a *mulgeni* tenant. We must also hold that his possession commenced as a *chalgeni* tenant. The fact that he has not been able to produce any *mulgeni* lease points to this inference.

It was then argued that a *chalgeni* tenant is a tenant-at-will and that at the end of the first year, possession became adverse. In South Canara all tenancies which are not permanent are roughly spoken of as *chalgeni* leases. The lease was one for cultivation and the presumption is that it was a lease from year to year. It is clear that the defendant continued in possession and rent was accepted by the trustee. Applying the principle of section 116 of the Transfer of Property Act, it must be held that the defendant held over as a lessee from year to year until 1894, when he set up title as a *mulgeni* tenant. The receipts by the trustee reciting that the defendant is a *mulgeni* tenant cannot be regarded as an assertion of right by the defendant. In this view, the question is whether for 12 years the defendant held as a *mulgeni* tenant.

Although the assertion was made in 1894, a suit was brought in 1903 by the trustee to eject him. The trustee got possession under the decree of the Court below which was reversed in second appeal. In consequence of this disturbance of possession, the continuous possession which the defendant was bound to have proved was broken. The decision in *Narayanan Chetty* v. *Kannammai Achi* (6) relied on by Mr. Sitarama Rao is no authority for the position that the period during which possession was taken under a hostile title would enure for the benefit of the original holder.

We agree with the District Judge that the defendant did not acquire a prescriptive title.

We reverse the decree of the lower Appellate Court and restore that of the District Munsif. Each party will bear his own costs throughout.

Appeal allowed ; *Suit decreed.*

V. R. P.

(5) 32 C. 1107; 2 C. L. J 107.

(6) 28 M. 338.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 136 OF 1915.

March 30, 1916.

Present:—Mr. Justice Parlett.

MI CHIT LU MA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

WI WIN MA U AND ANOTHER—DEFENDANTS—RESPONDENTS.

Buddhist Law, Burmese—Partition between children of two marriages and step-mother—Mode of division.

Division, whether between children of two marriages, or between children of the first marriage and their step-mother, is always *per stirpes*, not *per capita*. Children are not entitled to a share during the lifetime of their mother, but only succeed as representing their mother. [p. 424, col. 1.]

Ma Leik v. *Maung Nwa*, 4 L. B. R. 110, followed.

Mr. *Sin Hla Aung*, for the Appellants.

Mr *Campagnac*, for the Respondents.

JUDGMENT.—The finding that the land in suit was inherited by Maung Pyu during his first marriage is not contested and is according to the evidence. The question is what share the plaintiffs-appellants are entitled to therein. Maung Pyu married three wives in succession; 1st plaintiff is the 3rd wife, and 2nd and 3rd plaintiffs are her children by Maung Pyu. The 1st

defendant is Maung Pyu's child by his 1st wife: on the death of the latter he married again, and has a son, Sein Kaing: when his 2nd wife died, Maung Pyu married the 1st plaintiff. Now Maung Pyu is dead. The District Court has awarded 1st plaintiff a one-fourth share, and nothing to the 2nd and 3rd plaintiffs. The plaintiffs now object on the ground that the 2nd and 3rd plaintiffs should also have a share. What that share should be is not stated, nor is any authority quoted. I can find no texts of the Dhammathats exactly covering the present case. According to the texts collected in section 212 of the Kin Wun Min Gyi's Digest, Vol. I, if there had been no children by the 3rd marriage, the 1st plaintiff would have received a one-fourth share. According to the texts in section 245, if the 1st plaintiff were dead, the 2nd and 3rd plaintiffs would be entitled to a one-fourth share. In *Ma Leik* v. *Maung Nwa* (1) it was pointed out that the Dhammathats agree that the division, whether between children of the two marriages or between children of the 1st marriage and their step-mother, is always *per stirpes*, not *per capita*. The offspring of the 2nd marriage succeed as representing their mother.

It appears to me that during the lifetime of the 1st plaintiff, the 2nd and 3rd plaintiffs are not entitled to a share. I accordingly accept the finding of the District Court that 1st plaintiff is entitled to a one-fourth share.

There will be a decree for possession of one-fourth of the land upon payment of Rs. 60 in favour of the 1st plaintiff, and the defendants will pay her costs calculated upon one-fourth of the total claim, Advocate's fee in this Court three gold *mohurs*. The appeal of the 2nd and 3rd plaintiffs-appellants is dismissed with costs.

Appeal dismissed.

(1) 4 L. B. R. 110.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1952 OF 1912.

June 5, 1916.

Present:—Mr. Justice Atkinson.

Sheikh MUHAMMAD FARID AND OTHERS —DEFENDANTS NOS. 1, 2, 4 & 6— APPELLANTS

versus

M. HAKIM SHAH ABDUL WAHAB AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103—Record of Rights, value of—Presumption.

A Record of Rights should be presumed to be accurate until it is proved to be incorrect. [p. 425, col. 1.]

A Record of Rights is evidence not only between landlord and tenant, but in all cases where the subject-matter with which it deals is in dispute. [p. 425, col. 2.]

Mr. *Chandra Shekhar Prosad Singh*, for the Appellants.

JUDGMENT.—This is an action between two adjoining *zamindars* with regard to the possession of a certain area of land amounting to 3 *bighas* 9 *cottas* and 10 *dhurs*.

The question is as to whether they fall within the area of the village of Kulharia or whether they fall within the area of the village Kazichak. If they fall within the area of the latter then they belong to the defendants; if, on the other hand, they fall within the area of Kulharia then they belong to the plaintiffs. The plaintiffs claimed some 9 plots as forming their property making the entire area of 3 *bighas* 9 *cottas* and 10 *dhurs*; but of these, 6 admittedly are, and have always been, the property of the defendants; and this appeal relates only to the adjudication of the Appellate Court as to plot No. 418 and parts of plots Nos. 411 and 419.

The Munsif dismissed the case.

The learned Judge on appeal reversed the finding of the Munsif and granted a qualified decree, holding that plot No. 418 and parts of plots Nos. 411 and 419 fell within the boundary of the village Kulharia and that they, consequently, constituted the property of the plaintiffs in this action; and he, therefore, gave a decree in respect of plot No. 418 and parts of plots Nos. 411 and 419 which amounted in area to 3 *bighas* 15 *cottas* and 5 *dhurs*. This makes a difference, between what the plaintiff claimed by his plaint and what he got under the judgment by appeal, of 18 *cottas* or 1 *bigha*.

MUHAMMAD FARID *v.* ABDUL WAHAB.

The defence put forward before the learned Judge on appeal, was based mainly on the published Record of Rights; and undoubtedly in the published Record of Rights plot No. 418 and parts of plots Nos. 411 and 419 (given to the plaintiffs by the decree) are by the Record of Rights recorded and marked as being within the limits of the village Kazichak and, therefore, the property of the defendants. The Record of Rights seems to have been published between the dates of the finding before the Munsif and the decision before the Judge on appeal. This is of importance, having regard to the weight which the learned Judge attaches to the pleading of the defendants in paragraph 7 of the written statement and the pleading of the plaintiff in paragraph 3 of the plaint. But the Record of Rights is there. It is a document prepared by a State Official for State purposes in an open and public manner and the law requires that it should be presumed to be accurate until it be proved to be incorrect; and the person who appears recorded in the Record of Rights is not to have his rights lightly frittered away in the absence of legal proof. No legal proof, so far as evidence is concerned, was given to displace the legal effect of the admitted entry in the Record of Rights. The learned Judge adopted a somewhat unusual procedure because, inasmuch as both the parties, that is, the plaintiffs and the defendants, had stated by their pleadings, that their case was based upon the Survey Settlement Map of 1846, he looked at that map and compared it with the corresponding boundary as shown by the recent survey; and where it differed he drew the line accordingly in favour of one or the other of the parties, as the variance in the marking of the map showed a difference in favour of one or the other, irrespective altogether of the Record of Rights. It is from the map so marked that he comes to the conclusion that the Record of Rights is wrong; and finds as a fact without proof that the Record of Rights is based on evidence as to possession which is not of a satisfactory character. The learned Judge knows nothing of what evidence was given before the Revenue Officer. He had the map marked as I have indicated, prepared for the purpose of this case at his own instigation. It may have been right or it may have been wrong, but it appears to me to have frittered away the provisions of the Statute. I doubt if the Judge could, behind the back of the parties to the Record of Rights, seek to have the accuracy of the record impeached upon one of the vital parts of the record. The learned Judge says again, "I am not disposed to follow the Record of Rights as to plot No. 419 when there is no satisfactory evidence of possession", and he says the same again with regard to part of plot No. 411, "I think it better not to follow the entry in the Record of Rights, for that entry seems to have been based on evidence that was insufficient." I think the learned Judge wrongly assumed a duty and an onus which the law never cast upon him; and that as the defendants produced the Record of Rights and as the Record of Rights was in their favour, I think that there was no evidence in law to warrant the Judge on appeal in finding against the contention put forward by the defence.

The learned Judge says, at page 14, that when he considers on which side of the boundary line a portion of the plot may fall, he thinks that great weight is to be attached to the part that is most upon one side of the line; and he adds that the presumption is very strong that the possession of this small portion has gone with the possession of the larger portion. Certainly in the case of Nos. 411 and 419, which he decided as falling within the village Kulharia, he adopted and acted upon the very converse of the principle which he laid down for himself to follow as a guide. I do not at all agree with the argument addressed to me that the Record of Rights is only evidence as between landlord and tenant. I think it is evidence in all cases where the subject-matter with which it deals is in dispute. In my opinion the learned Judge had not before him either evidence or materials to show that the Record of Rights was incorrect. I think the defendants have shown that they have been in possession for a considerable number of years in accordance with the Record of Rights.

I shall allow this appeal with costs. And as the evidence before the learned Judge was not, in my opinion, sufficient in law to justify him in discarding the Record of Rights and the entries therein, I will reverse his decision. I reverse the decision of the lower Appellate Court and dismiss this action with costs.

Appeal allowed.

MAUNG BA KYAW *v.* JANALLI.

LOWER BURMA CHIEF COURT.
CIVIL REVISION No. 52 OF 1915.
December 23, 1915.
Present:—Mr. Justice Maung Kin.
MAUNG BA KYAW, BY HIS ATTORNEY MAUNG PO MYAING—APPLICANT
versus
JANALLI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Failure to apply law, whether ground for revision.

A failure to take into account a proposition of law as to which there is no doubt, is a ground for revision under section 115, Civil Procedure Code.

Mr. *P. N. Chari*, for the Applicant.
Mr. *Patel*, for the Respondent.

JUDGMENT.—The applicant claims from the respondent arrears of house-rent for 18 months, from the 1st of February 1913, to the 31st of August 1914. Respondent's defence is that on the 5th of February 1913, he vacated the house and returned it to the applicant, after giving him due notice of his intention to quit, and that one Majir Had then took the house from the applicant.

Both the lower Courts have found that the respondent gave no notice to quit and did not return the house to the applicant and that, for 14 months from the end of January 1913, the respondent did not occupy the house.

Upon these findings the Court of first instance gave a decree as prayed for, holding that the burden was upon the respondent to prove that the relationship of landlord and tenant had ceased when he quitted the house and that Majir Had rented it after him from the applicant. The lower Appellate Court held that the applicant was entitled to one month's rent only in lieu of notice and accordingly gave a decree for only one month's rent.

The applicant applies for revision of the judgment of the lower Appellate Court.

Mr. Patel for the respondent objects that the application does not lie. On the authority of *Zeya* v. *Mi On Kra Zan* (1), I am of opinion that it does lie, because on the case as it stood the lower Appellate Court failed to take into account a proposition of law as to which there can be no doubt, namely, so long as the lease is not terminated, the lessee must pay rent. Now, if the only point in the case was—it appears that seemed to be the case to the lower Appellate Court—whether the tenancy was terminated by the tenant by giving due notice, and the Court held that it was not so terminated, it should apply the law applicable and not allow itself to be influenced by the apparent hardship in so doing.

But I think that there are other matters to be considered.

Respondent alleged that after he left the house, Majir Had rented it from the applicant. If that was so, that would be sufficient to warrant the inference that there had been a surrender of the tenancy from the date on which Majir hired the house. [See *Walls* v. *Atcheson* (2).] There was no issue on this point. I would, therefore, remand the case to the Court of first instance under Order XLI, rule 25. That Court will try the issues mentioned below and return the evidence to this Court together with its findings thereon and the reasons therefor within 6 weeks from the date of the receipt of the proceedings from this Court.

The issues are the following:—

1. Did Majir Had rent the house from the plaintiff after the defendant had left it, if so, when?

2. If Majir Had did not expressly rent it from the plaintiff, did plaintiff recognize him as his tenant by demanding rent from him or by any other overt act? and

3. If the plaintiff did so recognize Majir Had, from what date did he do so?

Case remanded.

(1) 2 L. B. R. 333.

(2) 11 Moore 379; 3 Bing. 462; 2 Car. & P. 268; 4 L. J. (o. s.) C. P. 154; 28 R. R. 657; 130 E. R. 591.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2434 OF 1914.

April 5, 1916.

Present:—Mr. Justice Mullick.

PIRTHI CHAND LAL CHOUDHRY—DEFENDANT—APPELLANT

versus

Sheikh MOHAMED TAHIR—PLAINTIFF RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 50, 115, application of—Suit for declaration that Record of Rights is incorrect—Fixed-rate tenant—Evidence of long payment anterior to preparation of Record of Rights, admissibility of—Presumption.

A suit for a mere declaration that the Record of Rights is incorrect is not one governed by the Bengal Tenancy Act. But even in a suit not governed by the Act, the fact of long payment of rent at an unchanged rate is evidence as showing that the holding is a fixed rate holding.

Golab Misser v. *Kumar Kalanand Singh*, 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884, *Nunda Lal Gossami* v. *Atarmoni Dassi*, 12 C. W. N. 432; 35 C. 763, referred to.

The evidence of payment, anterior to the publication of the Record of Rights, is admissible.

Maharaja Radha Kishore Manikya Bahadur v. *Umed Ali*, 12 C. W. N. 904, referred to.

Second appeal from a decision of the District Judge, Purneah, dated the 19th May 1914, affirming that of the Officiating Munsif, Purneah, dated the 28th July 1913.

Syed *Mahomed Tahir*, for the Appellant.

JUDGMENT.—The plaintiff is the tenant and the defendant is the landlord. The plaintiff sues for a declaration that the entry in the Record of Rights showing his holding to be a *kaimi jama* is wrong and that his correct status is that of a *raiyat* at fixed rates paying rent at the rate of Rs. 19 per annum. The learned District Judge finds, *firstly*, that the suit is under the Tenancy Act, and *secondly*, that the plaintiff has by evidence and by invoking the assistance of section 50 of the Bengal Tenancy Act established that he is a *raiyat* at fixed rates as claimed.

The landlord prefers this second appeal and the first point taken in his behalf is that this is not a suit under the Tenancy Act at all, and that if the suit is not one under that Act, the presumption under section 50 cannot apply. Now the relief which the plaintiff claims in the present suit is not a relief conferred by or based upon any provision of the Bengal Tenancy Act. The relief is for a mere declaration such as under the general law of the country the plaintiff is entitled to claim. It cannot,

in my opinion, be said that the suit is one under the Tenancy Act, but because the suit is not one under the Tenancy Act, it does not follow that the decision of the learned Appellate Court is wrong in law. The learned Court was competent to take into consideration the evidence of long payment of rent at an unchanged rate as showing that the plaintiff had a holding at fixed rates. The case of *Golab Misser* v. *Kumar Kalanand Singh* (1), following *Nunda Lal Gossami* v. *Atarmoni Dassi* (2), is direct authority in the plaintiff's favour.

The next contention of the learned Vakil for the appellant is that under section 115 of the Bengal Tenancy Act, evidence of payment anterior to the publication of the Record of Rights was not admissible. That, however, has been shown to be an erroneous proposition in *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (3).

The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884.
(2) 12 C. W. N. 432; 35 C. 763.
(3) 12 C. W. N. 904.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 OF 1915.

March 16, 1916.

Present:—Mr. Stuart, A. J. C.

KALKA PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SITLA BAKHSH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Burden of proof—Suit by claimant to property under attachment—Plaintiff, what must prove.

A person intervening unsuccessfully as an objector in execution proceedings, on the strength of a document of title, who is obliged to bring a fresh suit to establish his title, must give *prima facie* evidence that the document represents a *bona fide* transaction, in order to get rid of the order which has been passed against him. [p. 428, col. 2.]

Appeal against the decree of the District Judge, Lucknow, dated the 14th December

1914, upholding that of the Munsif, North Lucknow, dated the 4th July 1914.

Babu *Bisheshwar Nath*, for the Appellants.

Mr. *Mumtaz Husain* and Babu *Har Dyal*, for the Respondent.

JUDGMENT.—Kalka Prasad and Munna Lal held decrees on mortgages against Ujagar Singh. They brought the mortgaged properties to sale in satisfaction of those decrees. The sale-proceeds proving insufficient, they obtained simple money-decrees for the balance against Ujagar Singh, on 18th April 1913. In execution of those decrees they attached and brought to sale a certain share in the village of Hardharpur, which stood in the name of Ujagar Singh. Sitla Bakhsh Singh objected in those execution proceedings that Ujagar Singh had transferred that share to him by a deed of gift, dated the 9th December 1912. His objection being dismissed, he brought a suit in the Court of the Munsif of North Lucknow for a declaration that the share in question is not liable to attachment and sale under the decrees in question. Kalka Prasad and Munna Lal were joined as defendants. They replied that the deed of gift in question was fraudulent and collusive. The lower Courts placed upon them the burden of proof to show that the deed in question was fraudulent and collusive and, as they were unable to satisfy that burden of proof, decided the case against them in absence of evidence that the deed in question was genuine. Kalka Prasad and Munna Lal come here in second appeal.

In an exactly similar case, *Govind Atmaram* v. *Santai* (1), a Bench of the Bombay High Court held that, where a third party had objected in execution proceedings that she had a title to the property attached under a deed of sale and where her objection was dismissed, it was incumbent upon her, as the defendant had obtained an order maintaining the attachment, to prove her case. In *Ram Nath* v. *Bindraban* (2) Aikman, J., followed that decision and held that an objector whose objection had been dismissed in execution proceedings had to prove that the deed relied on was not fraudulent or collusive as had been found in the previous proceedings. In a subsequent case, *Nannhi Jan* v. *Bhuri* (3), it was held that a party intervening in the execution department and failing in his objections to an attachment must give *prima facie* evidence in a subsequent suit to establish the genuineness of the document upon which he relies. In *Raghubar Dayal* v. *Musammat Kaniz Husain* (4) Chamier, J. C., followed the two Allahabad rulings which have been quoted, and decided, that a person intervening unsuccessfully as an objector in execution proceedings on the strength of a document of title, who is obliged to bring a suit to establish his title, must give *prima facie* evidence that the document represents a *bona fide* transaction in order to get rid of the order which has been passed against him.

The view of law adopted in the above decisions requires no additional support. The proposition is clearly correct, and I have no hesitation in following the decisions of the Bombay and Allahabad High Courts and of this Court. The lower Courts have decided the case from a wrong standpoint.

I, therefore, set aside the decree and remand the case to the Court of original hearing for re-trial. I remand the case with directions that it be re-placed on the file of pending suits under its proper number and be disposed of on the merits, regard being had to the points which I have noted. The costs here and hitherto will abide the event.

Appeal accepted; Suit remanded.

(1) 12 B. 270.
(2) 18 A. 369; A. W. N. (1896) 106.
(3) 30 A. 321; A. W. N. (1908) 125; 5 A. L. J. 601.
(4) 2 Ind. Cas. 258; 12 O. C. 74.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3208 OF 1914.

March 27, 1916.

Present:—Mr. Justice Mullick and Mr. Justice Roe.

SRI RANG BEHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RACHEYA LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19—Appeal dismissed for default—One Vakil refusing to appear in absence of other—Negligence—Ground for setting aside order of dismissal for default.

Adjournment of an appeal was sought on the ground that the better of the two Vakils both of whom represented the appellant, was absent from the station. The Court refused adjournment and proceeded to hear the appeal. The other Vakil declined to appear with the result that the appeal was dismissed for default:

Held, (1) that the Vakil's conduct amounted to a very gross neglect of his client's interests:

(2) that there was no ground for setting aside the order dismissing the appeal for default.

Second appeal from a decision of the District Judge, Muzaffarpur, dated the 6th and 9th June 1914, modifying that of the Subordinate Judge, Muzaffarpur, dated the 25th March 1913.

Mr. *Baldeo Narain Sinha*, for the Appellants.

Mr. *Saroshi Charan Mitter*, for the Respondent.

JUDGMENT.

ROE, J.—This appeal is directed against two orders of the District Court at Muzaffarpur, one dated the 6th June 1914 rejecting an application for re-hearing of an appeal, the other dated the 9th June 1914, disposing, *ex parte*, of a cross-appeal in connection with the same matter. The ground upon which the order of the 6th June is attacked is, that it is shown that the reason of the appellant's failure to prosecute his case was some slight neglect on the part of his legal advisers, and that this neglect, being the first committed in the case, should have been condoned. It appears that a *karpardaz* in the plaintiff's employ and the Vakil who had argued the case in the lower Court were present in Muzaffarpur and presumably in a position to go on with the case on the day fixed. The appellant, on the pretext that his best *karpardaz* and a Pleader better than the one originally employed were respectively ill and absent for three weeks from the station, applied for an adjournment. On being told that they must go on with the case, the *karpardaz* and the Pleader in Muzaffarpur declined to appear in the District Judge's Court. I regard this as very gross neglect of the client's interests. I am not of opinion that justice demands that the case should be re-heard. Condonement of such negligence can result only in its continuance.

With regard to the cross-appeal disposed of by the order of the 9th June, I again note gross neglect of the interests of the appellant, if indeed there was in his case anything but a desire to postpone, as long as possible, the evil day of restitution of the profits of the property that he had wrongfully acquired. Ample notice was given to his Pleaders that the question of mesne profits would be considered on the 9th June. The Pleaders deliberately absented themselves from Court, taking it for granted that the District Judge's orders dismissing the main appeal for default would be upset. Upon the arguments adduced before the learned District Judge, it was obvious that the cross-appeal must be decreed. Mesne profits had been given at the original hearing of the case by two Courts arriving at concurrent conclusions of fact and there was no interference with those orders in appeal to the High Court at a former hearing. Upon all the merits of the case the appeal fails. The appeal against the order for mesne profits is dismissed with costs *ad valorem*. I would make no other order as to costs of the appeal against the order of the 6th June, refusing to restore the main appeal.

MULLICK, J.—I agree that the appeal should be dismissed.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 52 OF 1915.

August 31, 1915.

Present:—Mr. Justice Ormond and Mr. Justice Twomey.

VALLIAPPA CHETTY AND OTHERS—APPELLANTS

versus

RUNGASAWMY NAICKER—RESPONDENT.

Court Fees Act (VII of 1870), Sch. I, Art. 1 and

KISHUN DEYAL SINGH *v.* KISHUN DEO JHA.

Sch. II, Art. 11—*Decree against firm—Execution, application for, against alleged partner—Order rejecting application—Appeal, Court-fee on memorandum of—Civil Procedure Code (Act V of* 1908*), Sch. I, O. XXI, r.* 50 (3).

An order refusing execution of a decree against an alleged partner of a firm against which the decree is passed, has the force of a decree and an appeal against such order should be stamped *ad valorem*, the matter being governed by Court Fees Act, Schedule I, Article 1, and not by Schedule II, Article 11.

FACTS.—The appellants obtained a decree against a firm and applied to the District Court for execution against the respondent, who, they alleged, was a partner of the firm. The District Court rejected the application on the ground that it was not proved that respondent was a partner.

An appeal having been preferred against the said order, a question was raised as to the proper Court-fee payable on the memorandum of appeal.

Mr. *J. R. Das*, for the Appellants.

Mr. *Campagnac*, for the Respondent.

ORDER.—The Court-fee payable on this appeal is regulated by Article 1, Schedule I, of the Court Fees Act. The order appealed against is an order which has the force of a decree [Order XXI, rule 50 (3)], and, therefore, does not come under Article 11, Schedule II, of the Court Fees Act. And there is no notification under section 35 of the Act in respect of orders under rule 50 as there is in respect of orders under section 47 of the Code. The Court-fee should, therefore, be *ad valorem*.

Order accordingly.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 768 AND 1522 OF 1914.

April 5, 1916.

Present:—Mr. Justice Mullick.

KISHUN DEYAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISHUN DEO JHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908*), Sch. I, Arts.* 120, 36, 115—*Co-sharer, action as between for profits of ferry.*

A suit by one co-sharer against another to recover his share in the profits of a ferry is governed by Article 120 and not by Article 36 or 115 of the Limitation Act.

Robert Watson v. *Ram Chand Dutt*, 23 C. 799, referred to.

Second appeals from the decisions of the District Judge, Purneah, dated the 20th December 1913, affirming those of the Subordinate Judge, Purneah, dated the 26th February 1913.

Mr. *Harihar Prasad Singh*, for the Appellants

Mr. *Kulwant Sahai*, for the Respondents.

JUDGMENT.—The plaintiffs are co-sharers of a certain ferry and sue the defendants, first party, who are certain other co-sharers, for their share of the profits of the ferry for the years 1315 to 1317 F. S. The Subordinate Judge gave a modified decree reducing the plaintiffs' claim as to the profits to a lower figure than that alleged in the plaint. That decree was upheld on appeal by the District Judge. The defendants first party now prefer the present second appeal before me. The *first* contention urged by the learned Vakil on their behalf is that the claim for 1315, 1316 and 1317 was barred under Article 36 of the Limitation Act. It appears, however, that in the Courts below and in the grounds of appeal before me only the claim for 1315 is alleged to have been barred under Article 36. The learned Vakil for the appellants says that this was an error. However that may be, it is quite clear that Article 36 has no application. There was no malfeasance, misfeasance or non-feasance by the defendants. The defendants were co-sharers of the plaintiffs and it is no one's case that defendants dispossessed the plaintiff or committed any tort. The case of *Robert Watson* v. *Ram Chand Dutt* (1) is indistinguishable from the present case and governs the period of limitation, which is six years under Article 120.

The *next* contention is that if Article 36 does not apply, then Article 115 applies. Now this argument was not advanced in any of the Courts below and is now taken for the first time. It has clearly no substance because there is no proof of any express or implied contract on the part of the co-sharer defendants to pay to the plaintiffs their share. The appeal fails and is dismissed with costs.

This judgment will also govern Appeal No. 1522 of 1914.

Appeals dismissed.

(1) 23 C. 799.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 179 OF 1914.
September 3, 1915.
Present:—Sir Charles Fox, KT.,
Chief Judge.
FOESON OR FAKIR CHAN AND ANOTHER—APPELLANTS
versus
ADI CHANDRO BORWA—RESPONDENT.

Buddhist Law, Burmese, applicability of, to Rajbansis—Custom.

Burmese Buddhist Law is not applicable to Rajbansis, even if they are Buddhists. The law applicable to them is the customary law prevailing among them in their habitat.

Ma Tin v. *Doop Raj Barna*, 1 Chan. Toon's L. C. 370; U. B. R. (1892-96) II, 608, dissented from.

Fone Lan v. *Ma Gyee*, 2 L B R. 95, referred to.

Mr. *Campagnac*, for the Appellants.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT.—The case was between Rajbansis or Mugs. One question for determination was whether the wife of a Rajbansi had an interest in property which had been bought by her husband. The District Judge, on the strength of the decision in *Ma Tin* v. *Doop Raj Barna* (1), was of opinion that she had. The part of the judgment quoted by the District Judge, *viz.*, "*prima facie*, as a Buddhist, deceased would come under the Buddhist Law of the country at large, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance", appears to me to be entirely opposed to the course of decisions in the Indian Courts, some of which are referred to in *Fone Lan* v. *Ma Gyee* (2). The various races are accorded the customary law prevailing amongst them, and such customary law is applied to them in whatever part of the Indian Empire they may settle or be. I cannot accede to the proposition that Burmese Buddhist Law is applicable to the Rajbansis, even if they are Buddhists. The law to be applied to them is the customary law prevailing amongst them in their habitat, which is Chittagong. Burmese Buddhist Law not being applicable in the case, there is no foundation for the claim that the wife in this case owned half the property sold to the deceased whom the plaintiff represents.

(1) 1 Chan. Toon's L. C. 370; U. B. R. (1892-96) II, 608.

(2) 2 L. B. R. 95.

It was for the contesting defendants to show that under the customary law applicable to Rajbansis a wife had an interest in property bought by her husband. There was no evidence that this was the case. The defence should have been held untenable on this ground. In this view the grounds of appeal to this Court are irrelevant.

The appeal is dismissed with costs—three gold *mohurs* allowed as Advocate's fee.

Appeal dismissed.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 3024 OF 1914.
April 6, 1916.
Present:—Mr. Justice Mullick.
BANWARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
JAGAR NATH PRASAD—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 80—Hundi—No interest mentioned in instrument—Oral evidence to prove contemporaneous agreement to pay interest, if admissible—Evidence Act (I of 1872), s. 92.

In a suit upon a *hundi*, in which no rate of interest is mentioned, the plaintiff is entitled to interest at the rate of 6 per cent. per annum under section 80 of the Negotiable Instruments Act. No evidence is admissible under section 92 of the Evidence Act, to prove an oral contemporaneous agreement as to the rate of interest. [p. 432, col. 1.]

Second appeal from a decision of the District Judge, Patna, dated the 5th August 1914, confirming that of the Subordinate Judge, Patna, dated the 28th January 1914.

Mr. *Ganesh Dutt Singh* (with him Mr. *Sivanandan Ray*), for the Appellants.

Mr. *Kulwant Sahai*, for the Respondent.

JUDGMENT.—The defendant No. 2 is the drawer, defendant No. 1 is the acceptor and the plaintiff is the payee. The *hundi* mentions nothing about interest but the lower Appellate Court has decreed the rate of 12 per cent. per annum on the footing of an oral contemporaneous contract. The present second appeal is preferred by the two defendants on the ground that the plaintiff is not entitled to more than 6 per cent. interest under the provisions of section 80 of the Negotiable Instruments Act. There can be no doubt, and it is in fact conceded, that the *hundi* is a negotiable instru-

ment in this case. Therefore, unless there is a special rate of interest contracted for by some other contract contemporaneous with the *hundi*, section 80 must apply. There is no such other contract in writing nor is oral evidence in support of any such contract admissible under section 92 of the Evidence Act. The case of *Luchmi Chand Jhowar* v. *Hemendra Prasad Ghosh* (1) is authority for this. Therefore, section 80 must apply and the plaintiff is entitled only to 6 per cent. interest. It was sought somewhat faintly to argue that if more than 6 per cent. interest was not allowable the plaintiff was at least entitled to 12 per cent. as damages, but the plaintiff does not show that any case for damages was made in the Courts below. The appeal will, therefore, succeed and the decree of the lower Appellate Court will be modified to the extent that interest will be calculated not at 12 per cent. but at 6 per cent. No order will be made as to costs.

Decree modified.

(1) 26 Ind. Cas. 935; 18 C. W. N. 1260 at p. 1263.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 107 OF 1915.

July 1, 1915.

Present:—Mr. Justice Twomey.

AUNG HLA—PLAINTIFF—APPELLANT

versus

TON GYI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144 *—Suit for possession based on title—Adverse possession, plea of—Burden of proof—Entry in revenue map, value of, in proving title—Evidence Act (I of* 1872*), s.* 102.

In a suit for possession of immoveable property based on title, in which the plaintiff does not allege dispossession, the plaintiff must first prove his title, and the defendant cannot be required to prove adverse possession until the plaintiff has proved his title. [p. 432, col. 2.]

An entry in a revenue map is not sufficient to establish title to immoveable property. [p. 433, col. 1]

Mr. *Ginwala*, for the Appellant.

JUDGMENT.—The plaintiff sued for possession of a strip of garden land, measuring ·27 of an acre and appearing in the revenue maps and registers as part of a holding which he bought in 1911 from a Karen woman named Ma Nabu. The strip is in the possession of the defendants who own the adjoining land, and the defendants' case is that the disputed strip forms part of their land which they bought in 1906 from one Maung Pa Gale.

The Township Court found that the plaintiff had established his title and that his suit was in time, and accordingly gave the plaintiff a decree. On appeal the District Court held that the plaintiff's suit must fail, as he had not shown possession by himself or his predecessor-in-title within a period of twelve years before the date of institution of the suit.

The plaintiff has now appealed to this Court and it is contended that the District Judge erred in applying Artice 142 of the Schedule of the Limitation Act, that Article 144 applies and, therefore, that on the plaintiff proving his title it was incumbent on the defendants to show that they had possession inconsistent with the plaintiff's title for upwards of twelve years before the suit. This contention is correct. The plaintiff does not allege dispossession. What he says is that in 1914, *i.e.*, about three years after he had bought the land from Ma Nabu, a Land Records subordinate brought to his notice that part of the area shown on the *kwin* maps as Ma Nabu's garden plot was occupied by the defendants. He, therefore, brought the suit. The case falls under Article 144 and not under Article 142.

It is further contended that the defendants have failed to prove adverse possession for twelve years. But before the defendants can be required to prove adverse possession it is necessary to see whether the plaintiff has proved title. The Township Court's finding on this point is based on the extracts from the revenue maps and on the evidence of the witness Bo Yi. The District Judge gives good reasons for disregarding Bo Yi's evidence altogether. This witness says that when the defendants bought their land, he helped them to put up a fence on the boundary over against Ma Nabu's land. He does not explain why he helped them to grab part of Ma Nabu's land. His evidence as to what Maung Pa Gale pointed out as the boundaries of his land is confused. On

the other hand there is no evidence that Ma Nabu was ever in possession of the strip now in dispute. She is still living and was even cited as a witness by the plaintiff, but she was not examined. This tells strongly against the plaintiff. According to plaintiff's 3rd witness Maung Sin, Ma Nabu's son objected to the defendants' fence saying that he thought the defendants were encroaching. This witness is admittedly on bad terms with the defendants. His evidence, if true, would only show that Ma Nabu was aware of the fact that the defendants in 1906 enclosed a strip of land shown on the maps as hers and that she took no active measures to assert her claim to it but allowed defendants to remain in occupation year after year. The plaintiff admits that his vendor Ma Nabu never told him that the defendants had encroached on her garden plot. Even the plaintiff's own witness Maung Sin says that before the defendants put up the fence the fruit growing on the land was enjoyed by the "public." There is nothing to show that Ma Nabu exercised rights of ownership over it.

If the plaintiff had proved that Ma Nabu was ever in possession, it would no doubt be necessary for the defendants to prove twelve years' adverse possession. But the plaintiff having failed to prove possession by his vendor at any time, the mere fact that the disputed land is shown as part of his holding in the revenue map is not sufficient to establish his title. It may well be that the map is incorrect.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2997 OF 1914.

April 6, 1916.

Present:—Mr. Justice Mullick.

Sheikh AMIRUDDIN *alias* TINCOWRIE—PLAINTIFF—APPELLANT

versus

Sheikh SAIDUR RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 111 (a)—Suit for declaration—Limitation.

In a Record of Rights finally published in 1905, the plaintiff was shown as defendant's tenant liable to pay rent to him. In 1908 the landlord obtained an *ex parte* decree for arrears of rent which the plaintiff paid off. In 1912 the landlord again brought a suit for rent, which the plaintiff contested but his contention failed. On 7th of October 1912 the plaintiff brought a suit for a declaration that he was a *lakheraj raiyat* and that he was not liable to pay rent:

Held, that the suit was in effect to correct the Record of Rights and as such was barred by limitation, having been filed after more than 6 years from the date of the final publication of the Record of Rights when the cause of action arose. [p. 434, col. 1.]

Second appeal from a decision of the District Judge, Purneah, dated the 20th June 1914, reversing that of the Munsif, Purneah, dated the 23rd September 1913.

FACTS.—In a Record of Rights finally published on the 14th of November 1905, the plaintiff was shown as the defendant's tenant liable to pay rent to him. On the 15th of December 1906 rent was assessed upon the land under section 105 of the Bengal Tenancy Act. In 1908 the defendant-landlord obtained an *ex parte* rent-decree which the plaintiff paid off. In 1912 the defendant brought another suit for recovery of rent. The plaintiff contested the suit, but his contention failed and a decree was passed against him on the 1st of August 1912. On the 7th of October 1912 the plaintiff brought this suit for a declaration that he was a *lakheraj raiyat* of the defendant and that he was not liable to pay rent. He based the cause of action of his suit on the decree passed against him on the 1st of August 1912. The Munsif decreed the suit, but the District Judge dismissed it as barred by limitation. The plaintiff appealed to the High Court.

Mr. *Baldeo Narain Singh* (with him Messrs. *Jogendra Nath Mukherji* and *Sivanandan Ray*), for the Appellants.

Mr. *Mohammad Ishfaq* (for Mr. *A. S. M. Akram*), for the Respondents.

JUDGMENT.—The plaintiff is the tenant and the defendant is the landlord. The Record of Rights shows the plaintiff to be liable to pay rent to the landlord at a certain rate. In 1908 the landlord obtained an *ex parte* decree for rent against the plaintiff. In execution of that decree he brought to sale a holding and purchased it himself, but the tenant paid up the amount within one month and got the holding back. In 1912 the landlord again sued for rent. The plaintiff con-

tested that suit, but failed and a decree was made against him on the 1st of August 1912. The plaintiff states that his cause of action accrued from the date of that decree and he brought the present suit on the 7th of October 1912, for a declaration that he is a *lakheraj raiyat* on the land and that he is not liable to pay rent to the defendant. The Munsif decreed the suit, but the Subordinate Judge has dismissed it on the ground of limitation; hence this second appeal by the plaintiff.

The only point urged before me is whether the suit is barred by limitation or not. The learned Vakil for the appellant relies upon *Ram Gulam Singh* v. *Bishnu Pargash Narain Singh* (1) and says that the Record of Rights is at best only evidence creating a presumption of title and that it was not necessary for the plaintiff to sue to set aside that presumption; that the suit is not one that has any reference to the Record of Rights, but that it is a suit which he is entitled to bring under the general law and that his cause of action properly dates from the last rent-decree. It is obvious that the suit is a declaratory suit. The learned Vakil for the appellant does not admit, but it is quite clear, that the suit is one substantially under section 111A of the Bengal Tenancy Act. The plaintiff carefully refrains from making any reference to the Record of Rights, because he knows that the period of limitation for getting declaratory relief in respect of entries in a Record of Rights is six years from the date of the publication. That has been decided in various cases and also in the case of *Ram Gulam Singh* v. *Bishnu Pargash Narain Singh* (1), which has been cited by the learned Vakil for the appellant. The only question is, whether the present suit is one under section 111A of the Bengal Tenancy Act. In my opinion it is. Although no reference is made to the Record of Rights, the effect of the declaration which the plaintiff seeks will be to correct the Record of Rights, and that being so, it makes no difference whether the plaintiff does in so many words attack the Record of Rights or not. The cause of action, therefore, accrued not on the date of the decree mentioned by the plaintiff, but on the date of the publication of the Record, and as that took place more than six years before the institution of the suit, the suit is barred. The appeal fails, and is dismissed with costs.

Appeal dismissed.

(1) 11 C. W. N. 48.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 206 OF 1914.

December 23, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

Thakur GOURI SHANKER SINGH—PLAINTIFF—APPELLANT

versus

Rai BAJRANG BAHADUR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Decree for sale obtained by prior mortgagee without impleading puisne mortgagee—Subsequent suit for redemption by puisne mortgagee—Adjustment of accounts—Proper procedure.

In cases where the correctness of the account contained in a previous decree, to which the person seeking redemption was not a party, is impugned, the proper course is to proceed on the basis of the mortgage to find out whether the amount then declared to be due to the mortgagee was excessive and if it was, to re-adjust the account, as if no such decree had been obtained. [p. 436, col. 1.]

A person who was not made a party to a decree cannot be held bound by an account made therein, and if the account embodied in the decree is shown to be mistaken, he can fall back on the mortgage-deed and repudiate his liability for anything beyond what is actually due on the mortgage. [p. 436, col. 1.]

Where, therefore, in a suit for redemption of a prior mortgage brought by a puisne mortgagee it appeared that the prior mortgagee had obtained a decree for sale on the basis of his mortgage without impleading the puisne mortgagee:

Held, that the puisne mortgagee was entitled to have the accounts adjusted on the basis of the original mortgage. [p. 436, col. 1.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 1st May 1914, modifying that of the Subordinate Judge, Rae Bareli, dated the 7th January 1914.

Messrs. *Samiullah Beg* and *Ali Mohammad*, for the Appellant.

Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption, and the question for consideration relates to the amount claimable on the mortgage. The mortgage was effected by Rao Bahadur Singh in favour of

Harchand Singh, the father of defendants Nos. 1 and 2, and Chandrapal Singh, the husband of defendant No. 3, in lieu of Rs. 700 on the 31st May 1887. The mortgage-deed provided for the re-payment of the mortgage money wth interest thereon at 1 per cent. per mensem between *Asarh* 1294 and *Jeth* 1295 *Fasli*. In case of default, the stipulation was that the mortgagees would be entitled to take possession of the mortgaged property and appropriate the profits thereof, which were estimated at Rs. 84 per annum, towards the payment of the interest due to them. There was a further provision that if the annual profits exceeded Rs. 84, the mortgagees would pay the excess to the mortgagor, and if it was less, the mortgagor would make up the deficiency, paying interest on the deficit at the rate of 1 per cent. per annum. The mortgagor was given a right to redeem the mortgage in the month of *Jeth* in any fallow season on payment of the principal money secured by the mortgage, and the interest remaining due at the time with interest on the latter at the rate above specified, in addition to any arrears of rent which might then be due by the tenants of the mortgaged property. The mortgagor did not pay the mortgage money at the stipulated date. The mortgagees, therefore, sued Kishenpal Singh and Sripal Singh, the sons and heirs of Ran Bahadur Singh, for possession of the mortgaged property and obtained a decree on the 12th March 1896. They were unable, however, to obtain actual possession. During the pendency of that suit Kishenpal Singh and Sripal Singh mortgaged the same property by conditional sale, along with other property, in favour of Sheo Ghulam Singh in lieu of Rs. 8,000 on the 26th February 1896. Other sums too were, subsequently, lent by Sheo Ghulam Singh to the same persons on deeds of further charge in 1897 and 1898. On the 19th April 1900 Kishenpal Singh and Sripal Singh sold their rights in the mortgaged property to Sheodat Singh, the father of Sheo Ghulam Singh and Gouri Shanker Singh. Subsequently, on the 13th December 1901, the sons of Harchand Singh and Chandrapal Singh filed a suit against Sripal Singh and Kishenpal Singh, the representatives of the original mortgagor, and Sheodat Singh, the assignee of the mortgaged property, for the recovery of the the mortgage money by the sale of the mortgaged property. In the plaint they alleged that although they got a decree for possession they were not able to get actual possession of the mortgaged property. On the 17th January 1902 they obtained a decree for sale against the above persons, which was made absolute for Rs. 2,795-2-0 on the 30th August 1902. In execution of that decree, they purchased the mortgaged property for Rs. 3,000 on the 20th November 1903, and succeeded in obtaining possession on the 20th April 1904. Sheo Ghulam Singh similarly obtained a decree for foreclosure in respect of his mortgage and deeds of further charge on the 4th April 1908, subject to the rights of Harchand Singh and Chandrapal Singh under the prior mortgage. Chandrapal Singh and the heirs of Harchand Singh were made parties to that suit. Sheodat Singh and his sons, Sheo Ghulam Singh and Gouri Shanker Singh, lived jointly, but it appears that Sheo Ghulam Singh carried on some separate business of his own too. On the death of Sheodat Singh and Sheo Ghulam Singh, a partition took place between Gouri Shanker Singh and the heirs of Sheo Ghulam Singh, whereby the village in dispute, which was subject to the prior mortgage, was allotted to the share of Gouri Shanker Singh. Gouri Shanker Singh, therefore, sued for redemption of the prior mortgage. His contention was that as a representative-in-interest of Sheo Ghulam Singh, the subsequent mortgagee, who was not made a party to the suit brought on the mortgage, he was entitled to redeem the same on payment of such amount as might be adjudged by the Court.

The Court of first instance held, that Rs. 3,000 were due to the prior mortgagees, but the lower Appellate Court found that the amount due to them was Rs. 7,436-14-3; the difference between the two figures having been due to the diversity of the method adopted by each of the said Courts, in adjusting the accounts. The Court of first instance proceeded mainly on the basis of the mortgage. The lower Appellate Court

proceeded on the basis of the decree for sale obtained by the prior mortgagees, to which the present plaintiff-appellant Gouri Shanker Singh or his predecessor-in-interest, Sheo Ghulam Singh, was not a party, adding to it certain other amounts to which in its opinion the defendants were entitled. The method in which compound interest was calculated by the two Courts also varied.

The plaintiff-appellant impugns the correctness of the account adopted in the previous suit for sale, to which his predecessor-in-interest was not a party. It is contended by the defendants-respondents that Sheo Dat Singh, the father of the plaintiff-appellant, was a party to the previous suit for sale, and as he was the head and manager of the family to which the plaintiff belongs, the appellant was bound by that decree. That contention has, however, no force, because the plaint in the previous suit for sale shows that Sheo Dat Singh was impleaded as an assignee of the equity of redemption. He was not impleaded as a manager of a joint Hindu family, comprising himself and his sons, Gouri Shanker Singh and Sheo Ghulam Singh, and no reference was made to the rights of Sheo Ghulam Singh or of the joint family, if the latter had any rights in the subsequent mortgage. This plea was, moreover, considered in the suit for foreclosure filed by Sheo Ghulam Singh on his subsequent mortgage, and as the defendants-respondents were parties to that decree, the decision in that suit is final and conclusive. In cases where the correctness of the account contained in a previous decree to which the person seeking redemption was not a party, is impugned, the proper course is to proceed on the basis of the mortgage to find out whether the amount then declared to be due to the mortgagee was excessive, and if it was, to re-adjust the account, as if no such decree had been obtained. A person who was not made a party to a decree cannot be held bound by an account made therein, and if the account embodied in the decree is shown to be mistaken, he can fall back on the mortgage-deed, and repudiate his liability for anything beyond what is actually due on the mortgage. The principal mortgage money in this case was Rs. 700, the amount of interest payable thereon from the 31st May 1890 to the 20th April 1904, when the prior mortgagees got possession of the mortgaged property in their capacity as auction-purchasers, at the rate specified in the mortgage amounted to Rs. 1,166-10-8. Under the terms of mortgage the mortgagees were entitled to claim interest on the interest remaining unpaid at the rate of 1 per cent. per mensem. There was a deficit in the interest due to the mortgagees after the date when they got possession amounting to Rs. 23-1-0 per year. The mortgagees are, therefore, entitled to Rs. 700 on account of the principal money secured by the mortgagee, Rs. 1,166-10-8 on account of interest from the 31st May 1890 to the 20th April 1904, leaving the interest for the first three years, which had admittedly been paid, out of the account (*vide* paragraph 5 of the plaint in the previous suit, Exhibit A8), Rs. 269-1-0 on account of the deficit interest from the 20th April 1904 till the date of this decree, and Rs. 172-5-10 on account of interest on the arrears of interest remaining due at 1 per cent. per mensem, besides Rs. 1,672 on account of prior encumbrances paid by them to Durga Sah and Jagmohan Singh in regard to which there is no contest. The total amount to which the mortgagees are entitled is thus Rs. 3,980-1-6.

The appeal is, therefore, allowed and the plaintiff's claim decreed for redemption of the mortgaged property, subject to the payment of Rs. 3,980-1-6 to the defendants-mortgagees with proportionate costs incurred by them here and in the Courts below and interest on the said amount at 1 per cent. per mensem till the date of payment, after deducting Rs. 84 per year hereafter from such interest on account of the profits of the mortgaged property which is in their possession. The decree will be framed in terms of Order XXXIV, rule 7, of the Code of Civil Procedure. Six months' time will be allowed for payment. In case of default the mortgagees will be entitled to bring the mortgaged property to sale. The plaintiff-appellant will, under the circumstances, bear his own costs of the Courts below and get his proportionate costs of this appeal from the contesting respondents.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1807 AND 2159 OF 1914.

April 6, 1916.

Present:—Mr. Justice Mullick.

GUR SAHAI MAHTO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KESHWAR SAHU—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 29, 179—Landlord and tenant—Enhancement of rent—Mukarrari patta—*Notice by tenant to landlord to perform certain acts in terms of* patta—*Ratification—Undue influence.*

By a *kabuliyat* a tenant agreed to pay an enhanced rate of rent and in consideration thereof the landlord passed a *mukarrari* interest in his land within the meaning of section 179 of the Bengal Tenancy Act. Subsequent to the execution of the *kabuliyat* the tenant served a notice upon the landlord to sink a *pakka* well in accordance with the terms of the *kabuliyat*:

Held, that section 29 of the Bengal Tenancy Act did not apply to the case, inasmuch as the *kabuliyat* created a permanent *mukarrari* interest within the meaning of section 179 of the Act. [p. 437, col. 2; p. 438, col. 1.]

Held, also, that the notice amounted to a ratification of the *kabuliyat* and it was not subsequently open to the tenant to plead that the *kabuliyat* was executed under undue influence. [p. 437, col. 2.]

Second appeals from the decisions of the District Judge, Patna, dated the 3rd April 1914, modifying those of the Munsif, Patna, dated the 26th September 1913.

Mr. *Ganesh Datt Singh*, for the Appellant.

Syed Mohammad Tahir, for the Respondent.

JUDGMENT.—The plaintiff is the landlord, the defendant is the tenant. The plaintiff brought the two suits out of which these two appeals before me arise, for the rent of two holdings measuring, respectively, 9 *bighas* and 6 *bighas* at a rental of Rs. 5 per *bigha*. The defence was that the rent of the former holding was Rs. 10-6 and of the latter Rs. 7-8. The plaintiff claimed upon the strength of a *patta* and *kabuliyat* dated 12th of June 1906. The Munsif held that the *kabuliyat* was executed under undue influence and decreed the suits at the rates admitted by the tenant. The plaintiff appealed and succeeded in the Court of the Additional District Judge in getting a decree at the full rates claimed. The defendants now prefer the present second appeals. It has been found as a fact by the learned Additional District Judge that the *kabuliyat* executed by the defendants was vitiated by undue influence, but the learned Additional District Judge has held that the *kabuliyat* was subsequently ratified by the defendants and that, as by the terms of the *kabuliyat* a permanent *mukarrari* lease was created, the plaintiff is not barred by the restrictions laid down in section 29 of the Bengal Tenancy Act, from getting the rent which has been decreed. The effect of the decree is to give a total increase of Rs. 58 upon the two holdings.

Now the *first* point urged by the learned Vakil for the appellants is that there was no election or ratification by the defendants and that, therefore, it is not a case which comes under section 19 (*a*) of the Indian Contract Act. Now it appears that about 4 years after the *kabuliyat* was executed, namely, on the 2nd of February 1910, the defendants through their Pleaders served the landlord with a notice; that notice recited the fact that on the 12th of June 1906 a *kabuliyat* was executed by which the defendants had agreed to pay rent at the rate of Rs. 5 per *bigha* on the two holdings and the landlord had agreed to sink a *pakka* well for irrigating the lands at his own expense and to do certain earthwork, and that as the landlord had failed to carry out his part of the contract, the land was not yielding as much as it ought to. The notice further called upon the landlord to sink a *pakka* well and to raise the earthwork within one month from the receipt of the notice and informed him that in the event of failure to do so, the defendants would take such legal proceedings for the reduction of the rent as might be considered proper. Now it is clear that this notice was a ratification of the *kabuliyat*. I agree with the learned Additional District Judge that the intention of the defendants was to accept the *kabuliyat* on condition that the landlord carried out his part of the contract. It is no longer open to the defendants to plead that there was undue influence, provided the landlord has sunk the well and done the earthwork which he promised to do. It is, however, contended that even if the *kabuliyat* has been ratified the enhancement, being illegal, cannot be enforced, and this brings me to the *second* point raised by the learned Vakil for the appellant. He relies on section 29 of the Bengal Tenancy Act, but it is clear that section 29 has no application, because the *kabuliyat* and *patta* created a perma-

nent *mukarrari* lease within the meaning of section 179 and, by the express terms of the Statute, section 29 is not applicable to a lease of this kind. The *patta* and its counterpart, the *kabuliyat*, recite that the tenants are to have their perpetual status at a fixed rate of rent of Rs. 5 per *bigha*, and that the landlord is not to have any power of enhancement. It is true that the document does not say that any heritable and transferable status is given, but it is quite clear from the terms of the document that the intention of the landlord was to create, what is commonly known as a permanent *mukarrari* interest. That being so and the question really depending upon the construction of the document, I agree with the learned Additional District Judge that the enhancement was not governed by section 29 of the Bengal Tenancy Act. The learned Judge below has added a further ground in support of his decree. He finds that the landlord has since 1318 *Fasli*, by sinking the well and doing earthwork, made improvements within the meaning of section 29 and that he is, therefore, entitled to the enhanced rent. But it is to be noticed that the suit is not based on a claim for enhancement for improvements and in order to make out such a claim it is necessary to comply strictly with the provisions of section 33 of the Bengal Tenancy Act. This the landlord has not done; moreover, there was no case of enhancement made in the plaint or litigated in the Court of first instance and in, my opinion, the learned Judge's observation that the enhancement may also be supported on the ground of improvements is wrong. But for the reasons already given by me the decree is correct and the result is that the two appeals must be dismissed with costs.

Appeals dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 166 OF 1914.

May 15, 1916.

Present:—Mr. Justice Parlett.

MA MIN THIN—PLAINTIFF—APPELLANT

versus

MAUNG PO WIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Decree passed after death of party, validity of—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Application to bring on record legal representatives of deceased appellant—Decree passed after death of plaintiff, effect of—Limitation—LimitationAct (XV of 1877), s. 6, Sch. II, Art. 175 A—Limitation Act (IX of 1908), Sch. I, Art. 176—Minors.

A decree passed in favour of a party after his death is a nullity.

Janardhan Krishna Padhye v. *Ram Chandra Vithal Ranade*, 26 B. 317; 4 Bom. L. R. 32, referred to.

An application under Order XXII, rule 3, Civil Procedure Code, to bring on record the legal representatives of a deceased appellant must be made within six months of the latter's death.

Section 6 of the Limitation Act does not apply to such applications.

Mr. *Wiltshire*, for the Appellant.

Mr. *Palit*, for the Respondents.

JUDGMENT.—Ma Min Thin filed an appeal on the 4th May 1914. The appeal was heard on the 10th and 11th May 1915 and judgment was delivered on 20th May 1915, remanding the case for a decision on the merits by the lower Appellate Court. It now appears that Ma Min Thin died on the 16th December 1914, that is, nearly five months before the appeal was heard. The decree subsequently passed in that appeal was, therefore, a nullity. [*Janardhan Krishna Padhye* v. *Ramchandra Vithal Ranade* (1).] Under Order XXII, rule 2, read with Article 175A, Schedule II, to the Limitation Act, the appeal abated on 16th June 1915. On 31st July 1915 Ma Min Thin's husband, Maung Aing, appeared before the District Court and asked for time to make an application to this Court to have the abatement set aside and Ma Min Thin's legal representatives brought upon the record. The case was postponed till 5th October 1915, upon which date Maung Aing again appeared, with his sons Maung Tha Ko, Maung Tha Hmo and Aung Nyun, the last named a minor. Maung Aing and his adult sons asked for further time to apply to this Court and the case was adjourned till 20th December. On 12th January 1916, the present application was filed by Maung Aing

(1) 26 B. 317; 4 Bom. L. R. 23.

in his personal capacity and also as next friend of two minor children, and by Tha Ko and Tha Hmo. It is, of course, long out of time, having become barred on 15th August 1915, under Article 171, Schedule II, to the Limitation Act. Maung Aing alleges that he became insane after his wife's death and only fully recovered his reason in July 1915. This is certainly not proved but even if it were it would be no ground to admit the present application. Maung Aing was clearly and admittedly sane on 31st July 1915; at most, therefore, his insanity would entitle him to time up to 29th September 1915. The other adult petitioners allege no cause whatever, and section 6 of the Limitation Act as it now stands will not avail the minor petitioners. The application is dismissed with costs, two gold *mohurs*.

The effect of this order is that, this Court's decree of 20th May 1915 being a nullity, the District Court's decree of 23rd February 1914 dismissing the suit remains in force.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 90 OF 1915.

January 26, 1916.

Present:—Mr. Lindsay, J. C.

Thakurain JAGANNATH KUAR—PLAINTIFF—APPELLANT

versus

SHEO SINGH—DEFENDANT—RESPONDENT.

Contribution, suit for—Agreement to contribute in case of payment of debt by one party—Execution of fresh security, whether amounts to payment.

The giving of a new security does not amount to a payment which entitles a plaintiff to demand contribution. [p. 440, col. 2.]

Maxwell v. *Jameson*, 106 E. R. 286; 2 Barn. and Ald. 51, *Taylor* v. *Higgins*, 102 E. R. 562; 3 East 169, followed.

Where, therefore, in a suit for contribution it appeared that the parties had compromised a previous suit agreeing to pay in equal proportions the money borrowed by the plaintiff, the compromise-deed providing that if the creditors realised the money from either party such party would have a right of contribution as against the other party, and the plaintiff had been obliged to execute a fresh security for the money due under one of the earlier bonds:

***Held*, that, as no money had been actually paid by the plaintiff, her suit was not maintainable.** [p. 440, col. 2.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 19th December 1914, modifying that of the Subordinate Judge, Rae Bareli, dated the 2nd July 1914.

Mr. *Samiullah Beg*, for the Appellant.

Babu *Bisheshwar Nath*, for the Respondent.

JUDGMENT.—The appellant in this case Thakurain Jagannath Kuar was plaintiff in the Court of the first instance in a suit for contribution. The defendant in the case was one Sheo Singh. The following facts may be stated in order to elucidate the matter in dispute between the parties. One Janki Prasad Singh was the owner of a village named Johwanakti. He died leaving a widow, Rukmin Kuar, a daughter-in-law, Thakurain Jagannath Kuar, who is the plaintiff in the present case, and a daughter named Jadunath Kuar. After the death of Janki Prasad Singh his widow *Musammat* Rukmin Kuar got possession of the property and when she died, possession of the whole village was taken by the daughter-in-law Jagannath Kuar. After she got possession of the property Jagannath Kuar borrowed certain sums of money under three deeds which were executed respectively on the 26th of October 1903, the 9th of January 1905 and the 27th of April 1910. Jadunath Kuar who is the daughter of Janki Prasad Singh brought a suit against Jagannath Kuar for possession of the property, alleging that after the death of *Musammat* Rukmin Kuar Thakurain Jagannath Kuar who was the daughter-in-law of Janki Prasad Singh had no right to the property. During the course of that suit *Musammat* Jadunath Kuar transferred her interest in the property to her three sons Sheo Singh, Ram Singh and Ganga Bakhsh Singh. Of these Sheo Singh is the defendant in the present case. The suit was compromised between Thakurain Jagannath Kuar and these three sons of *Musammat* Jadunath Kuar. It was agreed that one half of the village of Johwanakti should remain in possession of Thakurain Jagannath Kuar as absolute owner. The other half of the village was to be made over to the three sons of *Musammat* Jadunath Kuar. It was further agreed between the parties that the money which was borrowed under the three deeds mentioned above, should be paid in equal proportions by the parties to the compromise. It was stated in the compromise (which I may mention as incorporated in the decree) that if the

creditors to whom the moneys were owing under these deeds realised the money from either party, then the latter would have a right of contribution as against the other party. In the present suit the allegation of Thakurain Jagannath Kuar was that she had made certain payments to the creditors by virtue of which she was entitled to call upon the defendant-respondent, Sheo Singh, to contribute his share of the sums paid. I am concerned in this second appeal with only one item of Rs. 4,000. This was the sum which was borrowed by Jagannath Kuar from two persons Raghunandan and Mahabir under the deed which was executed on the 26th of October 1903. With regard to this document it was admitted by the plaintiff that she had not made any payment in cash for the purpose of discharging it. Her story was that under pressure which was brought by the creditors to whom the money was owing under this deed, she executed a fresh security in their favour on the 23rd of January 1914. The original deed was returned to her after the execution of this fresh deed. So far, therefore, as this item is concerned the plaintiff's case was that having discharged the original debt by the giving of a fresh security she was entitled to call upon Sheo Singh the defendant to pay cash to her in discharge of his proportionate share of her debt. The first Court, although it decreed the claim in part, held with respect to the transaction just mentioned that Jagannath Kuar had no cause of action for a suit for contribution against the defendant. The Subordinate Judge was of opinion that the execution of a fresh bond did not amount to a payment which entitled the plaintiff to claim contribution. This view of the case was adopted by the learned District Judge in appeal. Now it is contended in second appeal that both the Courts below were wrong and that as the execution of this fresh security operated to extinguish the earlier debt, Thakurain Jagannath Kuar was entitled under the terms of the compromise to call upon Sheo Singh to pay up his share of the former debt. It appears to me that this contention cannot be accepted.

The learned Counsel for the respondent has relied upon two English cases which are reported respectively in English Reports, Volume 102, at page 562 and Volume 106 of the same report at page 286. The last-mentioned case is the case of *Maxwell* v. *Jameson* (1). The facts of that case were as follows :— Maxwell, Jameson and two other persons gave a joint and several promissory note to a certain firm of bankers. Some time later Maxwell took up the note and gave his own bond to the firm undertaking to pay the same by a certain date. No money was in fact paid by Maxwell to the bankers of either on account of the bond or on account of the promissory note before the action against the defendant Jameson was begun. It was held that the suit was not maintainable and that until the plaintiff had paid money on the bond, he could not maintain an action for money paid in order to recover contribution against any of the other makers of the original note. In delivering judgment in that case one of the learned Judges, Bayley, J., remarked as follows :—"Then as the authorities differ, it becomes necessary to look for the reason of the thing. No money has yet come out of the plaintiff's pocket and *non constat* that any ever will; for if he recovers from the defendant in the present action, still it is possible that he may never pay it to Batson & Co. The time for his remedy against the defendant has not yet arrived." Another learned Judge, Abbott, J., referring to the case of *Taylor* v. *Higgins* (2), held that the giving of a new security which extinguished the old debt was not the same thing as payment. It is quite clear, therefore, that on the authorities just mentioned the giving of a new security does not amount to a payment which entitles a plaintiff to demand contribution, and the reason of this is clear from what is said by Bayley, J., in his judgment, namely, that no money had come out of the plaintiff's pocket and there was no certainty that any money ever would come out for he might recover the money from the defendant and never pay it to the creditor, and it may also be pointed out in the present case that although Thakurain Jagannath Kuar has executed a fresh security in favour of the two creditors it is, for all we know, quite possible that for some reason or other she may never be called upon to discharge the liability. A suit on the bond

(1) 106 E. R. 286; 2 Barn. & Ald. 51.
(2) 102 E. R. 562; 3 East 169.

against her may become time-barred or may become impossible for some other reason, and in this state of affairs it would be obviously unjust to call upon the defendant in the present case to pay to the plaintiff money which she might retain for her own benefit, without ever herself having spent anything by way of extinguishing the earlier debt. I agree, therefore, that the plaintiff had no right to recover in the present case. Her appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2502 OF 1914.

April 17, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

SES LAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HALDHAR NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaratory suit by trespasser, if maintainable.

The essence of section 42 of the Specific Relief Act is a title vesting in the plaintiff and, therefore, no suit will lie by a trespasser for a declaration that he is a trespasser.

Second appeal from a decision of the District Judge, Purneah, dated the 18th May 1914, modifying that of the Munsif, Kissenganj, dated the 24th September 1913.

Mr. *Karunamoy Ghosh*, for the Appellants.

JUDGMENT.

ROE, J.—The facts of this case are, that the plaintiff brought a suit for a declaration that the finally published Record of Rights was incorrect, in that it stated that the plaintiff was holding land under the defendants at a rental of Rs. 18 per annum. The relief prayed for was a declaration that the land in question was a part of the plaintiff's *milkiat*, and that he paid rent to no one for it. The Munsif who tried the case found as a fact that the lands in suit had been leased in *darpatni* to the defendants, and that they had been again let out by the defendants at a rental of Rs. 18 per annum to the plaintiff. The suit was dismissed by the Munsif. In appeal to the District Court the learned

Judge confirmed the finding of fact that the lands in suit formed part of the defendants' *darpatni* tenure, but he reversed the finding of the lower Court on the question of an attornment to pay rent. A declaration was, therefore, granted by the learned Judge which runs, "that the plaintiff did not hold the land under defendants, first party, at Rs. 18 a year, though it was included in the *darpatni* and *mustajiri* of defendants, first party." Against that decree the defendants appeal.

We must uphold the findings of fact arrived at by the learned Judge, but it is clear that the relief granted is in contravention of section 42 of the Specific Relief Act. That section runs, "any person entitled to any right as to any property may institute a suit". The essence of the section is a title vesting in the plaintiff. No suit will lie by a trespasser for a declaration that he is a trespasser. It is clear that the relief granted was in contravention of the terms of this section. The appeal is allowed, the suit is dismissed with costs, the order of the Munsif being restored.

SHARFUDDIN, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 121 OF 1915.

January 20, 1916.

Present:—Mr. Kanhaiya Lal, A. J. C.

KISHUN—DEFENDANT—APPELLANT

versus

SHYAM SUNDAR—PLAINTIFF—RESPONDENT.

Dihdar, *definition of—Acknowledgment by* taluqdar, *effect of—Suit by superior proprietor—Defendant's under-proprietary rights acknowledged by previous proprietors—Estoppel.*

A *dihdar* was generally a person to whom a certain portion of the property sold was assigned by the vendee for his subsistence. [p. 442, col. 2.]

A grant can be presumed from an acknowledgment by the *taluqdar*. [p. 443, col. 1.]

Raja Bhagwan Bakhsh Singh v. *Mazhar Husain*, 9 O. C. 167, followed.

Where in a suit by the superior proprietor of the village in which the plots in dispute were situated, it appeared that the defendant had been in the enjoyment of his *dihdari* rights within the knowledge of the previous superior proprietors and had been mortgaging the same for more than 12 years prior to the suit;

KISHUN *v.* SHYAM SUNDAR.

Held, that it was no longer open to the plaintiff to question the defendant's under-proprietary rights. [p. 443, col. 1.]

Maharaja Jagatjit Singh Bahadur v. *Suraj Bakhsh Singh*, 8 O. C. 145, distinguished.

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 18th March 1915, reversing that of the Additional Munsif, Sultanpur, dated the 4th September 1914.

Mr. *Har Narain Das*, for the Appellant.

Babu *Basudev Lal*, for the Respondent.

JUDGMENT.—The dispute in this case relates to certain plots of land which the defendant-appellant claimed as his *dihdari* or under-proprietary holding. The plaintiff-respondent is the superior proprietor of the village, in which the said plots are situated. His allegation is that he purchased the said village in execution of a decree against Nagar Sen Singh and Pateshwari Prasad Singh, the grandsons of Ishwari Singh, in 1907, and that he came to know in 1909 that the defendant-appellant was an ordinary tenant and that the said entry was incorrect.

The Court of first instance found that the defendant was a *dihdar* and dismissed the claim. The lower Appellate Court, however, found to the contrary. The latter Court relied on the decision in *Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh* (1). But that decision was based on rule 10 of the rules appended to the Sub-Settlement Act (XXVI of 1866) and is not exhaustive of the manners in which the under-proprietary rights can be acquired. It is not clear from the evidence whether the ancestors of the defendant were at any time the proprietors of the village. The copy of the *wajib-ul-arz* filed relates only to a portion of the village and direct evidence to prove the old proprietorship at this distance of time cannot always be easily obtained. It is clear, however, from the entries in the revenue papers, that in the old Settlement Budhram, the father of the defendant appellant, was recorded as a tenant of the land in dispute. In the recent Settlement, which took place in 1300 *Fasli*, he was recorded in the column prescribed for tenants as a *dihdar* with a favourable rate of rent. The circumstances under which the above entry came to be made have not been brought out but there is evidence, comprising certain receipts granted on behalf of the then superior proprietor of the village, to show that as far back as 1308 and 1311 *Faslis* the defendant was acknowledged as a *dihdar* and rent was accepted from him as such. It also appears that the defendant-appellant exercised his rights as a *dihdar* by mortgaging some of the plots in 1899. A *dihdar* was generally a person to whom a certain portion of the property sold was assigned by the vendee for his subsistence. Colonel MacAndrew described the term *dihdari* in the following way:—"*Dihdari* is a certain amount of land-rent free and has always, I believe, its origin in former proprietorship. When pressed by the *Nazims* under the later native rule, the proprietors often found they could not get on, and voluntarily sought the protection of some neighbouring *taluqdar*, who then took the management of the estate and whatever profit he could get out of it, and the smaller and former proprietor took a piece of land, varying according to the property he made over. This was rent free for ever, as the rest of the estate was chargeable with the revenue upon this portion and in eastern Oudh the tenure is called *dihdari*." In the Fyzabad Settlement Report it is stated that at the outset *dihdari* grants were always rent free and the majority of these are still so. In some cases, however, a low quit-rent was subsequently assessed, known by the name of *barbasti*. The *jamabandi* of the recent Settlement, in which the father of the defendant-appellant was described as a *dihdar*, was attested, as regards the holding and the rent, by the general agent of the then proprietor, and reading that fact with the subsequent acknowledgment of the *dihdari* tenure in the receipts for rent granted on behalf of the superior proprietor in 1901 and 1904, there can be no doubt that the defendant and his father were treated as *dihdars*, though they were not recorded in the old Settlement as such in respect of the land they held rent free, because they had not

(1) 8 O. C. 145.

obtained any decree from the Settlement Court. As pointed out in *Raja Bhagwan Bakhsh Singh* v. *Mazhar Husain* (2), a grant can be presumed from an acknowledgment by the *taluqdar*. The defendant-appellant has been in the enjoyment of the *dihdari* rights within the knowledge of the previous superior proprietors and mortgaging the same from more than twelve years prior to the suit. It is no longer open to the successor of the superior proprietors to question them.

The appeal is, therefore, allowed and the plaintiff's claim dismissed with costs throughout. The defendant-appellant will get his costs from the plaintiff-respondent in all the Courts.

Appeal allowed.

(2) 9 O. C. 167.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 586 OF 1915.

May 1, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

JAMUNA PRASAD - JUDGMENT-DEBTOR—APPELLANT

versus

MAGAI RAM - DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 69, O. XLI, r. 5—Ex parte *decree, dismissal of—Application to set aside—Appeal—Stay of proceedings in execution, application for—Discretion of original Court—Appellate Court, powers of.*

During the pendency of an appeal against an order refusing to set aside an *ex parte* decree, the original Court has discretion to stay proceedings in execution pending the disposal of the appeal. There is no such power vested in the Appellate Court.

Bhagwat Rajkoer v. *Sheo Golam Sahu*, 31 C. 1081; 9 C. W. N. 123, referred to.

Mr. *Abani Bhusan Mukherji*, for the Appellant.

Mr. *Ram Prasad*, for the Respondent.

JUDGMENT.—This Rule was obtained upon the opposite party, a decree-holder upon a mortgage suit, to show cause why execution proceedings in the suit should not be stayed pending an appeal in this Court.

The facts briefly are, that the applicant had filed an application to set aside an *ex parte* decree upon a mortgage; that application was rejected by the Subordinate Judge, and an appeal is now pending against that rejection. The judgment-debtor applied to have the sale postponed until the appeal against the order rejecting the application for re-hearing had been taken up and disposed of, and that application was rejected by the Subordinate Judge. The proceedings have so far been misconceived. The case reported as *Bhagwat Rajkoer* v. *Sheo Golam Sahu* (1) is sufficient authority for the proposition that there is no power vested in an Appellate Court to stay proceedings in a case such as this. But the papers being before us, under section 115 we deem it expedient to modify the orders made by the learned Subordinate Judge upon the application to postpone the sale. The learned Subordinate Judge writes: "Execution proceedings cannot be stayed unless there is a distinct order from the Appellate Court to that effect." That is, to a great extent, correct, but the learned Subordinate Judge failed to exercise the discretion vested in him under Order XXI, rule 69, which gives him power to postpone the sale to any specified date. Such an order should have been made in this case. We propose to advise the learned Subordinate Judge to make it now. We return the case to him, the order already made dated the 28th February 1916 being vacated, and we direct him to re-hear the application to postpone the sale, and recommend that the sale be postponed to the 15th June on condition that the judgment-debtor waives fresh service of attachment and proclamation.

In the meantime instructions will be issued to the Registrar to expedite this appeal and do everything possible to bring it on for hearing before the 1st day of June.

The costs of this Rule will form part of the costs of the case, hearing fee two gold *mohurs*.

Case returned.

(1) 31 C. 1081; 9 C. W. N. 123.

CHANDRAWATI KUNWAR *v.* BHAGWANTA.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 47 OF 1915.

February 28, 1916.

Present:—Mr. Stuart, A. J. C.

Rani CHANDRAWATI KUNWAR—PLAINTIFF—APPELLANT

versus

Musammat BHAGWANTA—DEFENDANT—RESPONDENT.

Oudh Rent Act (*XXII of* 1886), *s.* 138—*Rent suit—Third person, when can be made party—Intervener, whether can appeal—Title to receive rent, who can determine—Inquiry about receipt of rent.*

Where in a suit for rent the defendant pleads that payment has been made to a third person under compulsion, such person cannot be joined as a defendant under section 138, Oudh Rent Act. [p. 444, col. 2.]

An intervener under section 138, Oudh Rent Act, cannot appeal when the judgment-debtor himself does not appeal. [p. 444, col. 2.]

Sripat v. *Ram Saran*, 2 O. C. 137, distinguished

The question of title to receive rent cannot be determined between the plaintiff and an intervener in a Rent Court but in a subsequent suit in a Civil Court. [p. 445, col. 1.]

The inquiry under section 138, of the Oudh Rent Act, relates to the period prior to that for which rent is claimed by the plaintiff. [p. 445, col. 1.]

Gobind Ram v. *Narain Das*, 9 A. 394; *Habibullah Shah* v. *Surji*, 15 Ind. Cas. 857; 15 O. C. 295, followed.

Appeal against the order of the District Judge, Lucknow, dated the 21st September 1915, reversing that of the Assistant Collector, 1st class, Barabanki, dated the 21st June 1915

Babu *Bisheshar Nath*, for the Appellant.

Babu *Ram Chandra*, for the Respondent.

JUDGMENT.—This was a suit brought by Rani Chandrawati Kunwar, the wife of Raja Raghuraj Bahadur Singh of Harha, against Shankar on the following allegations:—The Rani asserted that her husband had assigned to her certain plots in the village of Seorha towards her maintenance, the plots in question being the Raja's *sir*, that she was the Raja's assignee of the plots, and that Shankar defendant was the tenant of the plots. Shankar in his written statement admitted the Rani's title, and admitted that he was a tenant, and liable to pay rent. But he asserted that he had paid the rent for the period in question (that is to say, 1321 *Fasli*) to a certain *Musammat* Bhagwanta, the payment having been made under compulsion. Bhagwanta is a Barin woman, a mistress of the Raja, and it appears that the Raja had executed a deed of gift transferring the village Seorha to Bhagwanta. On this allegation of Shankar the Assistant Collector who was hearing the suit, proceeded to make Bhagwanta a party to the suit and to inquire whether she had actually received and enjoyed the rent. He took this action under the provisions of section 138, Act XXII of 1886. I do not understand why he took action under the provisions of that section, for Shankar had not alleged that Bhagwanta had received and enjoyed the rent in good faith. His case was that Bhagwanta had extorted the rent from him illegally and improperly. Bhagwanta was, however, made a party, the inquiries continued, and the Assistant Collector decided the point against her, and passed a decree against Shankar. Shankar did not appeal against the decree. Bhagwanta appealed against that decree, and the learned District Judge decided on appeal in her favour. He stated that he reversed the judgment of the lower Court. I have difficulty in understanding what he meant. It is obvious that, as Shankar had not appealed against the decree, the decree could not be set aside as against Shankar, and whatever view the District Judge took as to the correctness of the decree the decree stands against Shankar and can be executed against him. Rani Chandrawati Kunwar has appealed to this Court against the District Judge's order. She is entitled to the relief which she seeks, for the following reasons:—

In the first place I do not consider that an intervener under section 138 can possibly appeal when the judgment-debtor does not appeal. In *Sripat* v. *Ram Saran* (1) Mr. Blennerhassett decided that an intervener is not barred by anything contained in section 138 from appealing and in the case in question heard the intervener on appeal. But there the tenant judgment-debtor had also appealed. If the intervener is allowed to be heard in the original suit he would naturally be allowed to be heard in appeal. But his right to be heard would depend on the contingency whether there was anything that he could be heard about. The point for decision in such inquiries is, whether the tenant is to

(1) 2 O. C. 137.

pay rent to the plaintiff or not, and the intervener is allowed to be heard in order that that point may be decided. But if the point is decided against the tenant and he is directed to pay the rent, and he is satisfied with that decision and does not appeal, the intervener cannot possibly be heard, because the Appellate Court is not in a position to reverse or alter the decree of the lower Court. Section 138 provided that the decision of the Court shall not affect the right of any party having a legal right to the rent of the land to establish his title thereto in a Court of competent jurisdiction. The question of title to receive the rent cannot be determined between the plaintiff and the intervener in a Rent Court. It can only be litigated and determined in a subsequent suit in the Civil Court. This proposition is laid down clearly with regard to the provisions of the corresponding Act then having force in the Province of Agra in *Gobind Ram* v. *Narain Das* (2), and the proposition holds equally good in Oudh. In these circumstances, the intervener can obtain no adjudication on the question of title and so has nothing on which he can appeal in a case in which the tenant is satisfied with the decision against him. But further, even if a right to appeal existed, it is obvious that on the merits the intervener had no case, for it is laid down in *Shah Hamid Ahmad* v. *Baijnath* (3), in *Habibullah Shah* v. *Surji* (4) and in *Musammat Mahadei Kuar* v. *Sant Bakhsh Singh* (5) that the inquiry relates to the period prior to that for which rent is claimed by the plaintiff. Bhagwanta is not alleged to have collected rent prior to the year 1321 *Fasli*. Nowhere is it asserted that Bhagwanta received and enjoyed the rent during any period prior to that year, and the period for which the rent was claimed by the plaintiff was 1321 *Fasli*. So it is clear that she had no case upon the merits either.

For the above reasons I allow the appeal, and set aside the order of the District Judge and restore the order of the Court below. Bhagwanta will pay her own costs and those of Rani Chandrawati Kunwar in all three Courts.

Appeal allowed.

(2) 9 A. 394.
(3) Rent Act Ruling 1893, No. 6 5.
(4) 15 Ind. Cas. 857; 15 O. C. 295.
(5) Oudh and Agra Law Reporter, Vol. IV, p. 453.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2639 OF 1914.

June 15, 1916.

Present:—Mr. Justice Kingsford.

Babu CHAND GORAIN *alias* TIKA GORAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHUB LAL MAHTON *alias* MUNI LAL MAHTON—DEFENDANT RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 147 (a)—Compromise in contravention of the section—Illegality.

A compromise decree passed in contravention of the provisions of section 147 (*a*) of the Bengal Tenancy Act is a nullity. [p. 446, cols. 1 & 2.]

Surjug Saran v. *Dukhit Mahto*, 18 Ind. Cas. 809; 17 C. W. N. 496, followed.

Appeal from a decision of the District Judge of Patna, dated the 31st July 1914.

Messrs. *Pugh* and *Naresh Chander Sinha*, for the Appellants.

Mr. *Chander Sekhar Prasad Singh*, for the Respondent.

JUDGMENT.—This appeal arises out of a rent suit brought by the appellants. The suit was decreed by the learned Munsif in accordance with a compromise decree, dated the 29th February 1908, passed in a previous suit between the parties. On appeal by the defendants, the learned District Judge held, that the compromise decree was a nullity under the provisions of section 147 (*a*), Bengal Tenancy Act. He accordingly decreed the suit in accordance with the settlement '*khatian*' which was finally published in October 1910. The plaintiffs preferred this second appeal.

The *first* contention is, that the learned Judge has made a new case for the defendant. This contention appears to be erroneous, because the defence set up in paragraphs 6 and 11 of the written statement is clearly, that the compromise was illegal and ineffectual.

The *second* contention is, that the suit in which the compromise decree was passed

was not between landlord and tenant as such, and, therefore, the provisions of section 147 (*a*) are not applicable. I find that the suit, which was brought by the present defendant against the predecessors of the present plaintiffs, was for a declaration regarding the amount of rent payable, and for the recovery of damages for illegal distraint. Recovery of compensation in such circumstances is provided for by section 140 of the Bengal Tenancy Act. It is clear that the suit was between landlord and tenant as such.

The *third* contention is, that the compromise decree did not infringe the provisions of section 29 of the Act. It certainly cannot be said that at the time of that compromise the defendants were not paying a money rent; for it appears from paragraph 2 of the plaint in the present suit, that the plaintiffs' allegation is that the defendants paid a money rent for certain lands, and '*bhouli*' rent for others. The defendants' contention, as set forth in paragraph 3 of the written statement, was, that up to the period of the compromise he had always paid a money rent only. It is contended that the money rent was variable according to the crop grown. That, no doubt, was the plaintiffs' contention, but it was not that of the defendant. The learned Counsel for the appellants relied upon a passage in paragraph 5 of the written statement. But in that passage the defendant is alluding not to the state of things previous to the compromise, but to the terms of the compromise itself. It was not necessary for the learned District Judge, nor is it necessary for this Court, to decide whether, as a matter of fact, the result of the compromise decree was to infringe the provisions of section 29. It was sufficient for him to hold, as he did hold, that the defendants were paying a money rent at the time of the compromise decree. That being so, it necessarily followed that the compromise decree passed without recording evidence in the manner provided by subsection 3 of section 147 (*a*) was without jurisdiction. The ruling in *Surjug Saran Lal* v. *Dukhit Mahto* (1) is sufficient authority for the proposition, that a compromise decree passed in contravention of the provisions of section 147 (*a*) is a nullity. In my opinion, therefore, the learned Judge was right in treating the compromise as a nullity, and in decreeing the suit upon the basis of the '*khatian*.'

The appeal is accordingly dismissed with costs.

Appeal dismissed

(1) 18 Ind. Cas. 809; 17 C. W. N. 496.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 515 OF 19.4.

March 8, 1916.

Present:—Mr. Lindsay, J. C.

DEBI BAKHSH—DEFENDANT—APPELLANT

versus

RAM DHANI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction—Validity of document of title, Civil Court, whether can adjudicate upon.

The Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of a document of title; such jurisdiction rests with the Civil Courts. [p. 447, col. 2.]

A notice of ejectment having been cancelled on the strength of a document produced by the defendant, which he declared to be a *shankalap patta*, the plaintiffs, who were the under-proprietors in the village, sued for a declaration (1) that defendant had no superior right in the land in suit, (2) that the *patta* set up by defendant was null and void as against the plaintiffs and the defendant could not acquire any rights in the land under it:

Held, that it was competent for a Civil Court to adjudicate finally upon the validity of the *patta*. [p. 447, col. 2.]

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 17th August 1914, confirming that of the Munsif, Sultanpur, dated the 24th March 1914.

Mr. *S. N. Roy*, for the Appellant.

Mr. *H. N. Misra* holding brief of Pandit *Gokaran Nath Misra*, for Respondent No. 6.

JUDGMENT.—The facts of this case may be briefly stated as follows. The plaintiffs are under-proprietors in a certain village and they issued a notice of ejectment against the defendant-appellant Debi Bakhsh for the year 1321 *Fasli*. Debi Bakhsh contested the notice of

ejectment and produced a certain document, which he declared to be a *shankalap patta*. On the strength of this document, which was accepted apparently by the Rent Court as genuine, the notice of ejectment was cancelled, it being held that under this *patta* Debi Bakhsh had certain rights which were a bar to his being ejected by the issue of a notice under the Rent Act. The notice having been cancelled, the plaintiffs came to the Civil Court with the suit for declaration out of which this appeal has arisen. A reference to paragraph 9 of the plaint shows that the plaintiffs claimed the following reliefs. (1) They asked that a declaration might be made in their favour to the effect that they were the under-proprietors of the land described in the plaint and that the defendant had no superior or under-proprietary right therein. (2) That if for any reason the first relief could not be granted, it might be declared that the *patta* set up by the defendant was null and void as against the plaintiffs and that the defendant could not, under the document in question, acquire any right in the lands described in the plaint. Then there was the ordinary prayer for any other relief to which the plaintiffs might be entitled. The suit was contested on various grounds, one of them being that the Civil Court had no jurisdiction to entertain the claim. The Court of first instance found that the first relief mentioned above could not be granted in the present suit by a Civil Court, but it gave the plaintiffs a decree awarding them the second relief which they had sought. The decree declares that the *patta* in question, Exhibit A1, is invalid and ineffectual as against the plaintiffs. An appeal was taken to the Subordinate Judge and the decision of the Court of first instance has been upheld there.

It appears to have been taken as proved by the Courts below that the document which the defendant Debi Bakhsh had set up in the Rent Court, and which bears the date of the 24th of August 1875 (*Bhadon Badi* 8th, 1282) was in fact a genuine document, and the Subordinate Judge, in his appellate judgment, has also held that, the document was properly stamped. He declared, however, that the document could not operate as a transfer in law of interest in the land specified therein, for the simple reason that it had not been registered. The Subordinate Judge refers to the registration law which was in force at the time when this document was drawn up. The law then was practically the same as it is now and there can be no doubt that the document upon which the defendant-appellant relied being unregistered, it could not operate to pass any interest to any person in any property. It has again been argued in this Court that the Civil Court had no jurisdiction to grant the relief, but at the end of the argument which was put forward by the learned Counsel on behalf of the defendant-appellant, it became apparent that he was labouring under some misapprehension as to the scope and meaning of the first Court's decree. It appears that the suit was decided in the first instance *ex parte* and it looks as if the learned Counsel for the appellant had only been provided with a copy of the first judgment. There can be no doubt as to what was decided when the case was re-admitted and tried out. As I have already said, the decree of the first Court is in complete accordance with its judgment. It cannot seriously be contested, and I do not understand that the learned Counsel for the appellant endeavours to contest the proposition, that it is competent for a Civil Court to adjudicate in a case of this kind upon the vaildity of a document of title. That point has been decided over and over again. It has been held, and I think rightly, that the Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of a document of title and it must be taken that the jurisdiction to give a final adjudication in a matter of this kind rests with the Civil Courts. It is impossible, therefore, to argue that the relief which has been granted in the present case was a relief which the Civil Court was not competent to give. This being the state of affairs, the appeal must necessarily fail and I dismiss it accordingly with costs.

Appeal dismissed.

MAUNG MAUNG *v.* S. G. FIRM.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 165 OF 1912.

September 1, 1913.

Present: Mr. Justice Ormond.

MAUNG MAUNG—DEFENDANT—APPELLANT

versus

S. G. FIRM, BY ITS AGENT SANMUGAM PILLAY—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Transfer in fraud of creditors—Land, grant of, transfer of, with grantor's permission—Non-solvency of transferor—Absence of consideration—Presumption—Payment by volunteer to save attachment, effect of.

A, who had a grant of land from the Collector with power to transfer the same with the Collector's permission, conveyed it to his brother *B*, after having secured the Collector's consent, for no consideration and at a time when he was pecuniarily embarrassed. *C*, a decree-creditor of *A*, attached the land, ignoring the transfer to *B*. The attachment having been raised at *B*'s instance, *C* sued *B* for a declaration that he was entitled to attach the land:

Held, that, under the circumstances, the presumption under section 53 of the Transfer of Property Act was that the transfer was void as against *C*.

D, who paid off a previous attaching creditor of *A*, claimed to stand in *A*'s shoes:

Held, that *D* had only a cause of action against *A* personally.

Mr. *May Oung*, for the Appellant.

Mr. *Doctor*, for the Respondent.

JUDGMENT.—The plaintiff-respondent attached land under a decree obtained against one Maung Myaing. The defendant Maung Maung, who is a brother of Maung Myaing, obtained an order for the removal of the attachment. The plaintiff then sued for a declaration that he is entitled to attach the land. On the 3rd March 1903, the Government made a grant of the land to Maung Myaing. Under that grant Maung Myaing was allowed three years' exemption of revenue (but he had to work the land) and he was to pay a fixed revenue for a subsequent five years. He was not allowed to transfer the land without the permission of the Deputy Commissioner. On the 5th July 1907, Maung Myaing applied to the Deputy Commissioner for permission to transfer the land to his brother, Maung Maung. On the 2nd April 1908 the transfer was sanctioned and the land now stands in the name of the defendant, Maung Maung. In March 1907, *i.e.*, before Maung Myaing's application to the Deputy Commissioner, Maung Myaing was hopelessly involved in debt and for that reason applied for the land to be transferred to his brother.

The plaintiff sued Maung Myaing on a promissory note, dated March 1907, and got a decree in August 1909. Maung Myaing's right to transfer with the permission of the Deputy Commissioner was a valuable right. He exercised that right in favour of his brother and took no consideration from him. He did so at the time when he was unable to pay his debts, of which the plaintiff's claim was one. The presumption, therefore, under section 53 of the Transfer of Property Act, is that the transfer is void as against the plaintiff. In November 1907, one Maung Daik sued Maung Myaing on a debt incurred before July 1907, and Maung Daik obtained a decree and attached the property as against Maung Myaing before the transfer to Maung Maung was made. Maung Maung paid off the amount of that attachment, and it is contended for him that he stands in the shoes of Maung Daik and that a declaration should be made in this suit to that effect. That is a matter between Maung Maung and Maung Myaing. If he has paid off Maung Myaing's debt, he naturally has a cause of action against Maung Myaing, if he did so under compulsion or on his behalf.

There will be a declaration, therefore, that the plaintiff is entitled to attach the land as if the grant to Maung Myaing was still subsisting, and the decree of the Divisional Court is modified to that extent. The appellant will have two gold *mohurs* costs for this appeal.

Decree modified.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 354 OF 1913.

December 13, 1915.

Present:—Mr. Hayward, A. J. C.

FIRM OF TARACHAND GANSHAMDAS —PLAINTIFF

versus

MESSRS. LOUIS DREYFUS & Co.— DEFENDANTS.

Contract Act (IX of 1872), ss. 73, 81, 83—Vendor and purchaser—Delay in taking delivery, liability of purchaser for deterioration of goods owing to—Property in goods, when passes to purchaser—Stamp Act (II of 1899), s. 35—Unstamped agreement containing submission to arbitration, validity of.

Under section 73 of the Indian Contract Act, a defaulting purchaser, delaying to take delivery of goods purchased by him, is bound to compensate the seller for any loss occasioned by reason of such delay, owing to deterioration of goods in the ordinary course of things, *e. g.*, by rain-fall, even though the property in the goods has not passed to the purchaser. [p. 453, col 2]

Property in goods under a contract of sale does not pass to the purchaser until it is weighed by the vendor, unless there are other terms of the agreement or some particular trade or local usage to the contrary. [p .454, col. 1.]

Firm of Motumal v. *Firm of Ruttanji*, 24 Ind. Cas. 883; 7 S. L. R. 141; *Harkishanlal* v. *Louis Dreyfus*, Suits No. 410 of 1912, referred to.

Firm of Ruttonji Burjorji v. *Firm of Motumal Bhagchand*, 32 Ind. Cas. 720; 9 S. L. R 160, dissented from.

An agreement containing a submission to arbitration is not invalid in default of bearing an eight annas stamp. [p. 454, col. 2.]

Hurdwary Mull v. *Ahmed Musaji Selaji*, 1 Ind. Cas. 371; 13 C. W. N. 63; *Bombay Company, Ld.* v. *National Jute Mills Company, Ld*, 16 Ind. Cas. 153; 39 C. 669; *Baijnath* v. *Ahmed Musaji Saleji*, 18 Ind. Cas. 978; 17 C. W. N. 395; 40 C. 219; *Khanchand Javhersingh* v. *Kodumal Javhersing*, 15 Ind. Cas. 819; 5 S. L. R. 240; *Samiya Mavali* v. *Minammal*, 23 M. 490; 10 M. L. J. 240; *Bhaurao Jivaji Tivli* v. *Radhabai Laxman Jivaji*, 2 Ind. Cas. 431; 11 Bom. L. R. 406; 33 B. 401, referred to.

Mr. *C. M. Lobo*, for the Plaintiffs.

Mr. *Wadhumal Udharam*, for the Defendants.

JUDGMENT.—The plaintiff Tarachand Ganshamdas sues the defendants Louis Dreyfus & Co., Karachi, to recover damages for breach of contract, in that the defendants failed to take delivery of 713 bags of barley purchased by them for delivery by them by the 31st July 1913; and in that they failed even subsequently to take delivery as directed by the arbitrators' award. The defendants plead that it was not their fault that delivery was not taken within 31st of July 1913, and that they are not liable for the subsequent deterioration or non-delivery of the barley and that they are not bound by the arbitrators' award.

The following issues were re-settled at the hearing.

1 Whose fault was it that no delivery was effected by the 31st July 1913?

2 Who was responsible for the subsequent deterioration and non-delivery?

3 Can these questions be raised in view of the arbitration proceedings and the award? and

4 The general issue as to the amount of damages and costs.

The plaintiff and the defendants are generally in agreement as to the bulk of the facts. The following are not disputed. The contract, (Exhibit 5) was entered into on the 25th July 1913 for the purchase of 713 bags of barley at Rs. 27-4-0 per candy to be delivered by the 31st July 1913, and there were provisions as to the quality required and as to delivery including the following clause as to weighment: "10 per cent. or more, as agreed upon by the buyers and sellers, of the bags to be opened for the purpose of ascertaining the weight." There was also a clause requiring all disputes to be referred to the final award of arbitrators. On the 28th July 1913 the plaintiff had the 713 bags of barley ready at the Thole Produce Yard, and called upon the defendants that morning to draw samples. The defendants drew the samples in the afternoon and sent them in the ordinary course in the evening to their office. That night and the following day there was rain. On the 30th July 1913 the plaintiff sent a notice to the defendants requiring them to take delivery within 4 hours. That notice (Exhibit 6) was received about 4 P. M. by the defendants. Defendants replied the same day claiming a right to draw fresh samples by noon of the following day (Exhibit 7). The plaintiff immediately replied stating that the defendants should send their men to draw the samples. The defendants accordingly drew fresh samples on the morning of the 31st July 1913. They were sent for analysis to their office in the evening. On the 1st August 1913 the defendants analysed the fresh samples and issued two delivery orders directing their men to take delivery of two lots of 265 bags and 301 bags respectively (Exhibits 9 & 10). They, however, issued no delivery order in respect of the 3rd lot of 148 bags, (there appears to have been one extra bag which,

however, does not materially affect the dispute) and noted on the sample-analysis-slip of paper, the words "Late reject" (Exhibit 21). Thereafter the same day they sent a letter cancelling the whole contract in respect of all the three lots, on the pretext that delivery had not been effected within the due date of contract (Exhibit 12). On the 5th August 1913 the plaintiff sent the defendants a notice requiring them to take delivery in 24 hours, or in default to allow re-sale of the goods at their risk (Exhibit 13). The defendants replied the same day, alleging that there had been delay in delivery and that extension had been refused and that defendants had agreed to pay a special price in order to obtain delivery by the 31st July 1913 (Exhibit 14). On the 9th August 1913, the plaintiff, after having obtained a copy of the contract, appointed Mr. Demetriadi, of Ralli Brothers, as his arbitrator and called upon the defendants to appoint theirs (Exhibit 17). On the 11th August the defendants replied that there was no dispute and that they declined to appoint an arbitrator (Exhibit 18). On the 12th August 1913, the plaintiff explained that they had refused to take delivery and so there had arisen the necessity for referring the matter to arbitration (Exhibit 19). The defendants thereupon replied the same day appointing Mr. Sawyer as their arbitrator (Exhibit 20). Messrs. Demetriadi and Sawyer disagreed as to their decision and appointed Mr. Woodward as umpire (Exhibits 21 & 22). On the 26th August 1913 Mr. Woodward made his award directing delivery to be taken by the defendants (Exhibits 23 and 41). On the 27th August 1913 the plaintiff called on the defendants to take delivery as directed, or in default to allow the goods to be sold at their risk (Exhibit 24). The defendants replied the same day that delivery would be taken on presentation of the delivery orders to defendants' men (Exhibits 28). That night there was again rain. On the 28th August 1913 the defendants wrote that they had inspected the barley and found it unfit for delivery on account of damage by rain. They intimated that they had appointed Mr. Sawyer as their arbitrator and they called upon plaintiff to appoint his arbitrator. They intimated that in the meanwhile it would not be possible to carry out the award (Exhibit 26). The plaintiff replied on the same day that the goods were at defendants' risk as the property had already passed to the defendants (Exhibit 27). Defendants replied the same day that they had appointed Mr. Demetriadi as the plaintiff's arbitrator (Exhibit 28). On the 29th August 1913 the defendants intimated that Mr. Demetriadi had declined to act, and so they appointed in his place Mr. Woodward (Exhibit 28). It appears that like Mr. Demetriadi, Mr. Woodward, not unnaturally, also refused to act as an arbitrator to re-open his award. The plaintiff gave notice the same day that he would sell the goods on the morrow at the risk of the defendants (Exhibit 30). Defendants replied the same day claiming seven days to take delivery under the award (Exhibit 31). On the 30th August 1913 the auction of the goods was duly held in the afternoon (Exhibit 32). On the 2nd September 1913 the defendants sent a telegram repudiating all responsibility as delivery had been refused to them under the award (Exhibit 34). There then followed the usual claim for damages by the plaintiff and repudiation by the defendants resulting in this litigation.

The plaintiff and the defendants are not in agreement as to the following subsidiary facts :—

On the 28th July 1913, the plaintiff alleges that the bags of barley were all duly covered with tarpaulins in order to protect them from the expected rain which actually fell that night. The plaintiff's managers Jivanram and *mukadam* Hemraj have spoken to the spreading of the tarpaulins. There seems no good reason to disbelieve them. They have been corroborated by the witness Rameshwar of another firm. But it is not necessary to pay particular attention to his evidence, which may or may not be true. It is significant that the defendants have not called their men Bechar and Tangwell or any witnesses on their behalf to deny that the tarpaulins were spread, as alleged, over the bags of barley that night. On the 31st July 1913, the plaintiff alleges that he pressed the defendants to send the samples immediately they were drawn the same morning to defendants' office for analysis but that defendants did not choose to send the samples to their office until the evening. The plaintiff's manager Jivanram has so deposed. It seems probable enough and may be accepted as true. It has not been denied by any

witness on behalf of the defendants. On the 1st August 1913, the plaintiff alleges that the defendants had analysed all the three lots of barley and had submitted the result of the analysis to him for acceptance and that he duly accepted the analysis of all the three lots. The plaintiff's manager Jivanram has deposed to these facts and stated that the defendants' head clerk Lobo was the man who offered him the analysis for acceptance and whose offer he accepted. Jivanram is corroborated by the fact that two delivery orders were actually issued in respect of two of the lots by the defendants (Exhibits 9 & 10). It is true that no delivery order was issued in respect of the third lot; and that the words "late reject" were noted on the sample-analysis-slip (Exhibit 2), and that defendants claimed in their subsequent letters to cancel the contract (Exhibits 12 and 14). But the defendants' head clerk Lobo has not been called to deny the allegation that the analysis was offered and duly accepted, nor has any witness been called to depose to this point by the defendants. The only point upon which any evidence was mentioned as available, was on the immaterial question whether defendants' assistant manager Krasner, declined to take delivery on account of the absence of railway vans to take the goods to defendants' godown, or on account of a dispute as to an allowance claimed in respect of the increased weight of the barley due to the rain. It does not matter much what pretext was put forward by the defendants' assistant manager Krasner. It is sufficient to note that some pretext or other was put forward, and that the market rate for the barley had fallen then, which would explain Mr. Krasner's searching for some pretext to evade the defendants' liability, and that the defendants subsequently admitted in their letter of the 11th August 1913 that there was no dispute as to the quality of the barley (Exhibit 18). It seems, therefore, that the correct conclusion to be drawn is, that plaintiff's manager Jivanram has told the truth when he asserted that the analysis was offered for acceptance by the defendants and duly accepted; and that the refusal of the defendants to give a delivery order for the third lot and their subsequent efforts to cancel the contract, not on account of any objection to quality, but on the plea of late delivery were mere pretexts put forward by defendants with a view to escape their just liability under the contract. On the 27th August 1913, the plaintiff alleges that the bags of barley were still covered with tarpaulins and continued to be so covered up to the time of the auction. The plaintiff's managers Jivanram and *mukadam* Hemraj have again deposed to these facts, and have been corroborated again by witness Rameshwar. The defendants' men Bechar and Tangwell have again not been called, nor has any evidence been called on behalf of the defendants as to this question of tarpaulins. It has been merely suggested that there could not have been tarpaulins owing to the damage sustained actually by the barley. But as regards this there is only the evidence of the auctioneer on one hand that no special damage was sustained by the barley, and the evidence of Mr. Whitehouse, assistant manager of E. D. Sassoon & Co., who was unable to give any estimate of the damage, but reported merely that he had examined the goods and found that the barley had sprouted by the day of auction (Exhibit 43). Mr. Whitehouse's examination was moreover *ex parte* on behalf of the defendants. And even assuming that he was shown the actual barley in dispute for examination, his report does not appear to me to be sufficient to justify the conclusion that more damage has been sustained by the barley than would naturally have arisen in the usual course of things from the substantial delay in taking delivery on the part of the defendants. On the 30th August 1913, the plaintiff alleges that his clerk Har Narayan went in the morning and saw defendants' assistant manager Mr. Krasner and that the latter agreed to take delivery if the auction were postponed, but that Mr. Krasner refused to put this undertaking in writing. There has been no denial of this allegation by any witness on behalf of the defendants, and it seems to me that this allegation is probably true, looking to the conduct throughout of the defendants and their subsequent professions of anxiety to obtain delivery under the award (Exhibits 31—33 and 34). The contract rate for the contract of 25th July 1913 was Rs. 27-4-0 per candy. This is alleged to have been a special rate for special delivery. It might

have been a special rate, but the conduct of the defendants does not indicate on their part any real anxiety for a particularly prompt delivery. Whatever that may be, it was the rate agreed upon between the parties and must be taken to be the proper rate for the purpose of estimation of damages. The Chamber of Commerce rates, in any case, indicate that the market was then falling. The Chamber of Commerce rates were the following: for 22nd July 1913, Rs. 26-8-0 per candy; 29th, Rs. 26-12-0; 6th August 1913, Rs. 26-10-0; 12th, Rs. 25-8-0; 19th, Rs. 25-8-0; 26th, Rs. 25-8-0; and for September 1913, Rs. 25-10-0. The auction rates realised at the sale on the 30th August 1913 were considerably lower, being Rs. 21-10-0 in respect of the lot of 148 bags; Rs. 21-4-0 in respect of the 265 bags, and Rs. 20-5-0 in respect of the 301 bags, according to the account sale (Exhibit 42). It has been suggested that this deficiency in rates realised indicated special damage to the barley. But it does not seem to me that this conclusion must necessarily be drawn. The sale was a forced sale by auction without analysis and would not be expected to realise rates equal to those which might have been obtained by private negotiations between merchants. The deficiency in rates must, in my opinion, be taken to indicate nothing more than the damage which naturally arose, in the usual course of things, owing to the delay in taking delivery by the defendants.

Now it remains to apply these facts, as above found, to the issues between the parties. With regard to the *first* issue whose fault was it that no delivery was effected by the 31st July 1913; it is urged on behalf of the defendants that they rightly refused to take delivery upon two grounds, *viz.*, (1) the inferior quality of the barley and (2) the late delivery. There is, in my opinion, no substance whatever in their belated objections as to the quality of the barley. It was never suggested at the time. It is to be observed that the defendants were allowed to draw second samples after the rain had fallen and they analysed and accepted the samples of two lots and issued delivery orders (Exhibits 9 and 10). They also accepted the analysis of the third lot, as already found, but declined to issue a delivery order, not on the ground of any supposed deficiency in the quality, but on the pretext of late delivery. They distinctly stated in their letter of the 11th August 1913 that there was no objection as to the quality of the barley (Exhibit 18), and they endeavoured to cancel the contract merely on account of late delivery (Exhibits 12 and 14). Nor is there, in my opinion, any substance in their contention that they were justified on the ground of delay in refusing to accept delivery. It appears clear upon the correspondence that it was entirely the fault of the defendants that delivery was not taken. They drew first samples on the 28th July 1913, and had plenty of time to go through the routine of analysis and to take delivery within the due date of 31st July 1913. They seized on the rainfall of the night of the 28th and the day of the 29th to demand a second sample but took no steps to draw them, as they might have done, on the 30th, nor, when they did draw them on the 31st, did they make any effort to expedite the analysis and consequently the weighment and delivery. They did not in fact exhibit any of the anxieties natural to a contractor anxious to fulfil his contract, but adopted rather the attitude of men desiring to evade the performance of their contracts. They had in fact ample time within which to have taken delivery if they had so desired. But they knew that the rates were falling and appear to have had no such desire. No other conclusion is, in my opinion, possible from their conduct than that they were discreditably endeavouring to wriggle out of their contract. It has been argued on the other side that, in any case, the defendants' conduct amounted to an extension of time for delivery, and that argument also appears to me to be good. The defendants clearly indicated their intention to accept delivery of two lots after the due date by issuing two delivery orders on the 1st August 1913 (Exhibit 9 and 10). They also indicated their intention of accepting delivery of the third lot after due date by offering the analysis of that lot for acceptance that same day, 1st August 1913. Their endorsement of the words "late reject" on the sample-analysis-slip (Exhibit 2) and their subsequent letters endeavouring to cancel the contract (Exhibits 12 and 14) were, in my opinion, dishonourable attempts to escape from the liabilities of a losing contract. It must accordingly be held that it was defendants' fault that no delivery was taken by the due date, 31st July 1913, and that de-

fendants were perfectly aware of this fact and did by their conduct extend the time for delivery beyond the due date, *viz.*, 31st July 1913, within the meaning of section 63 of the Indian Contract Act.

With regard to the *second* issue who was responsible for the subsequent deterioration and non-delivery—the argument has proceeded upon two separate suppositions, (1) that the property had not passed to the purchasers and (2) that the property had passed to the purchasers. It seems to me that this is a case which can be determined on the first supposition without considering the evidence which might be necessary in order to determine the case on the second supposition. And it seems to me that the case should be decided on the first supposition, as the second was not definitely pleaded in the plaint and has, consequently, not been fully dealt with in this trial. Proceeding then to consider the case upon the first supposition, that the property had not passed to the purchasers, the duty of the seller would ordinarily be to sell the goods to others within a reasonable time after due date, in case of refusal of delivery by the purchasers. But here the defendants, who were the purchasers, authorised, as already held, the extension of time for delivery after due date. That extension must, in my opinion, be held to have been further extended by the submission of the question, whether delivery should or should not be taken by the defendants, to the decision of the arbitrators (Exhibits 17 to 23), and by their professions of readiness to take delivery thereafter according to the arbitration award (Exhibit 25). This conclusion is not affected by the fact that the second fall of rain, after the arbitration, gave them a further opportunity of endeavouring to evade their liabilities, (Exhibit 26) by persuading the arbitrators to re-open the award (Exhibits 28 and 29) For, the arbitrators, when so approached, naturally declined to have any further dealings with the defendants, who thereupon again professed readiness to take delivery if they could obtain a postponement of the auction (Exhibits 30 and 31). There could be little doubt that these professions were again not *bona fide*, for the defendants declined to commit them to writing on the day of the auction; yet endeavoured, after delivery was impossible, owing to the actual sale of goods at the auction, to pose as injured persons, who had been most anxious all along to obtain delivery o the goods according to the arbitrators' award (Exhibits 33 and 34). Their conduct must, in my opinion, be held to amount to an extension of time for delivery up to a reasonable period after the award of the 26th August 1913. Their professions of readiness to take delivery were, as already indicated, mere disingenuous pretexts for avoiding their liability.

They never made any *bona fide* attempt to take delivery, and it was entirely their own fault that they did not get delivery before the goods were auctioned on the 30th August 1913. The defendants must, moreover, be held liable for the deterioration of the goods due to their not having taken delivery, for it was the rainy season when risk of deterioration from rain was in the usual course of things and must have been well known to the parties. There is no reason to suppose, as already indicated, that the usual precaution against rain had not been taken by spreading tarpaulins over the bags and the party in fault in the matter of delivery is bound to make compensation for any loss or damage which naturally arose in the usual course of things from their breach of the contract, under section 73 of the Contract Act. This leads, therefore, to the same result as the application of the principle that the risk is with the defaulting party even when the property has not passed to the purchaser, laid down by section 20 of the English Sale of Goods Act of 1893, even if that equitable rule should be held not to be in force in India under the provisions of the Indian Contract Act.

The other supposition, namely, that the property had passed to the purchaser was not suggested until the plaintiff's letter of the 28th August 1913 (Exhibit 27), and has been put forward for the first time in the course of this litigation now in argument. It is a supposition involving matters not wholly free from difficulty. The contract was one for sale of unascertained goods, and it has been argued that the property in these goods passed to the purchasers after the analysis of samples had been made and accepted and before the goods had actually been weighed and delivered over to the purchasers. It seems to me that the matter must *prima facie*

be determined by a consideration of the terms of the contract. And it will be observed that here the clause as to weighment does not specifically state by whom weighment has to be effected. It would seem to me that *prima facie* that would be part of the duty of the seller, unless that conclusion should be contrary to the other terms of the agreement or displaced by proof of some particular trade or local usage. Here there are, no doubt, considerations which must point to the duty of weighment having been placed on the purchasers by trade or local usage. But the pleadings have raised no issue as to the existence of any particular trade or local usage, and, in consequence, no evidence has been allowed as to any such particular trade or local usage which might be of the nature indicated in paragraph 422 of Volume 10 of Halsbury's Laws of England. Reference has merely been made to previous judicial decisions which would, however, only amount to particular instances in which a particular trade or local usage had been recognised, and would not, unless sufficiently defined and numerous, justify the particular trade or local usage being noticed judicially by the Court. Moreover, the first case referred to, namely that of *Firm of Motumal* v. *Firm of Ruttanji*(1), did not deal with the question of passing of ownership. And the contract in the second case of *Harkishinlal* v. *Louis Dreyfus* (2) contained a special clause placing the duty of weighment upon the purchaser, though, no doubt, there are some observations in the judgment which would lead to the conclusion that the clause merely reproduced the particular trade or local usage. The learned Judge who decided that case also gave expression to a similar opinion in the former case when before the Appellate Bench, *viz.*, that of *Firm of Ruttonji Burjorji* v. *Firm of Motumal Bhagchand* (3). But no expression of opinion upon that point was given by the other Judge, the Judicial Commissioner. If the duty of weighment were on the seller then, no doubt, the property would not have passed under section 81. But if the duty to weigh were upon the purchasers then, no doubt, the property would have passed under sections 81 and 83 of the Contract Act. It is not necessary to consider the matter further, for if the property had passed, the defendants, who were the purchasers would have been liable, just as on the former supposition, for all damages to the goods under the principle contained in section 20 of the English Sale of Goods Act, 1893, and also in section 107 of the Indian Contract Act.

With regard to the *third* issue—can this question be raised in view of the arbitration proceedings and award—it has been argued that the contract[3] containing the submission to arbitration was invalid in default of an eight annas stamp, on the authority of the case of *Hurdwary Mull* v. *Ahmed Musaji Selaji* (4). But the case was not followed in the subsequent cases of *Bombay Company, Ld.* v. *National Jute Mills Company, Ld.* (5) and of *Baijnath* v. *Ahmed Musaji Saleji* (6). It has then been suggested that in any case the appointment of the arbitrators under the submission ought to have been in writing duly stamped. But the appointment of the arbitrators and of the umpire had not been denied (Exhibits 17 and 20 to 23). It was, therefore, not necessary, even if such writing were required, to produce the writing appointing the arbitrators and as a matter of fact no such writing has been produced. No question can, therefore, arise as to whether that writing is or is not properly stamped, nor can any question arise of admitting it or excluding it from evidence under section 35 of the Stamp Act. The award itself has not been denied and has been admitted in evidence upon being duly stamped under the Stamp Act. It was, in my opinion, accordingly not open to the defendants in this litigation to deny that it was their fault, even if my conclusion on the point should be wrong, that no delivery was effected by the 31st July 1913, as that matter had been concluded by a valid award, though it was open to the defendants to contest their liability for subsequent deterioration and non-delivery, as these matters were subsequent to and not covered by the award. It will be sufficient on the question whether the

(1) 24 Ind. Cas. 883; 7 S. L. R. 141.
(2) Suit No. 410 of 1912.
(3) 32 Ind. Cas. 720; 9 S. L. R. 160
(4) 1 Ind. Cas. 371; 13 C. W. N. 63.
(5) 16 Ind. Cas. 153; 39 C. 669.
(6) 18 Ind. Cas. 978; 40 C. 219; 17 C. W. N. 395.

parties are bound by a valid award to refer to paragraphs 944, 986, and 992 of Vol. 1 of Halsbury's Laws of England and to the cases of *Khanchand Javhersingh* v. *Kodumal Javhersing* (7), *Samiya Mavali* v. *Minanmal* (8), *Bhaurao Jivaji Tivli* v. *Radhabai Laxman Jivaji* (9), *Laldas Jibhai* v. *Bai Lala* (10).

With regard to the *fourth* issue or general issue as to damages and costs, it follows from what has been said that the defendants are liable for damages calculated at the difference between the contract rate Rs. 27-4-0 per candy and the auction rates Rs. 21-10-0 per candy on 148 bags, Rs. 21-4-0 on 265 bags, and Rs. 20-5-0 on 301 bags, being damages amounting to Rs. 1,109 including the auctioneer's commission, as claimed and detailed in the bill (Exhibit 35), being in other words the difference between the contract rate and the rate on the extended date for delivery, namely, the auction of 31st August 1913. It appears to me finally, that a special order as to costs ought to be made in this case, in view of the discreditable endeavours of the defendants already indicated and maintained upon every possible technical objection during the trial to evade their just liability and to wriggle out of their contract. The defendants are, therefore, ordered to pay costs as between client and Pleader under rule (*g*) of Appendix VI at page 153 of the Rules of the Court.

Let there be a decree accordingly against the defendants for payment of Rs. 1,109 with interest at 6 per cent. from the date of suit to date of payment with costs calculated as between client and Pleader under rule (*g*) of Appendix VI of the Rules of the Court of the Judicial Commissioner of Sind.

Suit decreed.

(7) 15 Ind. Cas. 819; 5 S. L. R. 240.
(8) 23 M. 490; 10 M. L. J. 240.
(9) 2 Ind. Cas. 431; 11 Bom. L. R. 406; 33 B. 401.
(10) 1 Ind. Cas. 105; 11 Bom. L. R. 20; 5 M. L. T. 226.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 646 OF 1913.

August 20, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

KUMARAPPAN CHETTIAR—PLAINTIFF—APPELLANT

versus

NARAYANAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Consideration, want of effect of—Suit by puisne mortgagee contested by stranger—Defendant, whether can raise question of consideration—Burden of proof—Evidence Act (I of 1872), s. 106.

When a suit upon a mortgage is contested by a stranger who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case. [p. 456, col. 2; p. 457, col. 1.]

Bisheswar Dayal v. *Harbans Sahay*, 6 C. L. J. 659; 3 M. L. T. 38, followed.

Babu v. *Sita Ram*, 25 Ind. Cas. 426; 36 A. 478; 12 A. L. J. 806, referred to.

Janki Das v. *Ahmad Husain Khan*, 25 A. 159; A. W. N. (1902) 218; *Saluk Singh* v. *Ajudhya Pershad*, 15 Ind. Cas. 121; 10 A. L. J. 108; *Bhagwat Dayal* v. *Debi Dayal Sahu*, 35 C. 420; 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.); *Achal Ram* v. *Kazim Husain Khan*, 27 A. 271 (P. C.); 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 113; 8 Sar. P. C. J. 772; *Adaikulam Chetti* v. *Subban Chetti*, 26 Ind. Cas. 35; (1914) M. W. N. 684; 16 M. L. T. 279; 27 M. L. J. 621, distinguished.

Dowlat Rai v. *Khub Lal Singh*, 22 Ind. Cas. 645; *Sagaji* v. *Namdev*, 23 B. 525; 1 Bom. L. R. 5; *Ismail Mussajee Mookerdam* v. *Hafiz Boo*, 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.), referred to.

Per *Spencer, J.*—A mortgage without consideration is a nullity, and so inoperative, and it creates no charge on the property as against a subsequent purchaser [p. 456, col. 1.]

Ramaswami Chettiar v. *Sundara Reddiar*, 23 Ind. Cas. 805, followed.

Chinnan v. *Ramachandra*, 15 M. 54, distinguished.

Per *Kumaraswami Sastri, J.*—In cases of sales and assignments, mere non-payment of purchase-money would not vitiate the transaction, and in such cases, it is no concern of a person, who was no party to the transaction, to call in question the non-payment of consideration. Where the transfer itself is impeached on the ground of its being a colourable transaction or of its being otherwise invalid in law, different considerations will prevail. [p. 457, col. 2.]

Dowlat Rai v. *Khub Lal Singh*, 22 Ind. Cas. 645, referred to.

A mortgage is *prima facie* security for a debt, and, where the debt does not exist, the security cannot be enforced. Where, therefore, a puisne incumbrancer or a person in possession of mortgaged property and claiming title thereto succeeds in showing that there was no debt, the property cannot be ordered to be sold. [p. 458, col. 1.

KUMARAPPAN CHETTIAR v. NARANAYAN CHETTIAR.

Second appeal against the decree of the Subordinate Judge of Tuticorin, in Appeal Suit No. 12 of 1912, preferred against that of the District Munsif of Kovilpatti, in Original Suit No. 744 of 1910.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. R. Rangasami Aiyangar*, for the Appellant.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondents.

JUDGMENT.

SPENCER, J.—The plaintiff is a puisne mortgagee under a hypothecation bond and he sued for sale of the mortgaged property. The 1st defendant is the son and legal representative of the mortgagor. The remaining defendants were impleaded as claiming an interest in the property by reason of a prior mortgage to defendants Nos. 2 to 5, a sub-mortgage by them to 6th defendant, a suit brought by 6th defendant followed by a decree and a sale of the mortgaged property in Court auction, and lastly a private sale by 6th defendant to defendants Nos. 7 and 8.

Both the lower Courts held that the plaintiff's mortgage was without consideration and dismissed his suit. The questions that arise in second appeal are (1) whether it was open to any of the contesting defendants to raise the question of consideration, (2) whether, when the execution of the mortgage instrument is proved and it contains a recital that consideration passed, the onus of proving want of consideration does not lie on the persons who wish to attack its validity.

From the District Munsif's remark, in paragraph 11 of his judgment, about the plaint bond being a colourable one and the Subordinate Judge's remark, in paragraph 6 of his judgment, about its being nominal and fraudulent, I am inclined to think that, if the issue had been so worded, they would have declared the instrument to be a sham and collusive document; but as there was no issue on this point, we must see whether the plaintiff is entitled to succeed on the Subordinate Judge's finding that Exhibit A was indeed executed by 1st defendant's father but that no consideration passed.

I adhere to the view taken by Tyabji, J., and myself in *Ramaswami Chettiar* v. *Sundara Reddiar* (1) that a mortgage without consideration is a nullity, and so inoperative, and that it creates no charge on the property as against a subsequent purchaser. Reliance is placed on certain observations in *Chinnan* v. *Ramachandra* (2) for the contrary view. Even in that case when the mortgagor was made a party to that suit, as the mortgagor's legal representative is a party to this suit, and when it was found that it was not intended that the plaintiff should take any interest under his assignment, the suit failed. The point that arises here can hardly be said to have been directly decided in *Chinnan* v. *Ramachandra* (2). The plaintiff in that suit was a sub-mortgagee and seems to have been treated on the footing of a *bona fide* transferee of the mortgage interest.

On the *second* point I agree with the view expressed by Mookerjee, J., in *Bisheswar Dayal* v. *Harbans Sahay* (3), that when a suit upon a mortgage is contested by a stranger, who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case. His further observation, as regards the recitals in the deed, that consideration has been paid being good evidence and being presumed to be true, till the contrary is proved, as against the maker, but that an execution purchaser who knows nothing about it is entitled to call upon the plaintiff to prove not only its execution but that there was consideration for it, commends itself as just and in accordance with the provisions of section 106 of the Indian Evidence Act.

In *Babu* v. *Sita Ram* (4), where some observations occur not easily to be reconciled with the above, the peculiar position of a stranger who purchases without notice has not been so carefully examined.

I dismiss this second appeal with costs.

KUMARASWAMI SASTRI, J.—Plaintiff is the appellant. The 1st defendant's father, who was the owner of the suit property, mortgaged it to defendants Nos. 2 to 5 and they created a sub-mortgage in favour of the 6th defendant. The 6th defendant sued defendants Nos. 2 to 5 and 1st defendant's father and a decree was passed, in execution of which

(1) 23 Ind. Cas. 805.

(2) 15 M. 54.

(3) 6 C. L J. 659; 3 M. L. T. 38.

(4) 25 Ind Cas. 426; 36 A. 478; 12 A. L. J. 806.

the decree-holder himself purchased the property. Although the suit was by a sub-mortgagee, the mortgaged property seems to have been sold and not the mortgage interest of defendants Nos. 2 to 5. The 6th defendant, however, took possession of the property and has been in possession and enjoyment. The 7th and 8th defendants subsequently purchased the 6th defendant's interest. The plaintiff-appellant sues as the second mortgagee and his claim is resisted by the 7th and 8th defendants. Both the lower Courts found that the mortgage sued on was not supported by consideration.

It is argued for the appellant that it was not open to the defendants to raise the question as to want of consideration for the mortgage in his favour and, assuming that it was open, the onus is on them to show that there was want of consideration, the plaintiff being entitled to a decree on proof of execution, on the failure of defendants to adduce evidence as to want of consideration. It is to be remembered that in the present case the defendants claim to be prior mortgagees, and also claim title to the mortgaged property by virtue of the Court sale and possession for over 12 years as auction-purchasers. I am of opinion that it is open to third persons in possession of properties, which a e sought to be sold for non-satisfaction of an alleged mortgage, to put the plaintiff to the proof that any debt is due to him. They were not parties to the mortgage transaction and, even assuming that the mortgagor admits or does not dispute the claim, his admission, so far as they are concerned, can only be treated as a piece of evidence in favour of the mortgagee, and not as conclusive against third parties. In *Bisheswar Dayal* v. *Harbans Sahay* (3) it was held that, where a mortgage is contested by a stranger who asserts that there was no consideration for it, the onus is on the mortgagee to prove his case. Mr. Justice Mookerjee observes as follows:—

"No doubt, if the suit is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recitals as to the payment of consideration for the deed which he executed are untrue. When, however, the suit is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is clearly upon the plaintiff to prove his case."

I entirely agree with Mr. Justice Mookerjee. A similar view was taken in *Janki Das* v. *Ahmad Husain Khan* (5) and *Saluk Singh* v. *Ajudhya Pershad* (6). Reference has been made by the appellant's Vakil to *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (7), *Achal Ram* v. *Kazim Husain Khan* (8) and to *Adaikulam Chetti* v. *Subban Chetti* (9). I think these cases are distinguishable from the present one. All that they decide is that, where the right of performance under a contract has been assigned, it is not open to the obligee to call into question want of consideration for the assignment, if the assignment is, in other respects, valid in law. This is the view taken in *Dowlat Rai* v. *Khub Lal Singh* (10). It is well established that, in cases of sales and assignments, mere non-payment of purchase-money would not vitiate the transaction, and in such cases, as remarked by the Privy Council, so long as the deed stands, it is no concern of a person, who was no party to the transaction, to call in question the non-payment of consideration. Where the transfer itself is impeached on the ground of its being a colourable transaction, or of its being otherwise invalid in law, different considerations will prevail and *Chinnan* v. *Ramachandra* (2) and the other cases cited show, that want of consideration may be proved as part of other circumstances which go to show that the instrument is a colourable transaction and not intended to convey any interest to the ostensible purchaser or confer any title on him.

It is next contended for the appellant that, if there was no consideration for the mortgage sued on, the transaction would still hold good in the absence of any proof that it was a colourable or sham transaction. I am unable to accept this contention. In *Ramaswami Chettiar* v. *Sundara Reddiar* (4) it was held by Spencer and Tyabji, JJ., that the extent of the charge on the pro-

(5) 25 A. 159; A. W. N. (1902) 218.

(6) 15 Ind. Cas. 121; 10 A. L. J 108.

(7) 35 C 420; 12 C. W. N. 393; 10 Bom. L. R. 230; 7 C. L. J. 335; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49 (P. C.)

(8) 27 A. 271 (P. C.); 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 32 I. A. 13; 8 Sar. P C. J. 772.

(9) 26 Ind. Cas. 35; 27 M. L. J. 621; (1914) M. W. N 684; 16 M. L. T. 279.

(10) 22 Ind. Cas. 645.

perty would *prima facie* be measured by the actual consideration for securing which the charge was created and, where there was no consideration, there was *prima facie* no charge. With these remarks I concur. In the case of sales, when there is an intention to pass property, the non-receipt of consideration does not hinder the vesting of property. *Sagaji* v. *Namdev* (11). Again, as pointed out by their Lordships of the Privy Council in *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (12), the transaction may be viewed as a gift with an imaginary consideration inserted when there was no intention of demanding payment. Reference has been made to the observations in *Chinnan* v. *Ramachandra* (2) that, if the execution of a mortgage or other conveyance is proved, further evidence is not necessary to show that the purchaser has taken the interest which the document purports to convey, and that it is not necessary for him to prove, as against a third person, that consideration passed. These observations are no doubt in conflict with the ruling of a Bench of this High Court above referred to, but with great deference I think that the decision in *Ramaswami Chettiar* v. *Sundara Reddiar* (1) lays down the sounder rule. A mortgage is *prima facie* security for a debt, and, where the debt does not exist, it is difficult to see how the security can be enforced. Where, therefore, a puisne incumbrancer or a person in possession of mortgaged property and claiming title thereto, succeeds in showing that there was no debt, it is difficult to see how the property can be ordered to be sold. It may, perhaps, be open to the mortgagee to show that, though the consideration was recited in the document, the intention of the mortgagor was to benefit the mortgagee to the extent to which the fictitious consideration was recited, but that is not the case here, and if any such case is sought to be made out, the onus clearly is on the mortgagee.

I am of opinion that the decision of the lower Court is correct and dismiss the second appeal with costs.

Appeal dismissed.

V.R.P.

(11) 23 B. 525; 1 Bom. L. R. 5.

(12) 33 C. 773; 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 461 OF 1913.

April 12, 1916.

Present:—Sir Donald Johnstone, Kt., Chief Judge, and Mr. Justice Scott-Smith.

THE MUNICIPAL COMMITTEE, KARNAL—DEFENDANT—APPELLANT

versus

MUHAMMAD RUSTAM ALI KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Municipal Act (III of 1911), s. 3 (13) (b)—Public street—User of road by public as of right—Presumption—Dedication limited to particular class of persons—Burden of proof.

The user of a road by the public openly and as of right is sufficient to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive use. [p. 462, col. 1.]

Rana Ganpat Singh v. *Kangra Valley Slate Company*, 62 P. R. 1898; *Mannada Mudali* v. *Nallayya Goundan*, 4 Ind. Cas. 870; 6 M. L. T. 285; 19 M. L. J. 467; 32 M. 527, followed.

Anderson v. *Juggodumba Dabi*, 6 C. L. R. 282; *Municipal Commissioner of Bombay* v. *Mathurabai*, 30 B. 558; 8 Bom. L. R. 457; 4 Cr. L. J. 23; *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitter*, 10 C. W. N. 1044; 4 C. L. J. 343; 33 C. 1290, referred to.

The onus is on the owners of the site to show that the dedication was limited to a particular class of persons only. [p. 463, col. 1.]

Vibudapriya Thirthaswami v. *Esoof Sahib*, 8 Ind. Cas. 175; 20 M. L. J. 879; (1910) M. W. N. 779; 35 M. 28; 9 M. L. T. 44, followed.

Where, therefore, in a suit for possession of a plot of land in a market taken up by the defendant Municipality for making a metalled road, it appeared that the predecessors of the plaintiffs built the market with shops and left an open space lying between the shops, this open space opening into thoroughfares at various points, and then let the shops to grain-dealers:

Held, (1) that the presumption certainly was that they intended the members of the public to make use of the space left vacant as a highway; [p. 462, col. 2.]

(2) that, as there was no evidence to show that the dedication was limited to any particular class of persons and as the road had ever since been used by all members of the public without any interruption whatsoever, it was a public street within the meaning of the Municipal Act and the plaintiffs could not, therefore, get possession of the site. [p. 463, cols. 1 & 2.]

Kalidas v. *Municipality of Dhandhuka*, 6 B. 686; *Ahmedabad Municipality* v. *Manilal Udenath*, 20 B. 146 and *Sham Soonder Bhuttacharjee* v. *Monee Ram Doss*, 25 W. R. 233, distinguished.

First appeal from the decree of the District Judge, Karnal, dated the 23rd December 1912.

Mr. *C. Bevan Petman*, for the Appellant.

Mr. *Kirkpatrick* and the Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.

SCOTT-SMITH, J.—The plaintiffs in the present case are Nawab Bahadur Rustam Ali Khan and Nawab Umar Daraz Ali Khan of Karnal and the Municipal Committee of Karnal is the defendant. The dispute between the parties is in reference to a metalled road which the defendant Committee made in the Nawab Ganj, a grain market situate in a suburb of the City of Karnal and owned by the plaintiffs. There is a plan of Nawab Ganj on the record, which shows the position of the road in question. The Nawab Ganj was built by the plaintiffs' ancestors. It consists of two rows of shops with a vacant space lying between. The shops are occupied by the tenants of the plaintiffs who deal in grain and other commodities. On the vacant site lying between the shops, there are *tharas* on which the shop-keepers store grain. There is a good deal of vacant space which is not occupied by *tharas*. Carts bringing in grain pass along the vacant space and so do the members of the general public who come to buy grain. There are five gateways in the Nawab Ganj—No. 1 at the extreme north is called the Golakh Gate; it leads into a *bazar*; No. 2 the Telian Gate at the extreme south end of the market; No. 3 leads into the *bazar* from the Pansar Hatta on the east side; No. 4 leads into the same *bazar* at the north-east corner through the Halwai Hatta; and No. 5 leads into the Korianwala Serai and is immediately south of the Golakh Gate No. 1.

The road which the Committee has metalled is ten feet wide and leads from the Golakh Gate south to the Korianwala Gate. Two-thirds of the way towards Korianwala Gate it turns east and again, after some distance, turns due south and leads as far as the Telianwala Gate. It does not take up the whole of the vacant space between the *tharas* but only a part of it. It is in evidence and it is admitted by the defendant that there were gates at gateways Nos. 1, 2 and 4 which used to be closed at night for protective purposes. There never was a gate apparently at No. 3. The gate at No. 5 which leads into the Korianwala Serai is the subject of a connected appeal (No. 2731 of 1914)*, which is disposed of by a separate judgment. It is sufficient to state at this place that the evidence shows that the gate at No. 5 used also to be closed at night, until a period variously stated at 5 or 10 years ago, when it fell down. The plaintiffs brought the present suit in consequence of the action of the Municipal Committee in metalling the road. They sued for possession of the land so taken up and for Rs. 1,000 on account of damages. The lower Court has held that the site under the road belongs to the plaintiffs and that it is not a public street within the meaning of section 3 of the Punjab Municipal Act. It, therefore, decreed the claim to the site under the road but dismissed that for damages. The Municipal Committee, as defendant, has filed an appeal to this Court and the appeal has been argued at very great length before us.

The Nawabs charge the shop-keepers in the *mandi* a fixed rent for their shops. They also levy upon them a cess or tax called *chungi teh bazari*. On behalf of the plaintiffs the contention is that this charge is made for use of the vacant space in front of the shops on which the grain-dealers frequently store their grain. The first question which we shall deal with is, whether this *chungi* was charged for use of the vacant site. The lower Court in its judgment refers to Exhibits P-E, P-F, P.-I., P-G and P-H, as showing that this *chungi* was charged for use of the vacant site lying between the shops. In our opinion it has misinterpreted these exhibits.

Exhibit P-E is printed at pages 19—23 of the paper-book. The heading is "a translation of an extract from the registers relating to the income of sites lying between shops in Nawab Ganj" and so on. Mr. Petman urges that this heading is merely an invention of the copyist and that the real entry begins at the words "dated Saturday" and so on. Mr. Kirkpatrick admits the correctness of this statement and says that he lays no stress upon the heading. The extract itself refers to the *chungi* and says nothing about sites.

P-F (page 39 of the paper-book) is a copy of a judgment in a suit brought by the present plaintiffs to recover a certain sum on account of a lease of the *chungi* dues.

P-I at page 42 is the judgment

*See *Municipal Committee, Karnal* v. *Nawabzada Mahomed Umar Daraz Ali Khan*, 35 Ind. Cas. 355.—*Ed.*

on appeal. This judgment shows that *chungi* is charged on all grain brought into the *mandi* and is not a charge for rent of the site as such.

Exhibit P-25/9, at pages 46 and 47 of the paper-book, consists of two lists of bids offered at auction sales relating to the lease of *chungi* dues.

Exhibit P G comprises the plaint and the judgment in a civil suit. In the plaint, at page 63, the Nawabs clearly state: "Besides rent of the shops, we charge as rent $1\frac{1}{2}$ *chataks* per maund on goods received for being sold in the Nawab Ganj. The rent is known by the name of *chungi teh bazari*" At page 66 of the paper-book there is a translation of a lease dated 31st March 1907, executed by one Tulsi in favour of the plaintiffs. This is a lease in respect of *teh bazari* of shops at Nawab Ganj and Azmat Ganj. It shows that the *teh bazari* consists of dues realised on goods of all sorts brought into the *mandi* from out stations.

The same thing appears in the lease dated the 1st April 1908, printed at pages 78 and 79 of the paper-book.

Some of the witnesses produced by the plaintiffs, no doubt, say that this *chungi teh bazari* is realised as rent of the vacant site in the *mandi*, but their evidence to this effect is not borne out by the documentary evidence.

P. Ws. Nos. 3, 6, 7, 8, 9 and 10 all state clearly that the *chungi* is a cess paid on grain brought into the market and this is not now denied on behalf of the plaintiffs. Fallon's Hindustani Dictionary gives two meanings of *teh bazari*: (1) ground rent of a stall in a market; and (2) a cess levied from vendors in a market.

In our opinion it is cleary established by the evidence on the record that the *chungi teh bazari* levied by the Nawabs, is levied as a cess on all grain brought into the *mandi*, whether such grain is stored in the godowns behind the shops, or in the shops themselves, or on the *tharas*, or on the vacant site. We do not consider that there is any evidence that it is charged for use of the vacant site. In our opinion the levy of this charge does not help the plaintiffs in any way.

The *next* question is whether any road or passage existed in Nawab Ganj before the Municipal Committee made the metalled road in question. A letter dated 20th May 1842 (page 3 of the paper-book) was referred to by Mr. Petman. It appears to show, that in those days there was a road leading from west to east after one passed into the Ganj through the Telianwala Gate. That road is not apparently any part of the site now in dispute and the letter in question does not, in our opinion, assist either side. The following documents were also referred to by Mr. Petman:—

P-6 (page 29 of the paper-book), dated 5th August 1890. This was a *murasila* addressed by the President of the Municipal Committee, to the Nawabs asking them to repair the drain at Gate No. 1 and to have the ground there cleaned up.

P-11 (page 34 of the paper-book). This was a *murasila*, dated 10th August 1898, sent by the President, Municipal Committee, to one of the Nawabs asking him to level the way in the grain market as the public was put to much inconvenience by its muddy state.

P-15 (page 44 of the paper-book). This was a *murasila*, dated 29th July 1902, addressed by the President, Municipal Committee, to one of the Nawabs asking him to make certain arrangements in regard to the well in the Ganj and also asking him to pave the road in the market with concrete.

P-17 (page 59 of the paper-book). This was a *murasila*, dated the 15th August 1906, from the President of the Municipal Committee to one of the Nawabs asking him to make the road in the Ganj *pucca*. On this there is an endorsement to the effect that the road should be repaired.

P-18 (page 60 of the paper-book) is the resolution of the Municipal Committee in consequence of which the *murasila* P-17 was sent to the Nawabs.

In P-21 (page 82 of the paper-book) on the 4th September 1906, the Nawabs were reminded of a previous letter about the construction of a metalled road in the grain market. To this a reply was sent on the 17th February 1907 that a metalled road had been constructed in the grain market.

It is contended by Mr. Petman that these documents show that there was some sort

of road in the Nawab Ganj, even before the Municipal Committee made the metalled road in dispute. It is clear that the Committee was constantly asking the Nawabs to make the road *pucca* and that the Nawabs agreed to do this and eventually said that they had done it. Further the plaintiffs' witnesses all admit that carts laden with grain come into the Nawab Ganj from Gate No. 1, and, therefore, it is *prima facie* probable that there was some sort of a road, even though it may not have been well defined. The defendant's witnessess, many of whom are very respectable people, say that there was a *kucha* road where the *pucca* one has now been made.

D. W. No. 2. Lala Chuni Lal, *Sahukar*' says that at the place where the Municipality has made the *pucca* road in question, there used to be a *kucha* road previously. It was used as a road.

D. W. No. 3, Najm Din, Octroi Superintendent of the Municipal Committee, has made a similar statement.

D. W. No. 4, Sayad Abdulla Shah, Conservancy Darogha, supports D. Ws. Nos. 2 and 3.

D. W. No. 5, Mr. Ram Chander, Barrister-at-Law, says that he frequently passed through the Nawab Ganj by the *kucha* road which previously existed where the *pucca* road now is. He is a perfectly independent witness and we see no reason for disbelieving him.

D. W. No. 6, *Pandit* Tek Chand, Contractor of Karnal, and D. W. No. 7, *Pandit* Basant Lal, Pleader, are two more disinterested witnesses who depose to the existence of this *kacha* road.

A good many other witnesses were produced, but it is not necessary to reproduce their evidence in detail. In our opinion it is clearly proved that there was a *kucha* road in the Nawab Ganj occupying approximately the situation of the *pucca* road now in dispute. It is obvious that there must have been some such road for the numerous carts laden with grain which came into the *mandi* and discharged their grain at the different shops. Without a road of some kind business could not have been carried on.

Before coming to the legal points we must refer to one or two matters which Mr. Petman has brought to our notice. The first is the matter of lanterns which, it is said, were put up by the Municipal Committee for the lighting of the *mandi*. Ahmad Hussain P. W. No. 12 (page 79 of the paper-book) has given evidence about these lanterns. He says that one was put up at the instance of Mir Yusaf Ali, a member of the Municipal Committee. It was put up near the staircase of the Mir Sahib's house. It is clear that this lantern was put up by the member of the Committee for his own convenience. Another lantern was set up near Pansar Hatta. The object of this probably was to light the way into the *mandi* which opens into the *bazar*. It is not improbable that this lantern was also put up for the convenience of this member of the Municipal Committee when coming home at night. There is no evidence that the *mandi* was properly lit by the Municipal Committee and the putting up of these two lanterns does not prove that the place was a public one.

The next matter referred to is that of some vegetable-sellers who used to squat on the vacant space and sell their vegetables. The documents marked D 8 at pages 140-142 of the paper-book show that the Committee, at the instance of the Deputy Commissioner, passed orders that after the 1st October 1909, no one should be allowed to wash or clean vegetable and fruit at any other place in the *mandi*, except at a platform specially set apart for that purpose. From this document it also appears that Nawabs Rustam Ali Khan set aside some shops specially for these vegetable-sellers. All that these documents show is, that the Committee purported to act under section 96 of Act XX of 1891, the Punjab Municipal Act, and that the Nawabs raised no objection. What appears to have happened is, that they made suitable arrangements for the vegetable-sellers in consultation with the Deputy Commissioner. The fact that they raised no objection to the action of the Municipality and of the Deputy Commissioner does not, in our opinion, affect the question in dispute before us. The lower Court has held that the site under the road in dispute belongs to the Nawabs. The Municipal Committee admits that the whole of the land inside Nawab Ganj belonged originally to the Nawabs. Their contention is that the road which they have now metalled is a public

street within the meaning of section 3, sub-section 13, clause (*b*), of Act III of 1911. The definition of "street" in section 3, sub-section 13, clause (*a*), is as follows: "*Street* shall mean any road, footway, square, court, alley or passage accessible, whether permanently or temporarily, to the public, whether a thoroughfare or not."

Now we think that there can be no doubt that the vacant space lying between the shops in Nawab Ganj comes within this definition. It is accessible to the public, because any member of the public, who wishes to buy or sell grain or to make any enquiries of the shop-keepers or to go there for any purpose whatsoever, can go in. There is no evidence that anybody has ever been prevented or that any one wishing to enter is asked what his business is.

Coming to section 3 (13) (*b*), we find that a "public street" means "any street over which the public has a right of way." Mr. Petman contends that the public has a right of way over the roadway in question and in support of his contention has cited *inter alia* the following authorities.

Rana Ganpat Singh v. *Kangra Valley Slate Company* (1). In this case it was held that the principles of the English Law regarding the presumed dedication of a road to the public, arising from user of such road by the public, being founded on reason and commonsense and conducive to public convenience, are applicable to India. Further, that the user of a road by the public openly and as of right is sufficient, apart from the law laid down in the Limitation Act, 1877, section 26, to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive use. At page 217 of the Record the dictum of Chamber, J., in *Woodyer* v. *Hadden* (2) was quoted as follows:—"No particular time is necessary for evidence of a dedication:...if the act of dedication be unequivocal, it may take place immediately: for instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway." We consider this quotation to be very much in point in the present case. Here the predecessors of the Nawabs built a market of shops with an open space lying between the shops, this open space opening into thoroughfares at various points. They then let the shops to grain-dealers and the presumption certainly is that they intended the members of the public to make use of the space left vacant as a highway. Accordingly we find that the vacant space has ever since been used by all members of the public who come in to buy and sell grain and by carts bringing in grain, without interruption of any kind whatsoever.

In *Anderson* v. *Juggodumba Dabi* (3) the English presumption in regard to dedication from user was held to govern a case from the *mofussil* in Bengal.

The next case quoted by Mr. Petman is *Municipal Commissioner of Bombay* v. *Mathurabai* (4). The question here was, whether a certain proposed road was a "street" within the meaning of the City of Bombay Municipal Act. The decision in that case turned chiefly upon the meaning of the word "street" and the definitions given by certain eminent jurists were referred to at pages 567 and 568 and it was held that the proposed road would constitute a street within the meaning of the Act.

Mannada Mudali v. *Nallayya Goundan* (5). Here it was held that continued user by the public of a way raises a presumption that that way belongs to the public, and that it has been dedicated by the owner for the public use.

Vibudapriya Thirthaswami v. *Esoof Sahib* (6). Here again it was held that dedication must be presumed from the user by the public of a thoroughfare as a highway. Where there has been a general user by the public, a dedication without reservation would be presumed, if that was possible, and the burden of proving any reservation would be

(1) 62 P. R. 1898.
(2) 5 Taunt 125; 14 R. R. 706; 128 E. R. 634.
(3) 6 C. L. R. 282.
(4) 30 B. 558; 8 Bom. L. R. 457; 4 Cr. L. J. 23.
(5) 4 Ind. Cas. 870; 32 M. 527; 6 M. L. T. 285; 19 M. L. J. 467.
(6) 8 Ind. Cas. 175; 20 M. L. J. 879; (1910) M. W. N. 779; 35 M. 28; 9 M. L. T. 44.

on the party contending for it. One of Mr. Shafi's arguments may conveniently be disposed of at this point. He urges that the only members of the public who were allowed to use the way were those who wanted to buy or sell grain in the market or had some other business there. According to the principle enunciated in *Vibudapriya Thirthaswami* v. *Esoof Sahib* (6), the onus was on the plaintiffs to show that the dedication was limited to a particular class of persons. We cannot find anything in the evidence to support the view that in the present case the dedication was a limited one and that there was any reservation by the predecessors of the Nawabs, and that only those persons who had business in the *mandi* were allowed into it.

Chairman of the Howrah Municipality v. *Khetra Krishna Mitter* (7), where it is stated that an implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel; it proceeds not upon the principle that a grant has actually been made, but rather on the principle that the owner, having allowed the public to enjoy the user for any particular purpose, is estopped from denying the right of the public to the enjoyment of such user.

Mr. Shafi, on behalf of the plaintiffs-respondents, referred to *Kalidas* v. *Municipality of Dhandhuka* (8), *Ahmedabad Municipality* v. *Manilal Udenath* (9) and *Shum Soonder Bhuttacharjee* v. *Monee Ram Doss*(10). In the case of *Kalidas* v. *Municipality of Dhandhuka* (8) it was held that such limited access by the public as was there proved was not sufficient to show that the court in question ceased to be private property, and was converted into a street vesting in the Municipality. That case was distinguished in *Municipal Commissioner of Bombay* v. *Mathurabai* (4) and it was pointed out that in the ruling in question no reference was made to the definition of 'street' in the Bombay District Municipal Act. On the same page the High Court distinguished *Ahmedabad Municipality* v. *Manilal Udenath* (9). The facts in both those cases are distinguishable from those in the present one and we do not think that they help the respondents in any way.

In the case of *Soonder Bhuttacharjee* v. *Monee Ram Doss* (10) the facts also were quite different. There it was found, on the evidence, that the residents of two or three neighbouring villages used a certain road for the passage of themselves and cattle, but it was also found that the road was solely used by men of those particular villages, and that the residents of other villages had no right and as a matter of fact were not allowed to use it. It was, therefore, held that the road being used by only one section of the community was not a public one. We have no quarrel with the decision in that case, but it is obviously of no assistance to the plaintiffs in the present case.

Now, having regard to the authorities, and viewing the matter from a commonsense point of view, there can, in our opinion, be no doubt that there has been an implied dedication to the public of a roadway in Nawab Ganj. We think this inference clearly follows from the fact that the Nawabs' predecessors built these shops and established a grain market, with an open space lying between them, which open space or part of it was obviously meant to be used by carts bringing in grain and by members of the general public who came to buy and sell, and which, moreover, opens into public thoroughfares at several points and which has all along been used in the manner stated without any interruption. Several of the exits from the market were, no doubt, provided with gates, which used to be shut at night for protective purposes only, but this, in our opinion, makes no difference, and does not show that the plaintiffs' predecessors reserved to themselves the right of closing the market at their pleasure. The road now made by the Municipal Committee is ten feet wide and it is not urged that this is an unreasonable width.

We hold then that there has been a dedication of this road to the public and we accept the appeal and setting aside the order of the lower Appellate Court, dismiss plaintiffs' claim with costs in both Courts.

[The Court dismissed the plaintiffs' cross-objections on the merits].

Appeal accepted; Cross-objections dismissed.

(7) 33 C. 1290 at p. 1296; 10 C. W. N. 1044; 4 C. L. J. 343.
(8) 6 B. 686.
(9) 20 B. 146.
(10) 25 W. R. 233.

SARJU PARSHAD *v.* UMANPATGIR.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 212 OF 1915.
June 9, 1916.
Present:—Mr. Justice Walsh and
Mr. Justice Sundar Lal.
Babu SARJU PARSHAD AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
Mahant UMANPATGIR AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Practice—Party in default—Court, duty of—Discretion

When a party is in default, either through failure of the Court officials to serve notice or from some neglect to pay the necessary process-fees, the question whether he should be denied a hearing or should be allowed an adjournment, is a question which must be judicially determined upon proper materials *i.e.*, upon evidence and for reasons to be given by the Judge who decides to deny him a hearing, so that such reasons may be reviewed, if necessary, by a higher tribunal, inasmuch as it amounts in substance to a final order and is in fact a judicial act requiring as much care, circumspection and judicial discretion as any other judicial act. [p. 466, cols. 1. & 2.]

The practice of lower Courts commented upon.

Second appeal from the decision of the District Judge, Ghazipur, dated the 3rd November 1914.

FACTS of the case material for the report are briefly as follows:—

The plaintiffs-appellants instituted a suit on the 9th December 1912, on the basis of their account books against Debi Dayal, respondent No. 2, and obtained a decree against him and the assets of one Natha on the 28th February 1913. On the 31st October 1912, *i.e.*, about six weeks before the institution of the appellants' suit, Debi Dayal executed a sale-deed in favour of Umanpatgir (defendant-respondent No. 1) and a supplementary sale-deed on the 9th December 1912 in respect of the property in suit. On the plaintiffs' applying for the attachment of the same, the Sub-Registrar reported that it was no longer the property of the defendant Debi Dayal. The execution proceedings were consequently struck off. The plaintiffs thereupon brought this suit, out of which this appeal has arisen, for a declaration that the two sale-deeds were fictitious and without consideration. The Subordinate Judge dismissed the suit. The plaintiffs appealed to the District Judge making both the defendants parties to the appeal. The defendant No. 1 was served with a notice of the appeal but the defendant No. 2 was not. No process-fee was paid within the time allowed by the Court for the issue of fresh notice, and on the date fixed for the hearing of the appeal, on the application by the appellant for an adjournment, it was urged by the defendant, who was contesting the appeal, that the appellants were not entitled to have the case adjourned. The plaintiffs-appellants then applied to have the name of the defendant No. 2 removed from the array of parties, and this was done. It was then urged by the defendant No. 1 that the appeal must fail, on the ground that the sale-deed had been held to be valid as against the defendant No. 2 and that decision had become final. The learned District Judge gave effect to the plea and dismissed the appeal.

Plaintiffs came to the High Court in second appeal.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.—The learned District Judge forced us to remove the name of Debi Dayal from the array of parties. Even if we did not pay the necessary process fee within time, he should have granted an adjournment. We put in an application for adjournment and it was rejected by the Judge, and he gives no reasons for rejecting it. The Judge should have given reasons, and very good reasons, before he rejected our application for an adjournment. I concede that it is discretionary, but the discretion should have been judicially exercised. Moreover, it was not our fault that the notice was not served upon Debi Dayal. It will be noted that the address of Debi Dayal as given by us was the same as given by Debi Dayal himself in the sale-deed. The peon's report to the effect that there was no person of the name of Debi Dayal living in that village was a false report and probably written at the instigation of Debi Dayal himself.

Counsel was stopped

Mr. *M. L. Agarwala* (with him Mr. *Sital Prasad Ghosh*), for Respondent No. 1 (respondent No. 2 being unrepresented and absent).—The claim of the plaintiffs-appellants is solely against Debi Dayal. Rightly or wrongly, there is a decree of the Subordinate Judge that the property in suit does not belong to Debi Dayal and that decree has become final.

SARJU PARSHAD *v.* UMANPATGIR.

[WALSH, J.—It was forced upon the plaintiffs by the most unreasonable refusal of the lower Court to grant time. The duty of the Court is to help a party in obtaining justice and not to put impediments in his way.]

I submit that there was gross negligence on the part of the appellants in not paying the process-fee within the time fixed by the Court or even afterwards.

[WALSH, J.—There were other modes of punishing them, the Court could have ordered the neglectful party to pay costs. It is the duty of the Court to hear appeals and decide them on the merits and not to seek an opportunity to strike them off. The Judge knew thoroughly well when he granted the second application that objection would next be taken that the appeal could not go on.]

There was no reason to put in an application to strike off Debi Dayal's name. The application was deliberate and the party which put in the application must take the consequences.

[SUNDAR LAL, J.—Even if Debi Dayal's name was struck off in the lower Court, could we not deal with his case here since he was made a party to the second appeal?]

I submit that inasmuch as there was no order of the lower Court in favour of Debi Dayal against the appellants the case against him cannot be heard here. He should not have been made a party to this second appeal.

[WALSH, J.—I think the Court did not act properly in refusing their application for adjournment. In a case like this the Court should have given reasons, and very good reasons, for not granting time.]

The application was refused because the process-fee was not paid within the time fixed by the Co rt: Civil Procedure Code, Order XLI, rule 18.

In any case we are entitled to our costs up to this day irrespective of the results of the suit.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents, said that he would submit to their Lordships' order as regards costs

JUDGMENT.

WALSH, J.—Mr. Agarwala has done his best as he always does, and has put every possible argument on behalf of his client in defence of the order which has been passed by the Court below. In spite of everything which he has said, this is one of the most striking examples which has come to my notice, during the short time that I have been here, of the methods which are from time to time adopted by the lower Appellate Courts to shut the door and to refuse to hear appeals when it is their duty to admit and hear them. Anybody studying the history of the attempts of the appellant in the lower Appellate Court in this case to get his appeal heard and decided and of the way in which those attempts were dealt with by the lower Appellate Court might well pause and think that the administration of Law under the rules of procedure was a mere game of hide and seek. It is true that justice cannot be administered in Courts of Law without strict and technical rules of practice and procedure. It is equally true that parties who come for a hearing must do their best to comply with those rules of practice and procedure, otherwise business cannot be conducted on orderly lines at all. But life is full of accidents and mistakes occur, as is often said, in the best regulated families and I think that there is no civilized Court in the world in which it is not the recognized principle, where slips, mistakes, delays, and failure to comply with rules have occurred, to remedy such slips and mistakes if they are remediable, in order to arrive at a decision on the real dispute between the parties and if it is possible to punish the person who has been guilty of such mistakes in such a way as to remove any sense of grievance or injustice from the mind of the opposite party. I have had occasion more than once to call the attention of the lower Courts to the principles which have rightly guided the Courts in England now at least for two generations in dealing with matters of this kind, and to the principles which, I believe, prevail in the several High Courts of India and which certainly ought to prevail in any Court which seeks to administer justice.

Now the facts in this particular case are as follows. A suit was brought against two defendants Nos. 1 and 2 for a fraudulent sale, that is to say, the allegation was that they had dishonestly entered into a tran action with the express purpose of depriving the plaintiff of his rights. Now

in an Appellate Court it is undesirable to make any observation about any allegation of that sort which still remains to be decided. At the present moment it has been decided by the Court of first instance adversely to the plaintiff, but the law gives the plaintiff a right to have his case on issues both of fact and of law, which are involved in the suit, re-heard and re-determined by the lower Appellate Court. In this case in order to enable that re-hearing to take place it was necessary for the plaintiff to serve defendant No. 2 as well as No. 1. He failed to do so. That he made an effort nobody denies, and the reasonable presumption from the effort that he made, is that he had a *bona fide* intention to bring defendant No. 2, if he could, before the Court, and have his case against him heard and decided. Everybody knows much better than I know the many reasons which may exist for failure of service. One knows the machinery which is adopted and the way in which notices are constantly served either insufficiently or at wrong places, or not served at all and in either of those cases they are matters for which the Court or at least the Court officials are responsible certainly, not the party. Where an act for which the party is not responsible has led to non-service, it is his duty to obtain extension of time. In this particular case for some reason or other, although some extension of time had been given to him to pay process-fee to enable the Court to serve defendant No. 2, he had failed to comply with that provision. Whether it was done owing to absence on business or to delay on his part or to an oversight on the part of his Pleader nobody has the slightest idea. The lower Court has not condescended to arrive at any finding upon the question at all. To my mind when a party is in default either through failure of the Court officials to serve notice or from some neglect to pay the necessary process-fees, the question whether he should be denied a hearing or should be allowed an adjournment is a question which must be judicially determined upon proper materials, *i.e.*, upon evidence and for reasons to be given by the Judge who decides to deny him a hearing, so that such reasons may be reviewed, if necessary, by a higher tribunal. It amounts in substance to a final order, it is in fact a judicial act, and to my mind it requires as much care, circumspection and judicial discretion as any other judicial act. It is not the first time that a case of this nature has come to my notice, and what I feel so strongly about it is that the right of an adjournment was denied to the appellant on the sole ground that he was unable to effect service on defendant No. 2, and this was done without any judicial determination of the question at all. To my mind that was wrong, and no attempt has been made on behalf of the respondent to justify it or to suggest that any grounds existed for believing that the plaintiff-appellant was not asking for the adjournment perfectly *bona fide*. That mistake was an unfortunate one. It was a mistake of the Court and a mistake which in my view is much too frequent and which the inferior Courts will do well to guard themselves against. The result was that the plaintiff's Pleader was in a very considerable difficulty. I will not discuss here the alternatives open to him, but the net result was that, as things stood, he could not get his appeal heard and decided against one of the parties to the contract which he was attacking and to the appeal which he was asserting. He ultimately took the course which has been described as a mistake. In the result it has turned out to have been a very unfortunate course to take. I am not myself prepared to describe it as a mistake. I think it was a genuine attempt to get out of a difficulty which was really the result of the Court's action itself, and at the highest it was a mere error of judgment arrived at undoubtedly upon the spur of the moment for which very little blame, if any, can be attached. Of course if it had been a deliberate and voluntary decision on the part of the Pleader the whole aspect of the case changes. But it was not so: it was a decision thrust upon him by the emergencies of the moment and I am surprised that the Court should, without warning him, dismiss the appeal for that sole ground alone. That, however, is what happened. The application having apparently been settled, the name of defendant No. 2 having been struck off as a party to the appeal, the Court below found that the

defect was fatal to the appeal and went on to hold that there was a final decree that the sale-deed was valid and *bona fide*. I should not be disposed to award any costs to the respondents in this matter at all unless they eventually succeed in the cause before the lower Appellate Court, but as my learned brother takes another view I agree in ordering that the respondents here should get the costs of this appeal. I would, therefore, allow the appeal and remand the case to the lower Appellate Court.

SUNDAR LAL, J.—I agree with the order proposed and my reasons for doing so as shortly stated are these. The plaintiff in this case is a decree-holder. He had brought a suit on the 9th of December 1912 for recovery of a certain sum of money due to him, for which he obtained a decree on the 28th of February 1913. Shortly before the suit the judgment-debtor seems to have transferred certain property to his spiritual adviser for a sum of money set forth in the sale-deed. The plaintiff in this case brought a suit to obtain a declaration that the said sale and a supplementary sale executed on the date the former suit was filed were fraudulent, without consideration and null and void. On trial the Court of first instance came to the conclusion that the transaction was *bona fide* and for consideration. The plaintiff preferred an appeal against the said decree in the Court below making the transferee and the transferor both parties to it. The transferee had been duly served and appeared in the Court below. The address of the transferor given in the memorandum of appeal was the correct address and the address on which he was served in the Court of first instance, but in this particular case the peon sent it back with the report that no man of that name was to be found. On the report coming back the Court granted a week's time for payment of process-fees. This fee was not paid. The Court was not inclined to give any further indulgence and under those circumstances the plaintiff's Pleader made an application to strike off the name of the transferor from the array of parties to his appeal. This, in my opinion, was a mistake on the part of the plaintiff's Pleader, the transferor was a necessary party to the appeal and he should have insisted upon the appeal proceeding against both. However, under a mistake he applied for the name of the transferor being struck off. The Court allowed him to do so and sometime afterwards in November it rejected the appeal, on the ground that the appeal could not be heard because the transferor was a necessary party. Dr. Tej Bahadur Sapru has appealed. In this case the circumstances clearly show that unless some indulgence was shown by the Court to the plaintiff by granting him further time and allowing the mistake to be corrected, the appeal was bound to be dismissed. Pleaders like all other human beings are at times liable to err, and in this case the Pleader in perfect good faith, believing that the vendor was not a necessary party, faced as he was by the reluctance of the Court to grant him any further time, made the application. The Court apparently then did not think that he was a necessary party and granted the application. Dr. Tej Bahadur's client is not entitled as a matter of law to any indulgence but the Court may, in the interests of justice, allow the mistake to be rectified. I have no objection to permitting the mistake to be rectified by the addition of the transferor in the Court below amongst the respondents and as it will enable that Court to do justice between the parties, I concur with the order proposed but as, in my opinion, the fault lay in the plaintiff's application to strike out the name of the transferor, Mr. Agarwala is entitled to his costs of the appeal. I would also allow the appeal and remand the case.

BY THE COURT.—The appeal is allowed, the decree of the lower Appellate Court is set aside and the case sent back to it with directions to re-admit the appeal upon its file of pending appeals, to add the name of the transferor in the array of respondents, to give the plaintiff-appellant a reasonable time to serve the transferor with notice of his appeal and then hear the appeal on the merits and decide it according to law. Under the circumstances of the case the appellant must pay the costs of this appeal, which will include Counsel's fee in this Court on the higher scale.

Appeal allowed; *Case remanded.*

ABDUL GANI *v.* RAJA RAM.

PATNA HIGH COURT.
FULL BENCH.
FIRST CIVIL APPEAL NO. 384 OF 1914.
May 4, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Atkinson.

Haji ABDUL GANI—JUDGMENT-DEBTOR—APPELLANT

versus

RAJA RAM AND OTHERS, MINORS, THROUGH THEIR MOTHER AND GUARDIAN *Musammat* NARAYAN KOER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 95—Order delivering possession to decree-holder auction-purchaser—Appeal.

No appeal lies against an order under Order XXI, rule 95, delivering possession to the decree-holder auction-purchaser. [p. 469, col. 2.]

First appeal from an order of the Subordinate Judge, Mozaffarpore, dated the 6th June 1914.

Messrs. *Mahomed Mustafa Khan* and *Kail spati*, for the Appellant.

Dr. *Dwarka Nath Mitter* (with him Messrs. *Sailendra Nath Palit* and *Baikuntha Noth Mitter*), for the Respondents.

JUDGMENT.

CHAMIER, C. J.—Madhab Prasad father of the respondents obtained a decree for money against the appellant, in execution of which he caused certain property of the appellant to be sold. By leave of the Court he purchased it himself. He succeeded in obtaining possession of part of the property, but in respect of the remainder he was obstructed by the appellant who contended that it was not part of the property sold. Madhab Prasad died soon afterwards and his sons, the present respondents, applied to the Court under Order XXI, rule 95, to place them in possession of the disputed property. The Court allowed the application. Hence this appeal. The respondents contend that no appeal lies.

The question thus raised is one on which there has been much conflict of judicial opinion during the last 30 years or more.

Some Judges have taken the view that an order under section 318 of the Code of Civil Procedure, 1882, or Order XXI, rule 95, of the present Code disposes of a question "relating to the execution, discharge or satisfaction of the decree" within the meaning of section 244 of the Code of 1882, or section 47 of the present Code, and that where the question arises between the judgment-debtor and an auction-purchaser, who was originally plaintiff in the suit, it is a question "arising between the parties to the suit" within the meaning of section 244 of the Code of 1882, or section 47 of the present Code, and the decision is consequently a decree within the meaning of section 2 of either Code and is appealable as such.

Other Judges have held that an appeal does not lie, either because the question is not one "relating to the execution, discharge or satisfaction of the decree" or because the question does not arise between the judgment-debtor and the decree-holder *as such* but between the judgment-debtor and the auction-purchaser *as such*.

In the Allahabad High Court after many conflicting decisions the question was referred to a Full Bench of five Judges with the result that three Judges held that an appeal did not lie, and the Chief Justice and Knox, J., held that an appeal did lie, *Musammat Bhagwati* v. *Banwari Lal* (1).

In the Bombay High Court it has been held that an appeal does lie, *Sadashiv Mahadu Dhole* v. *Narayan Vithal Mawal* (2).

In the Madras High Court it is now settled by a long course of decisions that an appeal does lie in such a case, but in two cases the Judges have expressed great doubt as to the correctness of those decisions [see *Kattayat Pathumayi* v. *Raman Menon* (3) and *Sandhu Taraganar* v. *Hussain Sahib* (4)].

In the Calcutta High Court it has been held in three cases that an appeal does lie in such a case [see *Madhusudan Das* v. *Gobinda Pria Chowdhurani* (5) decided without reference to the reported cases on the subject, *Ram Narian Sahoo* v. *Bandi Pershad* (6) and *Hari Charan Dutt* v. *Mon Mohan Nandy* (7)]. The case of *Sariatoolla Molla* v. *Raj Kumar Roy* (8), which was

(1) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.
(2) 11 Ind. Cas. 987; 35 B. 452; 13 Bom. L. R. 661
(3) 26 M. 740; 13 M. L. J. 237.
(4) 28 M. 87; 14 M. L. J. 474.
(5) 27 C. 34; 4 C. W. N. 417.
(6) 31 C. 737.
(7) 20 Ind. Cas. 874; 18 C. W. N. 27.
(8) 27 C. 709; 4 C. W. N. 681.

referred to, deals with a different question but language was used in the judgment which supports the view that an appeal does lie in such a case.

In the same Court it has been held in seven cases, either expressly or impliedly, that an appeal does not lie [see *Seru Mohun Bania* v. *Bhagoban Din Pandey* (9); *Iswar Pershad Gurgo* v. *Jai Narain Giri* (10); Appeal No. 207 of 1884 decided on July 20th 1885, unreported; *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (11); *Bhimal Das* v. *Musammat Ganesha Koer* (12); *Mahomed Mosraf* v. *Habil Mia* (13) and *Sasibhusan Mookerjee* v. *Radhanath Bose* (14), where all the authorities are reviewed, and the decision in *Bhimal Das* v. *Musammat Ganesha Koer* (12) has been expressly approved in *Bujha Roy* v. *Ram Kumar Pershad* (15) and *Jagarnath Marwari* v. *Kartick Nath Pandey* (16)].

Much stress was laid upon the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (17), but that case in no way affects the question which we have to decide and an order of the kind there in question is under the present Code of Civil Procedure appealable as an order and not as a decree [see Order XXI, rule 90 and Order XLIII, rule 1 (*j*)].

Nor does the decision in *Manickka Odayan* v. *Raja Gopala Pillai* (18), which has been cited, affect the present question, for that was a case under section 310A of the Code of 1882. The question whether an appeal lies against an order under that section or Order XXI, rule 89, of the present Code depends upon other considerations [see *Mahomed Akbar Zaman Khan* v. *Sakhdeo Pande* (19).]

I am strongly of opinion that this Court should not without very good reason depart from a long course of decisions in the Calcutta High Court. I consider that the cases which I have referred to show that the balance of opinion in the Calcutta Court has been since 1883 so strongly in favour of the view that an appeal does not lie in such a case, that we ought to follow it as if it were a settled *cursus curiæ*. To do otherwise would cause great and unnecessary confusion. I would accordingly dismiss this appeal but under the circumstances make no order as to costs.

SHARFUDDIN, J.—I agree.

ATKINSON, J.—I agree.

BY THE COURT.—The order of the Court is that the appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

(9) 9 C. 602.
(10) 12 C. 169.
(11) 14 C. 644.
(12) 1 C. W. N. 658.
(13) 6 C. L. J. 749.
(14) 25 Ind. Cas. 267; 19 C. W. N. 835; 20 C. L. J. 433
(15) 26 C. 529; 3 C. W. N. 374.
(16) 7 C. L. J. 436.
(17) 19 C. 683 (P. C.); 19 I. A. 166; 6 Sar. P. C. 209.
(18) 30 M. 507; 2 M. L. T. 347; 17 M. L. J. 291.
(19) 10 Ind. Cas. 51; 13 C. L. J. 467.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 105 OF 1915.

March 3, 1916.

Present:—Mr. Justice Maung Kin.

M. R. R. M. FIRM—PLAINTIFF—APPELLANT

versus

U ZAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46, 64, 79—Attachment and sale of debt—Procedure.

A debt can be sold under Order XXI, rule 64, Civil Procedure Code, and delivery made in the manner prescribed in rule 79. [p. 470, col. 2.]

It is only when the garnishee or third party admits the debt that payment can be ordered to be made to the judgment-debtor, and if the former denies the debt, it is open to the judgment-debtor to have it sold or to apply for the appointment of a receiver with power to sue the garnishee for the recovery of the debt from him. [p. 470, col. 2.]

Natchappa Chetty v. *Mohamed Jan*, 8 Bur. L. R. 91; *Toolsa Goolal* v. *John Antone*, 11 B. 448, followed.

Mr. *S. M. Bose*, for the Appellant.

Mr. *Halkar*, for the Respondents.

JUDGMENT.—The facts which are material to the point raised in this appeal are the following as stated in the judgment of the Township Judge:—

"The plaintiff M. R. R. M. Chetty obtained a decree for Rs. 190 against Maung Po Nyein and Ma Pu in Suit No. 238 of 1911. In execution of the decree they caused the attach-

ment by prohibitory order in Execution Case No. 377 of 1913 of the rent of 325 baskets of paddy in the hand of Maung Tha Dum and Ma Paw as the rent of land due to their judgment-debtors Maung Po Nyein and Ma Pu. * * * A proclamation for sale was issued and the paddy sold as debt payable to the judgment-debtors. The plaintiff purchased the paddy with the permission of the Court.

"The plaintiffs now sue the defendants for the recovery of 325 baskets of paddy or the value Rs. 373-12-0 at Rs. 115 per 100 baskets, alleging that the defendants Maung Tha Dun and Ma Pu transferred the paddy to the defendants U Zan and Ma Hman while it was under attachment and that by the defendants' unlawful action the plaintiffs have been deprived of the paddy.

"The defendants assert that the paddy was due to the defendants U Zan and Ma Hman by the defendants Maung Tha Dun and Ma Paw towards a piece of land which was delivered by Maung Po Nyein, that the land together with the crops thereon was sold by the Sub-Divisional Court in Execution Case No. 106 of 1912, that the defendants U Zan and Ma Hman became the purchasers and that Maung Po Nyein and Ma Pu had no right, title and interest in the paddy."

The above facts are as set out in the pleadings, both of which are in English.

The Township Judge framed the following issue:

"Whether the paddy in suit belongs to Maung Po Nyein and Ma Pu or not?

and passed a decree against all the defendants for 227 baskets of paddy or the value, Rs. 261-0-9.

The defendants appealed to the District Court and that Court allowed the appeal for the following reasons:—"The attachment was by prohibitory order under rule 46. And the next step after a prohibitory order under rule 46 is not a sale, but an order to pay the debts into Court instead of to the person to whom it is due. There can be no sale of a debt. There must be actual property to be sold. In this case there was none and, therefore, the sale was null and void, because there was nothing to sell".

An application was next made to the District Court to review its judgment, *inter alia*, upon the following grounds:—

"That this Court erred in law in holding that a debt could not be sold but should have held that under rule 64 the debt was rightly sold and that the purchaser was entitled to realise the debt from the debtors".

Upon this ground the Court remarked as follows:—

"It is true that I was in error in saying that a debt could not be sold. It could be sold under rule 64 of Order XXI and delivery made in the manner prescribed in Order XXI, rule 79. This would put the plaintiff in the shoes of Maung Po Nyein and Ma Pu as regards the debt alleged to be due by Maung Tha Dun and Ma Paw to Po Nyein and Ma Pu. And if the debtors did not pay the plaintiff, he could sue them".

This is in accord with the ruling of Birks, J., in *Natchappa Chetty* v. *Mohamed Jan* (1), where it was held, following *Toolsa Goolal* v. *John Antone* (2), that it is only when the garnishee or third party admits the debt that payment can be ordered to be made to the judgment-debtor and that if he denies the debt, it is open to the judgment-creditor to have it sold or to apply for the appointment of a receiver with power to sue the garnishee for the recovery of the debt from him.

But the learned District Judge proceeded to construe the plaint strictly and said that what was sold was the paddy, and what the plaintiffs were suing for was paddy and that the plaintiffs did not profess to have bought a debt; further that he could not have bought paddy, because there was none to sell. The learned Judge then went on to say, "Although, therefore, I was in error in saying that a debt could not be sold, the mistake does not affect the merits of the case and I see no reason to alter my original order."

This is a narrow view to take of the nature of the case. The plaintiff's case had all along been understood by both sides and the Township Judge and also, I fear, by the District Judge at the hearing of the appeal to be that they had bought a debt and that they were suing to recover the debt. The misstatements which appear in the plaint are due to the language difficulty of the Pleaders, and I think it wrong at the stage of the review

(1) 8 Bur. L. R. 91.
(2) 11 B. 448.

proceedings to construe the language used in the proceedings so strictly as has been done, without reference to what the parties and everybody concerned had understood was the case.

On reference to the proclamation I find the thing to be sold described in these words: "* * * * * * * * * * * * * * * *"

If this description was literally translated it would be this:—The paddy in the hands of Maung Tha Dun and Ma Paw, namely, 315 baskets, is to be sold. This paddy is due from Maung Tha Dun and Ma Paw as rent of paddy land belonging to Maung Po Nyein and Ma Pu.

Read and construed as a whole and in the light of the surrounding circumstances, what was sold was the rent payable in paddy by Maung Tha Dun and Ma Paw. And when the parties and everybody concerned had also understood what was attached and sold to be such, it would, in my opinion, be unfair to the plaintiff to say that "this is not what happened at all," as the learned District Judge says in his judgment.

I will now proceed to deal with the merits of the case. There were two pieces of land, namely, holding No. 14 and holding No. 22 in respect of which the defendants U Zan and Ma Hman obtained a mortgage decree against Po Nyein and Ma Pu. At a sale in pursuance of the decree U Zan and Ma Hman bought the holdings. Subsequently the sale of holding No. 14 was set aside by the Court. This means Po Nyein and Ma Pu must be considered to be the owners of the holding until some higher Court has held to the contrary. And in Civil Second Appeal No. 74 of 1914 of this Court U Zan and Ma Hman's suit, for a declaration that a mortgage decree over holding No. 14 obtained by the present appellants in Civil Regular No. 47 of 1912 of the Sub-Divisional Court against Po Nyein and Ma Pu was void, has now been dismissed.

The rent payable in respect of the land must be held to be payable to Po Nyein and Ma Pu and it is likely under the circumstances that the respondents Maung Tha Dun and Ma Paw had taken a lease of the land from U Zan and Ma Hman instead of from Po Nyein and Ma Pu. I think the Township Judge was right in rejecting the oral evidence tendered on behalf of U Zan and Ma Hman to show that three years before the suit the land was delivered outright to them by Po Nyein and Ma Pu inasmuch as the evidence is inconsistent with the action of U Zan and Ma Hman in suing for a mortgage-decree in respect of the property.

In my judgment the 1st and 2nd defendants paid the rent to persons who are not entitled to it. They owed it to Po Nyein and Ma Pu, and the debt was still subsisting when it was attached as aforesaid and the 1st and 2nd defendants are, therefore, bound to pay it to the plaintiffs. Their plea that they had paid it to U Zan and Ma Hman cannot be held to be good. They paid it to persons who were not entitled to it. The person who is entitled to it can nevertheless recover it from them.

Having regard to the nature of the case as stated above, I must hold that there was no cause of action against U Zan and Ma Hman at the instance of Po Nyein and Ma Pu, in whose place the appellant is now.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 498 OF 1914.

June 1, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

HARCHAND SINGH, MINOR, SON OF SUNDAR SINGH, DECEASED, THROUGH *Musammat* MALAN HIS MOTHER AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUNSHI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Custom versus *Hindu Law*—Sodhi Khatris *of village Samalsar, Tahsil Moga, Ferozepore District—Daughter or nephew.*

In matters of succession the *Sodhi Khatris* of village Samalsar, Tahsil Moga, Ferozepore District, follow Hindu Law and not agricultural custom. [p. 472, col. 2.]

Sodhi Kartar Singh v. *Sher Singh*, 50 P. R. 1895; *Harvans Singh* v. *Harnam Singh*, 84 P. R. 1898, Civil Appeal No.60 of 1902, distinguished.

Harnam Singh v. *Musammat Hardevi*, 10 Ind. Cas. 365; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. R. 1911; *Sardar Singh* v. *Maharaj Das*, 3 Ind. Cas 603; 79 P. R. 1909; 126 P. L. R. 1909; 127 P. W. R. 1909, referred to.

Therefore, a daughter and daughter's son succeed to the ancestral immoveable property of a male *Sodhi Khatri* proprietor of Samalsar in preference to his nephews and grandnephews. [p. 472, col. 1.]

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the the 19th December 1913, reversing that of the Subordinate Judge, 2nd class, Ferozepore, dated the 24th June 1913, dismissing the claim.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *Raushan Lal*, for the Appellants.

The Hon'ble Bakhshi *Sohan Lal*, R. B, and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.

SHADI LAL, J.—The sole question for determination in this appeal is whether among the *Sodhi Khatris* of the village Samalsar in the Moga Tahsil of the Ferozepore District, the nephew and grand-nephews of a male proprietor succeed to his ancestral immoveable property to the exclusion of his daughter and her son. It is beyond dispute that under the Hindu Law the latter would inherit the property, and that the onus is on the collaterals to prove a custom overriding the rule of the personal law in the matter of succession.

The learned Divisional Judge, dissenting from the Court of first instance, has found against the collaterals, and after listening to the arguments advanced by Mr. Raushan Lal on their behalf we are of opinion that there is not sufficient evidence on the record to warrant a finding in favour of the custom set up by them.

The history of the village shows that these *Sodhis* did not settle with the founders of the village, and that Bhup Singh, the grandfather of the propositus, was the first person to acquire six ploughs of land, nearly one-tenth of the village, by purchase from the original proprietors. It appears that the parties live by agriculture mainly, and celebrate *Karewa* marriages, and there is some evidence to the effect that they have departed from the strict rules of Hindu Law relating to adoption. But these facts are wholly insufficient to prove that they have discarded their personal law in the matter of succession. It is their duty to establish a custom at variance with that law on the exact point before us, and this they have failed to do. One witness deposes that, on the death of Hakim Singh, his house property was inherited by his nephews in the presence of his daughters; but the facts are by no means clear, and one instance, even if taken at its face value, is too slender a foundation to support a finding in favour of the custom.

As regards the decisions of this Court, we find that *Sodhi Kartar Singh* v. *Sher Singh* (1) (*Sodhi Khatris* of Muktsar Tahsil) was based upon definite instances shewing that the reversioners could control alienations, and related to a family which owned whole villages, and that the Full Bench reference in *Harvans Singh* v. *Harnam Singh* (2) (*Sodhi Khatris* of Zira Tahsil) proceeded upon the assumption that the parties followed custom and that the only question was whether a collateral, in the presence of his father, was entitled to sue for a declaration in respect of an alienation of ancestral property. Neither of these cases deals with the question of succession, and cannot, therefore, be of any use to the appellants. The unpublished judgment in Civil Appeal No. 60 of 1902 was the result of a compromise, the terms of which were rather unfavourable to the reversioners.

This is all the evidence which has been adduced to support the plea of custom set up by the defendants-appellants. We are clear that, even if it stood unrebutted, it would be insufficient to discharge the onus. But there are two recent judgments of this Court, in which the *Sodhi Khatris* were found to be governed by Hindu Law and not by agricultural custom. In *Harnam Singh* v. *Musammat Hardevi* (3) (*Sodhi Khatris* of Tahsil Jagraon) the collaterals failed to prove a custom excluding daughters from succession to the ancestral immoveable property of their father, and in *Sardar Singh* v. *Maharaj Das* (4) (*Sodhi Khatris* of Tahsil Batala) the allegation as to a custom restricting the power of disposition of a male proprietor was negatived by this Court.

Upon an examination of all the facts and circumstances we concur with the Divisional Judge that the initial presumption in favour

(1) 50 P. R. 1895.
(2) 84 P. R. 1898.
(3) 0 Ind. Cas. 865; 43 P. R. 1911; 86 P. W. R. 1911; 137 P. L. R. 1911.
(4) 3 Ind. Cas. 603; 79 P. R. 1909; 126 P. L. R. 1909; 127 P. W. R. 1909.

of the applicability of the personal law has not been rebutted. Before concluding we may mention that the respondents' preliminary objection that the appeal was barred by limitation by reason of the necessary certificate not having been filed within the period of ninety days was overruled by us, because we were of opinion that there was sufficient cause for not applying for the certificate within the prescribed period.

The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 829 OF 1915.

July 15, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay

Saiyed NAZIR HUSAIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANHAYA LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 92, cl. (3)—U. P. Government Rules, rr 30, 32—Execution before Collector—Suit to set aside sale, maintainability of—Fraud—Suit, if treated as application—Remedy.

In an execution proceeding transferred to a Collector under section 68 of the Civil Procedure Code, 1908, the property attached was sold at auction and purchased by the decree-holder. After the confirmation of the sale the judgment-debtors presented a petition to the Collector asking that the sale should be set aside on the ground, *inter alia*, that the decree-holder had fraudulently kept them in ignorance of the pendency of the execution proceedings. The objection having been overruled the judgment-debtors instead of filing an appeal to the Commissioner, as provided by rule 45 of the Rules of the Local Government made in this behalf, filed a civil suit for the recovery of the property:

Held, that the suit was barred by Order XXI, rule 92, clause (3), of the Civil Procedure Code or the corresponding provisions of clause (3), rule 32, of the Rules made by the Local Government. [p. 475, col. 1.]

Held, also, that the suit could not be treated as an application under section 47 of the Civil Procedure Code, as the Court in which the suit was instituted was not the Court executing the decree at the time when the decree was made over to the Collector. [p. 475, col. 2.]

Second appeal from the decision of the Additional Judge, Meerut, dated the 6th March 1915,

FACTS material for the report appear from the judgment.

Mr. *Agha Haider*, for the Appellants, after stating the facts of the case at length, contended that the suit was maintainable and the lower Courts had wrongly dismissed the suit and referred to *Ganga Pershad Sahu* v. *Gopal Singh* (1), *Sita Ram* v. *Subhedar Kuar* (2) and *Bhaiaji Thakur* v. *Jharula Das* (3). In case it was held that the suit was not maintainable, the suit ought to be treated as an application under section 47 of the Civil Procedure Code, 1908.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents, contended that the argument that the suit ought to be treated as an application under section 47 would have been valid if the Legislature had not provided Order XXI, rule 90. Moreover the Court in which the suit was instituted was not the Court executing the decree at the time when the decree was made over to the Collector.

The question of jurisdiction was involved. The application should have been made to the Collector. The suit was barred by Order XXI, rule 92, clause (3). He referred to *Viraraghava Ayyangar* v. *Venkatacharyar* (4), *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5), *Durga Kunwar* v. *Balwant Singh* (6), *Mchendro Narain Chatwraj* v. *Gopal Mondul* (7), *Ganga Pershad Sahu* v. *Gopal Singh* (1).

Mr. *Agha Haider*, in reply.—Order XXI, rule 90, covers fraud committed in publishing or conducting a sale. If fraud is quite apart from conducting or publishing the sale a suit is maintainable. If, of course, the Legislature meant fraud in a very wider sense then the judgment-debtor has no remedy. The rulings of *Viraraghava Ayyangar* v. *Venkatacharyar* (4), *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5) do not apply. This case is quite different. Order XXI, rule 92, does not bar the suit The Legislature has omitted the words "such irregularity", which were in the old Code.

(1) 11 C. 136; 11 I. A. 234; 4 Sar. 572 (P. C).
(2) 24 Ind. Cas. 695.
(3) 24 Ind. Cas. 501; 12 A. L. J. 1176; 16 M. L. T. 210; 27 M. L. J. 100; 1 L. W. 549; (1914) M. W. N. 636; 16 Bom. L. R. 845; 20 C. L. J. 360; 42 C. 244; 18 C. W. N. 1020 (P. C.).
(4) 5 M. 217.
(5) 17 M. 228.
(6) 23 A. 478; A. W. N. (1901) 175.
(7) 17 C. 769.

The ruling of *Durga Kunwar* v. *Balwant Singh* (6), falls short of the allegations contained in this suit. In this suit the sale and all other proceedings have been conducted secretly.

JUDGMENT.—This is a second appeal by two plaintiffs whose suit has been dismissed by both the Courts below. It arises out of the following facts. The plaintiffs were judgment-debtors under a simple money-decree held by the defendants, in execution of which decree certain immoveable property belonging to the plaintiffs was attached. The property being ancestral, the execution of the decree was transferred to the Collector under section 68, Civil Procedure Code. Its execution proceeded subject to the rules made by the Local Government, which are to be found in the United Provinces *Gazette* of 14th October 1911, Part I, page 1005. In the result, the property attached was sold at auction and purchased by the decree-holders on the 20th of March 1913. The sale was confirmed on the 25th of April 1913. On the 25th of June 1913 the judgment-debtors presented a petition to the Collector asking that the sale should be set aside. They alleged that the decree-holders had fraudulently kept them in ignorance of the pendency of the execution proceedings; also that the sale was liable to be set aside because the decree-holders had purchased without the leave of the Court, and finally they tendered the full amount of the decree though not the extra payment for the benefit of the auction-purchasers which is required by rule 30 of the rules published by the Local Government. This objection was rejected by the Collector on 2nd July 1913. Against that order an appeal lay to the Commissioner under rule 45 of the rules of the Local Government already referred to. Instead of making such an appeal the judgment-debtors filed the present suit. They set forth in substance the facts which had been put forward as the basis of their application to the Collector, and they asked for a decree for recovery of possession of the property acquired by the defendants at the auction-sale. Both the Courts below have held that this suit is barred by the provisions of Order XXI, rule 92, clause (3), Civil Procedure Code. They should have referred to rule 32 of the rules published by the Local Government; but otherwise the decisions of the Courts below appear to be correct.

The case for the appellants was laid before us in a very careful and able argument. Reliance was placed upon the decision of their Lordships of the Privy Council in *Ganga Pershad Sahu* v. *Gopal Singh* (1), also on the decision of a single Judge of this Court in *Sita Ram* v. *Subheda Kuar* (2). Reference was further made to *Bhaiaji Thakur* v. *Jharula Das* (3). These last two cases are obviously distinguishable. In the last case the suit was one for a declaration that a decree had been obtained by fraud and for consequential relief. Of course a suit will lie to get rid of a decree which has been obtained by fraud; and if the decree is found to have been vitiated by fraud, the execution proceedings become null and void and will be set aside by the Court. In the case now before us no attack is made upon the decree, but only upon the conduct of the execution proceedings. In the single Judge case the plaintiff came into Court with the allegation that property belonging to her had been sold in execution of a decree against another person, and that she had had no previous opportunity of objecting to the execution proceedings because she had been fraudulently kept in ignorance of the same. On the facts before him the learned Judge was able to find that the plaintiff in that suit was not a person against whom an order had been made under Order XXI, rule 92, Civil Procedure Code, and consequently her suit was not barred by the 3rd clause of that rule. With regard to the Privy Council case reported as *Ganga Pershed Sahu* v. *Gopal Singh* (1), it seems sufficient to remark that the decision proceeded upon the particular facts of the case, and that there has been a very definite alteration in the law since that decision was passed. The provisions of section 311, Civil Procedure Code, Act XIV of 1882, are reproduced in Order XXI, rule 90, of the present Code, with this important modification, that an application for setting aside a sale can now be made, not only on the ground of material irregularity, but also on the ground of fraud in publishing or conducting the sale. Consequential alterations have been made in the provisions of Order XXI, rule 92, Civil Procedure Code, so that the prohibition contained in the 3rd clause of that rule has a wider scope than that of the corresponding provisions of the

Code of 1882. It was contended before us that the present case ought to be withdrawn from the operation of the rule because of the peculiar allegations in the plaint. It is quite true that the plaintiffs alleged that the defendants as decree-holders, not only contrived fraudulently to keep the plaintiffs in ignorance, but deluded them by carrying on a pretence of negotiations for the satisfaction of the decree until the ordinary period of limitation within which the judgment-debtors could have applied to have the sale set aside had expired. In the *first* place, this question of limitation has no real bearing upon the facts of this case. Under section 18 of the Limitation Act any person, who, having a right to make an application, is by means of fraud kept from the knowledge of such right, is permitted to make the application in question within the prescribed period of limitation computed from the time when the fraud first became known to him. On the facts alleged in the present plaint, these plaintiffs as judgment-debtors were entitled to make an application to the Collector under rule 31 of the Rules published by the Local Government or on the ground of the decree-holder's violation of the provisions of rule 22, and could have pleaded section 18 of the Limitation Act so as to bring their application within time. In the *second* place, the fraud alleged against the defendants in the plaint is simply that they kept the plaintiffs in ignorance of the execution proceedings. This was a fraud in the conduct of the sale, and a fraud which could not have been committed without fraudulent proceedings in connection with the publication of the sale. The negotiations to which the plaint refers were, according to the allegations made in the plaint, merely a step-in-aid of, and a part of the fraud said to have been perpetrated. We are unable to take the present case out of the operation of the provisions of Order XXI, rule 92, clause (3), Civil Procedure Code, or the corresponding provisions of clause (3), rule 32, of the rules made by the Local Government. In this view of the case it is not necessary for us to enter into the further question, whether the present suit is not also barred by the provisions of section 47, Civil Procedure Code, a proposition for which the Courts below have been able to quote authority of this Court in the case of *Durga Kunwar* v. *Balwant Singh* (6). With regard to this point it has been suggested on behalf of the appellants that the Courts below could have treated the present suit as an application under section 47, Civil Procedure Code, and dealt with it accordingly. There was in any case a fatal objection to the adoption of this course, in the fact that the Court in which the suit was instituted was not the Court executing the decree at the time when that decree was made over to the Collector. Apart from this, however, we are satisfied, for the reasons already given, that this was a case in which, on the facts alleged, the remedy of these plaintiffs was by way of an application, either under rule 22 or rule 31, of the rules published by the Local Government, and that their rights were limited to the due prosecution of such application.

The present suit has been rightly dismissed by the Courts below, and we must affirm their decisions, dismissing this appeal with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1151 OF 1915.

July 3, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

BHIRGEE NATH CHAUBE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NARSINGH TEWARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mesne profits—Sale by Hindu father set aside by sons—Purchaser, liability of, for mesne profits, from what date—Repudiation—Practice—Procedure.

Where a sale has been made by a father and manager of a joint Hindu family without legal necessity, and the sons afterwards repudiate it and set the transaction aside, the purchaser is accountable for mesne profits from the date of the repudiation by the sons by the institution of the suit, inasmuch as from that moment the purchaser continues in possession and disputes the claim at his own risk. [p. 477, col. 1; p. 478, col. 1.]

The procedure of permitting separate suits for mesne profits discountenanced. [p. 477, col. 2.]

Second appeal from the decision of the Subordinate Judge, Ghazipur, dated the 22nd April 1915.

BHIRGEE NATH *v.* NARSINGH TEWARI.

FACTS material for the report appear fully from the judgment.

Mr. *Narbadeshwar Upadhya* (for Dr. *S. N. Sen*), for the Appellants.—The sale in question was made by the father but his sons got that sale set aside. The sons sued for mesne profits. The first Court decreed the suit. The lower Appellate Court dismissed the suit, on the ground that the possession was not wrongful. The lower Appellate Court is clearly wrong in its decision. When there was no legal necessity the sale was not valid in law and the possession of the purchaser was not rightful. The purchaser is liable for mesne profits from the date of his purchase: *Dungar Mal* v. *Jai Ram* (1).

Even if he be a *bona fide* trespasser he is liable for mesne profits: *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (2).

[SUNDAR LAL, J.—It has no bearing. The deed was voidable at your instance. You avoided it in 1912. You are entitled to mesne profits from that date and not previous to that. If you had not brought a suit you would not be entitled.]

If the purchaser's possession was wrongful I am entitled to profits.

[SUNDAR LAL, J.—Is not a sale by a father until avoided a good sale?]

Dr. *Tej Bahadur Sapru*, for the Respondent. —The point is not decided. The question arose two or three times but did not arise as in present case: *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3).

A distinction has to be made between trespasser and trespasser. If the trespasser is without title he is not entitled to any indulgence, but if he comes under colour of a title he is not to be treated as a trespasser.

[WALSH, J.—There is no case in which this question has directly arisen.]

Dr. *Tej Bahadur Sapru* referred to *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3).

[WALSH, J.—The case is not direct. If anything is direct you may read].

Dr. *Tej Bahadur Sapru* referred to *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3) at bottom of page 147

[SUNDAR LAL, J.—The liability to pay mesne profits is admitted.]

By a parity of reasoning when my client purchased property from the father his title was good, but if the sons choose to defeat it they cannot treat my client as a person in possession without colour of a title. Until they did it the title was all right.

[SUNDAR LAL, J.—Was the plaintiff entitled to certain damages in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3)?]

The case does not cover my case but the principle applies. If a person comes in possession under colour of a title he is not to be treated as a rank trespasser.

Mr. *Narbadeshwar Upadhya* was heard in reply.

JUDGMENT.

WALSH, J.—This case is one of some importance and raises in a pronounced form a question of principle which appears never to have been decided by the Courts in this country; namely, where a sale has been made by a father and manager of a joint Hindu family without legal necessity, and the sons afterwards repudiate it and set the transaction aside, from what date ought the purchaser to be held accountable for mesne profits.

The defendants in this case purchased certain property from the plaintiffs' father, who was manager of the family property, on the 18th of October 1900. It was property of a joint Hindu family, and the sale was made without legal necessity. The plaintiffs who are two sons of the vendor, the vendor having died before the institution of the proceedings, brought a suit to set aside the sale shortly after attaining their majority. The transaction was, of course, voidable, and on the 30th of April 1913 it was set aside and the plaintiffs obtained a decree for possession. On the 10th of August 1914 the present suit was instituted for mesne profits. I will deal in a moment with the question of bringing two suits in such a case. The lower Appellate Court has decreed mesne profits from the date when possession was obtained by the plaintiffs. This is clearly wrong. But it does not follow from that that the plaintiffs are right. They have brought this appeal in assertion of the principle that mesne profits are payable from the date of the defendants' original purchase. Ordinarily

(1) 24 A. 376; A. W. N. (1902) 90.
(2) 8 W. R. 479.
(3) 21 C. 142 (P. C.); 20 I. A. 160; 6 Sar. P. C. 366.

speaking this would be so. It has been found by the Court below that the defendants purchased in good faith, that is the correct expression to use when they take the risk, as they did here, of the sale being subsequently challenged. But it is clear law that the good faith of the defendant is no answer to a claim for mesne profits by a man who has been kept out of his lawful property, and has lost the proceeds of it. The purchaser who has acquired no title against him has his remedy against his vendor. That was the ground of the decision in an old case reported as *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (2), where the purchaser had been deceived by the vendor, and had to pay mesne profits from the date of his purchase. But, in my opinion, the class of case with which we are now dealing must be treated as an exception to the general rule. The sale need never be avoided, unless it is repudiated by a member of the family. The defendant had a title, though a defeasible one. It might be years before the children repudiated, and in any case the sale did not dispossess them of property to which at the time they were entitled in their own right. I think it is the position of the plaintiffs and the existence of their option to avoid the sale, which makes the difference and creates an exception to the general rule. The *bona fides* of the defendants is material, in the sense that it enables them to avail themselves of the exception, but it does not create it. I think the fair and equitable conclusion is that the possession of the defendants becomes wrongful, and they are, therefore, answerable to the plaintiffs, as from the date of the repudiation by the plaintiffs by the institution of the suit, namely, on the 11th of December 1912. From that moment the defendants continue in possession and dispute the claim at their own risk. The question appears to be *res integra*. The respondents relied upon what was said by the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (3). Although the point in that case was quite different and the defendant who had been in possession under a binding order of a competent Court was made answerable for what he had actually received with a credit for salvage and expenses, still the principle is recognized that the Court is entitled to deal with a question of this kind with a free hand, and to do what seems most in accordance with equity and justice. I would further refer to a dictum of the Privy Council in *Girish Chunder Lahiri* v. *Sasi Sekhareswar Roy* (4), in which Lord Hobhouse says: "Mesne profits are in the nature of damages which the Court may mould according to the justice of the case." I am fortified, if not altogether persuaded, in adopting the view I do in this particular matter by the concurrence of my learned brother, who has the advantage of his intimate knowledge and experience of what one may call the equitable considerations which arise when persons who deal in joint Hindu family property, have to surrender it with a valueless remedy against their vendor or his estate.

I am at a loss to understand why in this case the plaintiffs were allowed in their original suit for cancellation of the deed to drop this claim and commence a second action against the defendants. They were allowed to do so by the Court, otherwise the second suit would have been altogether barred, so there is nothing to be said on the question of right. But presumably they did it for their own purposes. I think such procedure should be severely discountenanced. And although I would allow the appeal to the extent of modifying the decree of the Court below by giving the plaintiffs mesne profits from the 11th of December 1912, I think they ought to have no costs either of the suit or of the appeal.

SUNDAR LAL, J.—I am of the same opinion. The sale by the father and manager of a joint Hindu family is not necessarily void, though it may be avoided on certain grounds by other members of the family. It may be a sale advantageous to the family, though not for a legal necessity, which the minor members of the family may decide to adhere to. Sales like this are frequently made in good faith by the head of the family. Until avoided I think the sale holds good. The plaintiffs avoided the sale-deed by their suit filed on the 11th December 1912. They obtained a decree for possession. The claim

(4) 27 I. A. 110; 27 C. 951; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. 687 (P. C.).

for mesne profits is subject to equities in favour of the purchaser and in many cases the Courts in this country have made the price paid by the purchaser a charge on the vendor's share of the property and given to the plaintiffs a decree for possession of their share of the property as separate property. In this case I think the plaintiffs were entitled to avoid the sale-deed and to obtain mesne profits from the date on which they gave notice of their option to avoid it to the purchaser. That date in this case is 11th of December 1912, and I think that it is from that date the plaintiffs are entitled to mesne profits. In an ordinary Hindu family no member of a joint family is entitled to an account from the head of the family and the plaintiffs would not have been entitled to obtain an account of their share of the profits from the father, nor are mesne profits awarded in a partition suit except under very exceptional circumstances. I think where the purchaser from the head of a family has purchased in good faith the property, he is entitled to treat the sale as binding until one of the members of the family exercises his option to avoid it, and on that ground I agree entirely in the judgment just pronounced by my brother Mr. Justice Walsh.

BY THE COURT.—We allow the appeal, reverse the decree of the lower Appellate Court and give the plaintiffs a decree for mesne profits from the 11th of December 1912 until possession was given up to the plaintiffs, *viz.*, 23rd of December 1913. Each party will pay his own costs of the suit in all Courts and of this appeal. We remand the case under Order XLI to the lower Appellate Court to ascertain the correct sum of mesne profits on the basis of this decree. The term "mesne profits" is to exclude any sum for interest.

Appeal allowed ; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 23 OF 1914.

December 22, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

DULARAM PINIOMAL—PLAINTIFF—APPELLANT

versus

BADALDAS JAMIATRAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Co-parcener, alienation by, of his undivided share in family property—Rights of alienee—Alienee, whether can sue for partition—Principle underlying "partial partition".

An alienee of a particular joint undivided share of a Hindu co-parcener is not entitled to possession of the specific parcel alienated to him. The only right he acquires is a right to compel the same general partition which his vendor might have compelled, and an equity to have the particular parcel purchased by him allotted, if possible, to his share. [p. 479, cols. 1 & 2.]

Per *Crouch, A. J. C.*—When an individual member of a co-parcenary purports to sell a particular parcel of the joint estate he can only transfer such right, title and interest as is actually vested in him. [p. 479, col. 2.]

In all suits for partition, the Court considers not merely the legal rights of the plaintiff, but also the legal and equitable rights of all other parties interested, whether on record or not; and where a particular parcel has been alienated, the Court will ordinarily allot such parcel to the alienating co-parcener leaving the alienee in possession; provided that this can be done without unfairness to the other persons interested. [p. 479, col. 2.]

Uharam Sitaram v. *Ranu Panduji*, 11 B. H. C. R. 76; *Narayan* bin *Babaji* v. *Nathaji Durgaji Marwadi*, 28 B. 201; 5 Bom. L. R. 945; *Dhamoomal Chandiram* v. *Musammat Kiam Khatun*, 1 S. L. R. 133; *Munshi Tuljaram* v. *Chutal Khan*, 1 S. L. R. 142; *Iburamsa Rowthan* v. *Thirumalai Muthuveera Theruvenkatasami Naick*, 7 Ind. Cas. 559; 34 M. 269; 8 M. L. T. 269; 20 M. L. J. 743; (1910) M. W. N. 580; *Ram Charan* v. *Ajudhia Parshad*, 28 A. 50; A. W. N. (1905) 174, referred to.

Appeal against the decision of the Joint Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Udharam Khubchand*, for the Respondents.

JUDGMENT

PRATT, J. C.—The family consisted of two joint co-parceners Badaldas the uncle and Kandhari the nephew. Badaldas mortgaged a house, which was part of the family property, to Hassomal in 1899 for a debt which was not a family debt.

Dularam in 1909 purchased a half share of the house at a sale in execution of a money-decree against Kandhari.

Dularam was obstructed by the mortgagee Hassomal in getting possession in execution.

Dularam then sued for partition and possession of the half share of Kandhari which he had purchased at the Court sale.

The first Court held that a suit for partial partition would not lie but passed a decree for joint possession.

The lower Appellate Court held that Dularam was not even entitled to joint possession and dismissed the suit altogether. Dularam has filed this second appeal.

The suit is one by an alienee of a particular property from one co-parcener suing for partial partition and impleading the mortgagee of another co-parcener.

Both the lower Courts have referred to the cases of *Dhamoomal Chandiram* v. *Musammat Kiam Khatun* (1) and *Munshi Tuljaram* v. *Chutal Khan* (2). But those are both cases where the suit for partial partition restricted to the particular property alienated was brought by a co-parcener who was not a party to the sale. The rights of a co-parcener as to partition and possession stand in some respects on a different footing to those of the alienee. There may be cases not referred to in those judgments where a co-parcener, other than the vendor, might be allowed to bring a suit for partial partition.

But those judgments are not relevant to the point in issue here, which is whether the alienee who is not in possession is entitled either to joint possession or to partial partition. This is a point which is well settled. The alienee is not entitled to possession of the specific parcel alienated to him and the only right he acquires is a right to compel the same general partition which his vendor might have compelled, *Udaram* v. *Sitaram Ranu Panduji* (3), and an equity to have the particular property he purchased alotted, if possible, to his share, *Narayan bin Babaji* v. *Nathaji Durgaji Marwad* (4). Mr. Rupchand does not seriously contest these propositions, but asks that a declaration may be made of the alienee's right similar to that made by the Privy Council in *Suraj Bansi's* case (5). But in *Suraj Bansi's* case (5) the suit was by a co-parcener who impeached the validity of the execution proceedings and the Court sale whereby the alienation had been effected. The Privy Council held that the alienation was valid and that its effect was to confer upon the alienee the right to sue for partition. The decree confirming the co-parcener's possession was, therefore, made subject to a declaration of the alienee's right to alter that possession by a partition suit. In *Suraj Bansi's* case (5) the relief sought was equitable. Here a Common Law relief is sought and the plaintiff is precluded by section 42 of the Specific Relief Act, from obtaining a declaration. He is entitled to further relief and his suit fails because he chose not to sue for further relief to which he is entitled.

I would confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

CROUCH, A. J. C.—I concur in the proposed order. When an individual member of a co-parcenary purports to sell a particular parcel of the joint estate he can only transfer such right, title and interest as is actually vested in him. To do more is a legal impossibility. In such particular parcel he has a beneficial interest—a right to enjoy it in common with the other co-parceners and also the chance of its being allotted to him on a general partition, such chance being dependent on his enforcing partition during his lifetime. That is what he alienates.

In all suits for partition, the Court considers not merely the legal rights of the plaintiff, but also the legal and equitable rights of all other parties interested, whether on record or not; and where a particular parcel has been alienated, the Court will ordinarily allot such parcel to the alienating co-parcener leaving the alienee in possession, provided that this can be done without unfairness to the other persons interested. This is the principle underlying all decisions touching what is is called "partial partition."

(1) 1 S. L. R. 133.
(2) 1 S. L. R. 142.
(3) 11 B. H. C. R. 76.
(4) 28 B. 201; 5 Bom. L. R. 945.
(5) 5 C. 148; 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1 (P. C.).

If, therefore, one of several co-parceners entitled to a one-eight share, sues the alienee for partition of the particular parcel and for possession of his share, the suit must be dismissed; for the plaintiff can prove no title to the share claimed. On a general partition, the whole parcel might and probably would be allotted to the alienee. This was the case in *Dhumoomal Chandiram* v. *Musammat Kiam Khatun* (1).

So, also, if all the co-parceners other than the alienor sue for partition of the particular parcel alienated, their claim must be rejected; for they are claiming something to which they cannot prove title, something to which they would almost certainly be found not entitled were there a general partition [see *Munshi Tuljaram* v. *Chutal Khan* (2)].

In *Iburamsa Rowthan* v. *Thirumalai Mathuveera Theruvenkatasami Naick* (6) there were only two co-parceners, and one co-parcener alienated his share in certain items of the joint estate. The alienee sued both his alienor and the other co-parceners for partition of his share in the alienated parcel. The Court having all parties before it could effect partition without injustice to any one. It was morally certain that on a general partition the plaintiff would get what he was claiming. Partition was allowed.

So also in *Ram Charan* v. *Ajudhia Prasad* (7)there were two joint brothers, one of whom sold his half interest in a certain portion of the family property. It was held that the other brother could sue for partition of the portion so alienated. There was no reason to suppose that defendant was under any circumstances entitled to anything more than the half of his particular parcel, and plaintiff was certainly entitled to the other half.

In the present case, unless and until the whole estate is before the Court, it cannot be established that on a general partition plaintiff would be entitled to any share in the property in dispute. It is probable that the defendant-mortgagee would be held equitably entitled to continue in possession of the whole of it as the mortgage was with possession. Plaintiff has not proved his claim, and cannot prove it in a suit for partial partition. I would dismiss the appeal with costs.

Appeal dismissed.

(6) 7 Ind. Cas. 559; 34 M. 269; 8 M. L. T. 269; 20 M. L. J. 743; (1910) M. W. N. 380.

(7) 28 A. 50; A. W. N. (1905) 174.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 181 OF 1913.

January 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

SWAMINATHA PILLAI—PLAINTIFF—PETITIONER

versus

MONDAIYAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), *s.* 20—*Interest, payment of, as such—Labour in lieu of interest, whether saves limitation.*

Where the plaintiff proves that he received interest through the labour of the defendants till within three years before suit, the claim is not barred by limitation.

Mylan v. *Annavi Madan*, 29 M. 234; 16 M. L. J. 99, followed.

Where, therefore, plaintiff made such an allegation in the plaint:

Held, that his suit ought not to have been dismissed as time-barred, but that he should have been given an opportunity to prove that allegation.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Mannargudi, South Arcot District, in Small Cause Suit No. 1463 of 1912.

Mr. *C. Padmanabha Iyengar*, for the Petitioner.

JUDGMENT.—The respondents do not appear. Following the principle of the ruling in *Mylan* v. *Annavi Madan* (1), I hold that if the plaintiff is able to prove that he received interest through the labour of the defendants till within three years before suit and without a break over three years from 1902 till the date of suit, his claim is not barred by limitation.

He makes substantially the above allegation in his plaint and his suit ought not to have been dismissed as barred without giving him an opportunity to prove that allegation.

The District Munsif's decree is set aside and he is directed to dispose of the suit according to law. Costs will abide the result.

Petition allowed; Case remanded.

V. R. P.

(1) 29 M. 234; 16 M. L. J. 99.

DODUMAL *v.* EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 22 OF 1916.

March 13, 1916.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

DODUMAL *wd.* MOTUMAL—APPLICANT

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 195—"Sanction", meaning and essentials of—Direction to prosecute, whether sanction.

It is not essential to the validity of a sanction under section 195, Criminal Procedure Code, that it should be addressed to a particular complainant, for it only removes the bar put by the section on the jurisdiction of the Court. But sanction implies the existence of a person who desires to prosecute, and it is not desirable that it should be so indefinite as to be capable of being used by any possible prosecutor. [p. 481, col. 2.]

A sanction is quite distinct from a direction to prosecute A sanction leaves the private prosecutor to exercise his unfettered discretion as to whether he will proceed or not. An order expressly ordering a prosecution is, therefore, not a sanction. [p. 481, col. 2.]

Gridhari Mondul v. *Uchit Jha*, 8 C. 435; 10 C. L. R. 46, referred to.

The order of a Magistrate ordering a prosecution *suo motu* is not a sanction. [p. 481, col. 2.]

A Collector ordering the prosecution of a person for an offence under section 182, Penal Code, for making false allegations against one of his subordinates in a written petition puts himself in the position of a prosecutor and is disqualified from performing the judicial function of deciding whether to grant a sanction or not. His order is a mere executive order. [p. 482, col. 1.]

Application against the order of the District Magistrate, Karachi.

Mr. *F. J. de Vertueil*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application to revoke a sanction granted by the Collector and District Magistrate, Karachi, for the prosecution of the applicant Dodumal for an offence under section 182, Indian Penal Code.

Dodumal addressed a petition to the Collector of Karachi, stating that the *mukhtiarkar* of Manjhand had borrowed Rs. 50 from him and would not repay him and also making vague allegations of oppressive conduct against the *mahalkari* and the Sub-Inspector of Police.

The Collector sent the petition for inquiry to the Deputy Collector, Kotri, and on receipt of his report made the following order:—

"The Collector and the District Magistrate, Karachi, hereby orders Dodumal Motumal, resident of Manjhand, to be prosecuted under section 182, Indian Penal Code, for making a petition to the Collector containing false allegations against Mr. Daryanomal Nanikram, *mahalkari* of Manjhand, knowing or believing them to be false and intending thereby to cause, or knowing that it was likely that he would thereby cause, the Collector to use his lawful powers to the detriment of the *mahalkari*".

The order is described as a sanction and the *mahalkari* has filed a complaint of an offence under section 182, Indian Penal Code, against the applicant.

We find it difficult to give the order effect as a sanction.

The alleged false information was given to the Collector. Why then is the order passed by "the Collector and District Magistrate"? It is not even a case in which the District Magistrate could take cognizance *suo motu*, for the offences described in section 195, Criminal Procedure Code, are excepted from section 190.

It was the Collector who could under section 195 either give sanction himself or file a complaint.

The order is not a complaint. Is it a sanction?

There was no application for sanction. It is true that it is not essential to the validity of a sanction that it should be addressed to a particular complainant, for the sanction only removes the bar put by section 195 on the jurisdiction of the Court. But sanction implies the existence of a person who desires to prosecute and to quote the picturesque expression of the Calcutta High Court, it is not desirable that the sanction should be an abstract thing which may float about the world like a bit of thistle-down until it comes into contact with some possible prosecutor.

But it is quite clear that a sanction is not a direction to prosecute. It leaves the private prosecutor to exercise his unfettered discretion as to whether he will proceed or not: *Gridhari Mondul* v. *Uchit Jha* (1). This so-called sanction expressly orders a prosecution.

(1) 8 C. 435; 10 C. L. R. 46

When the Collector orders a prosecution he puts himself in the position of a prosecutor and is by that very fact disqualified from performing the judicial or *quasi*-judicial function of deciding whether to grant a sanction or not.

The Collector acted *suo motu* and without notice to the complainant. It is clearly merely an executive order.

As such it is a mere *brutum fulmen* and has not the effect of a sanction.

We, therefore, quash the proceedings instituted against Dodumal.

Proceedings quashed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1515 OF 1915.

March 27, 1916.

Present:—Mr. Justice Rattigan.

TOTA RAM AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), s. 74—"Manager", definition of—Default in filing balance-sheet—Managing Agents and Directors, liability of.

The expression "Manager" as used in section 74 of the Companies Act, 1882, includes every person or body of persons who conducts or conduct the affairs of a Company and to whom its management, subject to the control of the Directors, is entrusted. [p. 484, cols. 1 & 2.]

Where, therefore, a firm is entrusted with the management of a Company, it cannot escape liability for its misfeasance or non-feasance merely by calling itself "Managing Agent" instead of "Manager". [p. 484, col. 2.]

Where the balance-sheet of a Company should have been made out and filed with the Registrar of Joint Stock Companies on the 20th August 1913, but was not in fact submitted till the 22nd October, and consequently the Chairman of Directors and the Managing Agents of the Company were convicted under section 74 of the Companies Act, 1882:

Held, (1) that the Chairman of Directors could not escape liability on the ground that he depended upon the Managing Agents to do all that was necessary and had on several occasions asked them to do so, but that he was bound to take such reasonable measures as he could to prevent default being made and not having done so, was rightly convicted; [p. 483, col. 2; p. 484, col. 1.]

(2) that the fact that one of the members of the firm, which acted as Managing Agents, was also punished in his individual capacity as a Director was no reason for not punishing him as a member of the firm. [p. 484, col. 2.]

Petition for revision of the order of the Sessions Judge, Multan, dated the 28th May 1915.

Mr. *Nand Lal*, for the Petitioners.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This judgment will dispose of this petition and also of the connected petitions for revision, Nos. 1812 and 1713 of 1915. The petitioners are (1) Tota Ram; (2) the Firm of "Tota Ram and Brothers"; (3) Ram Kishen and (4) Punnun Lal. They have all been convicted by Mr. Brayne, Magistrate, 1st class, Multan, of an offence punishable under the last paragraph of section 74 of the Indian Companies Act, 1882, and sentenced each to pay the fixed fine of Rs. 1,000. The convictions and sentences having been upheld by the Sessions Judge on appeal, petitions for revision have been presented to this Court, and I have heard lengthy arguments by Mr. Nand Lal on behalf of the two first named petitioners, and by Mr. Hargopal on behalf of Ram Kishen and Punnun Lal. Before proceeding I might here note that Tota Ram, Ram Kishen and Punnun Lal have been convicted as Directors of the said Persian Gulf Trading Company, Limited, and the firm of "Tota Ram and Brothers," as Managers of the said Company.

It has been found as a fact, and is not denied, that the first balance-sheet of the Company should have been made out and filed with the Registrar of Joint Stock Companies on the 20th August 1913, but was not in fact submitted until the 22nd October 1913.

The grounds upon which I am asked to interfere with the convictions are, that the default was not "knowingly and wilfully" authorized or permitted by the Directors, and that "Tota Ram and Brothers," though the Managing Agents of the Company, were not the Managers of the Company within the meaning and for the purposes of section 74 of the Act. It was also urged that as Tota Ram had been convicted in his personal capacity of the offence he could not also be convicted of the same offence in his capacity as a partner of Tota Ram and Brothers.

The *first* point is not one upon which this Court ought to interfere on the revision side, inasmuch as the Magistrate and Sessions Judge are agreed that in point of fact and upon the evidence the petitioners have been proved to

have knowingly and wilfully permitted the default. However, as the case has been argued with reference to this finding, I shall deal with the question upon the merits.

Tota Ram urges that in July 1913 he was seriously ill and that it was on this account that the default took place so far as he is concerned. As to this I agree with the Magistrate and Sessions Judge that it is not shown that this illness was such as to incapacitate Tota Ram from attending to business. On the contrary, it is proved that, though he was at times suffering from fever and "breast-ache," he was very active indeed in his business affairs, travelling from Multan to Lahore, and from Lahore to Amritsar and back again to Multan. The finding that this plea of illness is a mere pretext is amply justified and I have no hesitation in holding that Tota Ram has failed to show that he was so ill that he could not carry out his legal duties as a Director of the Company. At all events his illness did not prevent him from drawing fees and allowances from the Company.

It is *next* urged on his behalf (though somewhat inconsistently with his first plea) that he was very busy trying to discover a really first class accountant to whom the difficult duty of auditing the Company's accounts could be entrusted. This is palpably absurd and there is not an iota of evidence to support the plea. There are numerous well-qualified accountants doing business in various parts of the Province and it would have been a matter of no difficulty to find an expert auditor fully capable of auditing the very meagre accounts of this Company which, despite its grandiloquent title, did next to no business. Both excuses put forward by Tota Ram who was undoubtedly the evil genius of the Company, are futile and I have no hesitation in rejecting his petition.

On behalf of Ram Kishen Mr. Hargopal argues that his client was a young and inexperienced Pleader, ill versed in Company Law and accounts and was to all intents and purposes a dupe of Tota Ram. To a large extent this is true, but a man, and especially a legal practitioner, who accepts the position of Chairman of the Board of Directors of a Company and in such capacity proceeds to draw fees for his services, must also accept the responsibilities attached to his office. It is true that on the 28th June 1913 Ram Kishen wrote a letter (Exhibit D—11) to Tota Ram pointing out to the latter that a balance-sheet should be prepared within a year and expressing the hope that Tota Ram would not neglect to do his duty. But this very letter shows that the writer was fully aware of his legal obligations, and it was incumbent on him when he found that the time for the submission of the balance-sheet was drawing near, to do something more definite than to write letters of complaint to Tota Ram, and he was bound to take such reasonable measures as he could to prevent default being made.

Admittedly, however, he did nothing until the 17th August (*i.e.*, until three days before the balance-sheet should have been filed with the Registrar) when he wrote Exhibit D—12 to Tota Ram. In this letter he states that he entirely depended upon Tota Ram whom he trusted and that since receiving a letter from him, he had remained "at ease." The letter continues that the prosecution of the Bank of Peshawar had filled him with alarm and that he pities himself for having depended upon Tota Ram, that he has taken upon himself to prepare the accounts but he finds it a difficult job as he is unacquainted with the facts. The writer concludes with the request that Tota Ram should come to Multan as soon as possible and that in the meantime Kirpa Ram should be asked to assist him in the preparation of accounts. No doubt by this time Ram Kishen was, as he says, filled with alarm and I see no reason to disbelieve the statement that he depended very largely upon Tota Ram.

At the same time as one of the leading Directors of the Company, it was his bounden duty to see that default was not made in the submission of the balance-sheet and when he found that the time was getting short and that Tota Ram would not do his duty, he should have taken prompt measures to carry out, as far as he could, the provisions of the law. It was within his power to call a meeting of the Directors (see section 38 of the

Act, Table A, Article 66), but no attempt has been made by him to show that he did anything beyond writing to Tota Ram. It is urged on his behalf that no meeting of the Directors could validly be held in the absence of the Managing Agents and in this connection reliance is placed on Articles 100 and 101 of the Articles of Association. These articles, however, do not assist Ram Kishen. Article 100 is not relevant and Article 101 merely provides that if the Chairman of the Board of Directors is not present, no meeting of Directors shall be valid unless the Managing Agents are present, the obvious inference being that if the Chairman is present, the meeting is valid, whether or not the Managing Agents are also present.

I must accordingly hold that Ram Kishen was guilty of the offence, though I am quite prepared to admit that his guilt is in no way as great as that of Tota Ram. Had it been possible for me to do so I should have reduced the amount of penalty imposed upon Ram Kishen, but the section gives the Court no option in the matter and I must accordingly reject his petition.

As regards Punnun Lal, it is urged that he was at Karachi attending to his duties there in connection with the Derajat Bank (a connected concern) and could not leave without Tota Ram's permission. Punnun Lal, however, has not attempted to shew that he endeavoured to get such permission, and in any case if he found himself unable to attend to his duties he should have resigned his office forthwith. So far from doing so, he continued to draw his fees as a Director and was seemingly quite willing to let matters take their course. There is nothing to be said for him and his petition is also rejected.

Finally as regards Tota Ram and Brothers, there remains the contention that for the purposes of section 74 of the Act that firm, though they were "Managing Agents" of the Company, were not the "Managers." I cannot accept this argument. There is no magic in the expression "Manager" as used in section 74 and I see no reason why it should not include every person or body of persons who conducts or conduct the affairs of the Company and to whom its management, subject to the control of the Directors, is entrusted. A firm is as capable of managing a Company as an individual and if it does so, it surely cannot escape liability for its misfeasance or non-feasance merely by calling itself "Managing Agent" instead of Manager. Article 111 of the Articles of Association states that the firm of Tota Ram and Brothers are appointed "Managing Agents" of the Bank; Article 112 provides for their remuneration as such, and Articles 113 and 114 give the Managing Agents, subject to the control of the Directors, full powers of management of the business of the Company. In these circumstances it is only reasonable to hold that Tota Ram and Brothers were the Managers of the Company for the purposes of section 74 of the Act.

The argument that Tota Ram is being punished twice for the same offence has, in my opinion, no force, inasmuch as it overlooks the fact that Tota Ram in his individual capacity of Director is an entirely separate and distinct personage from the firm of Tota Ram and Brothers, Managing Agents, though it may well be that the latter firm was dominated by the sinister personality of its senior partner.

For reasons given I reject this and the connected petitions for revision.

Petition rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 188 OF 1915.

February 16, 1916.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

ALI MOHAMED *wd.* YAR MOHAMED—APPLICANT

versus

EMPEROR—OPPONENT.

Workman's Breach of Contract Act (XIII of 1859), ss. 1, 5—Jurisdiction of Court, what determines.

Under the Workman's Breach of Contract Act, the jurisdiction of the Court is determined by the place of residence or of business of the employer, irres-

pective of the place of residence of the workman, or of the place where the advance was made, or the work was to be performed or the breach was committed. [p. 485, cols. 1 & 2.]

Lal Mohan Chowbey v. *Hari Charan Das Bairagi*, 25 C. 637, referred to.

Application against the order of the City Magistrate, Shikarpur.

Mr. *F. J. de Verteuil*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application for revision of an order passed by the City Magistrate, Shikarpur, returning the complaint made by the applicant under section 2 of the Workman's Breach of Contract Act, XIII of 1859, on the ground that he had no jurisdiction to entertain the complaint.

The complainant employer has his Head Office at Shikarpur. He has made a contract with the opponent for work to be performed at the village of Lundi in the Kandiaro Taluka of the Nawabshah District. The complainant said that the contract was made in Shikarpur but that payment was made to the workman in Kandiaro, where the work was to be performed. The City Magistrate declined to receive the complaint because he thought that the complaint should have been filed before the Magistrate at Kandiaro, where the money was paid, where the work was being performed, where the breach occurred and where the workman was residing at the time the complaint was filed.

The Public Prosecutor supports the Magistrate's order and suggests that the question of jurisdiction is determined by the place where the advance was made, where the breach occurred or where the defendant resided. But we cannot find anything in the Act itself to support these contentions. It certainly is not the residence of the opponent workman that determines jurisdiction, for the Act was passed for the relief of the employer and it was not the intention of the Act that the employer should be compelled to pursue absconding workmen. Under section 1 of the Act, it seems clear that what gives jurisdiction is the fact of the employer residing or carrying on business within a Presidency town. If the employer resides or carries on business within a Presidency town he can prefer his complaint to the Magistrate of the place, irrespective of the place where the work was to be performed or where the breach was committed. This was so decided in the case of *Lal Mohan Chowbey* v. *Hari Charan Das Bairagi* (1). If residence and business within the Presidency town confer the right to make the complaint to a Magistrate of Police there, it seems to us that when the Act has been extended under section 5 to an area outside a Presidency town, residence within the area confers a right to prefer the complaint to the nearest Magistrate empowered in that area.

The City Magistrate, Shikarpur, has, therfore, jurisdiction to entertain the complaint. No doubt it is possible that the enquiry at Shikarpur instead of at Kandiaro, where the opponent resides and where he had agreed to do the work, might entail hardship upon the workman. If the Magistrate has reason to think that it is so, it is open to him after taking cognizance of the complaint to refer it to us for transfer to the Magistrate of Kandiaro under section 526 (3), Criminal Procedure Code. We accordingly quash the order of the Magistrate and direct him to entertain the complaint and dispose of it according to law.

Order quashed.

(1) 25 C. 637.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 124 OF 1916.

March 29, 1916.

Present:—Mr. Justice Piggott.

LAL BEHARI—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Appeal to District Magistrate—Judgment, what to contain.

A Court of Criminal Appeal, dismissing an appeal summarily, is not bound to write a judgment, but an appeal from an order requiring a person to furnish security to be of good behaviour is certainly distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence. [p. 486, col. 1.]

EMPEROR *v.* SUJAN SINGH.

A District Magistrate should not dispose of an appeal from an order requiring a person to furnish security to be of good behaviour otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant, both in the Court below and in his memorandum of appeal. [p. 486, col. 1.]

Criminal revision from an order of the District Magistrate, Basti.

Mr. *T. N. Chadha*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government-Advocate, for the Crown.

JUDGMENT.—A very similar case to this was recently before this Court, *vide Sarwan* v. *Emperor* (1). The question, of course, is how far the procedure of a Court of Criminal Appeal dismissing an appeal summarily can be held to be reasonably applicable to appeals under Chapter VIII of the Code of Criminal Procedure. I take it to be settled law that a Court of Criminal Appeal dismissing an appeal summarily is not bound to write a judgment. This Court has, however, always maintained a right to interfere, in the exercise of its discretion, where there was reason to suppose that the appeal had not received fair and adequate consideration. An appeal from an order requiring a person to furnish security to be of good behaviour is certainly distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence. I think that in a case like the present it is not unreasonable for this Court to insist that the District Magistrate should not dispose of an appeal of this nature otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant, both in the Court below and in his memorandum of appeal. At any rate I am not prepared to dissent from the view taken by a learned Judge of this Court in the case already referred to. I set aside the order of the District Magistrate dismissing the appeal of Lal Behari in this case, and I direct that the said appeal be re-heard and tried according to law. I further transfer the hearing of this appeal from the Court of the District Magistrate of Basti to that of the District Magistrate of Gorakhpur.

Re-hearing ordered.

(1) 33 Ind. Cas. 647; 14 A. L. J. 279; 17 Cr. L. J. 67.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 185 OF 1916.

April 3, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

EMPEROR—PETITIONER

versus

SUJAN SINGH AND OTHERS—CONVICTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 562, scope of—Offence of manufacturing illicit liquor—Sentence—Punjab Excise Act (I of 1914), s. 61.

Section 562 of the Criminal Procedure Code is intended to apply to those offenders (especially youthful ones) who, without being persons of depraved character, may, on occasion, succumb to sudden temptation. [p. 487, col. 2.]

The view, sometimes expressed, that, because an excise offence is a *malum prohibitum* and not a *malum in se*, the culprit should be mortified in pocket rather than in person, is wholly incorrect. [p. 488, col. 1.]

The accused were convicted under section 61 of the Excise Act, 1914, for the offence of manufacturing liquor contrary to law and being in possession of it and were sentenced to four months' rigorous imprisonment and a fine of Rs. 50 each. On appeal the Sessions Judge reduced the sentences, on the ground that this was appellants' first offence, that the principle of section 562, Criminal Procedure Code, applied and that appellants were father and son. The Government applied for enhancement of the sentences:

Held, that as the offence of manufacturing illicit liquor implied a good deal of preparation and as it was mostly done with the intention of selling to others it could not be said to be done in consequence of succumbing to sudden temptation; that when a man was found for the first time by the Police manufacturing illicit liquor, he had probably done it at least a dozen times before; and that as it deprived the Government of revenue, besides demoralising the people, deterrent sentences were necessary in such cases; [p. 487, col. 2.]

(2) that the Legislature intended that substantial terms of imprisonment should be awarded in these cases, as was shown by the fact that the maximum term of imprisonment was raised by section 61 of the present Excise Act. [p. 487, col. 2; p. 488, col. 1.]

Criminal revision from the order of the Sessions Judge, Sialkot, dated the 30th of September 1915.

The Government Advocate, for the Petitioner.

Mr. *B. N. Kapur*, for the Respondents.

EMPEROR *v.* SUJAN SINGH.

JUDGMENT.—In this case five persons, namely, Sujan Singh, Kharak Singh, Sher Singh, Pala Singh and Bulaqi, were placed before a lst class Magistrate, Sialkot, charged under section 61 of the Excise Act of 1914 with manufacturing liquor contrary to law and being in possession of it. Of these persons Pala Singh and Bulaqi were acquitted and the other three were convicted and sentenced to four months' rigorous imprisonment each and a fine of Rs. 50 each. These three persons appealed, and the learned Sessions Judge, while holding that the convictions of the accused were certainly correct, inasmuch as the appellants' conduct was in the circumstances most "convincing evidence of their guilt," yet considered that the sentences were excessive and reduced them to 21 days' imprisonment and a fine of Rs. 20 in each case. The reasons given for this reduction of sentences are that this is appellants' first offence, that the principle of section 562, Criminal Procedure Code, applied and that the appellants are father and two sons.

The Government have applied to this Court on the revision side for enhancement of the sentences and, after hearing arguments, it seems to me quite clear that the sentences are wholly inadequate. The accused persons were represented in this Court, and their learned Counsel not only argued against enhancement of sentence but also tried to make out that there was doubt about the guilt of the accused.

After hearing what he had to say, I have formed the opinion that, as regards the guilt of the accused, there is no doubt whatever. The evidence for the prosecution is largely that of important officials of unimpeachable veracity and their evidence was quite sufficient to prove the case, even if the testimony of the boy Budhu and of Mangal Singh and Rur Sing witnesses is brushed aside. Both the lower Courts have been very careful in their estimate of the evidence for the prosecution, rejecting the statements of Mangal Singh and Rur Singh, which may after all be perfectly true, and in the case of the lower Appellate Court, rejecting also the statement of the boy Budhu which, in my opinion, is almost certainly true. However this may be, I am quite certain that the accused did manufacture spirit contrary to law and were in possession of spirit contrary to law.

The reasons given by the learned Sessions Judge for reducing the sentences seem to me wholly inadequate. I fancy the idea of the Legislature in framing section 562 of the Criminal Procedure Code was that sometimes offenders (and in especial youthful offenders), without being persons of depraved character, may on occasion succumb to sudden temptation; for example, a poor youth without an anna in his pocket sees suddenly displayed before him some property which is worth his stealing. He, having never previously committed any crime whatever, succumbs to temptation and steals the property, and is caught. The Legislature very humanely and very properly allows the Magistrate in such a case as that to give the young man another chance and to deal with him under section 562.

But the offence of manufacturing illicit liquor stands on quite a different footing from all that sort of thing. It implies a good deal of preparation. In most cases it is done with the intention of selling to others. It can never be said that it is done in consequence of succumbing to sudden temptation. Further, it is an offence which probably escapes detection 9 times out of 10, and it deprives Government of revenue, besides demoralising the people. Deterrent sentences in such circumstances are absolutely necessary. The profits of illicit distillation are so large that an offender would cheerfully pay a fine like Rs. 20 and still continue his evil courses. Lastly, it may be taken for granted in almost every case that, when a man is found by the Police manufacturing illicit liquor, he has probably done it at least a dozen times before undetected, so that the principle of "first offence" has no application to such cases at all.

Further, the Legislature, in passing the new Excise Act of 1914, evidently realised that the old law was not sufficiently deterrent. Under the old Act (see section 51) only three months' rigorous imprisonment could be inflicted for possession of illicit liquor, but under section 61 of the present Act the maximum imprison-

ment has been raised to one year, and under section 74 of the present Act an enhanced maximum is provided for second offences of the same kind. All this seems to me to shew that it is the duty of the Court to inflict substantial sentences in these cases. In my opinion the view that is sometimes expressed that, because an excise offence is a *malum prohibitum* and not a *malum in se*, the culprit should be mortified in pocket rather than in person, is wholly incorrect. In 9 cases out of 10 excise offences are committed with the intention of making money, and the nefarious trade is usually very lucrative. In my opinion the Legislature intended that substantial terms of imprisonment should be awarded in these cases. In the present instance, even the sentence passed by the first Court seems to me to have been, if anything, too light, but in the circumstances in which the present case comes before me I am not disposed to go beyond it.

I allow this revision and restore the sentences passed by the first Court. The three accused persons will, therefore, be re-arrested and will have to suffer on the whole four months' rigorous imprisonment and pay a fine each of Rs. 50, or in default suffer 1½ months' more rigorous imprisonment.

Revision allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 117 OF 1916.
CRIMINAL REVISION PETITION No. 100 OF 1916.
July 14, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

EMPEROR—PETITIONER

versus

SANKARA NARAYANA CHETTI,
PROPRIETOR OF MESSRS. ASWIN AND CO., CHEMISTS AND DRUGGISTS, BROADWAY, MADRAS,
—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Essentials of offence.

The offence of "receiving stolen property" under section 411, Indian Penal Code, is constituted only on proof of the accused's knowledge or belief that the property was stolen and of his having received the goods in that state of mind. It is not enough to prove that the accused must have suspected that the property was stolen. [p. 488, col. 2.]

Empress v. *Rango Timaji*, 6 B. 402, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1893, praying the High Court to revise the order in Calendar Case No. 24557 of 1915, on the file of the Third Presidency Magistrate's Court, George Town, Madras.

The Crown Prosecutor, for the Petitioner.

The Hon'ble Mr. *T. Richmond*, for the Respondent.

ORDER.—I do not think that the order of discharge is wrong. The Magistrate would have been well advised to have examined Sadagopa Naidu, but I cannot say that he was bound to do so. On two material points, the prosecution evidence is unconvincing. In the *first* place, there is no satisfactory evidence that the bottles before the Court were stolen from the Government Stores. The store-keepers, prosecution 2nd witness and prosecution 3rd witness, say distinctly that nothing has been stolen from their Stores. The suggestion of the learned Crown Prosecutor is that the bottles must have belonged to some other Government store and must have been stolen from it. It does not follow that because the store mark is put upon the bottles, the stuff was stolen from some Government store. The evidence given by the 2nd prosecution witness shows that empty bottles are sold. Further, there is the evidence of Mr. Smith, the Court witness, who says "the bottles before the Court are common bottles. We get them occasionally. There is no well understood rule on the subject of these bottles. They are left to the manufacturers to sell them." In these circumstances, I cannot say that it is established beyond doubt that these bottles came from any of the Government stores and that the chloroform in them belonged to the Government.

On one *other* point the evidence is unconvincing. As argued by Mr. Richmond, it has to be established that the accused who received these goods believed them to be stolen property. As pointed out by the learned Judges of the Bombay High Court in *Empress* v. *Rango Timaji* (1), it is not enough that the receiver suspects the goods to be stolen property. In this case, there

(1) 6 B. 402.

is hardly any evidence to show that the accused believed that these goods were stolen and that in that state of mind received the goods. In these circumstances, I cannot say that the Magistrate was wrong in discharging the accused. The petition is dismissed.

Petition dismissed.

V.R.P.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 73 OF 1916.

May 26, 1916.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

SARJUG LAL AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 106 - Lathis, *whether "arms."*

Lathis are 'arms' within the meaning of section 106 of the Criminal Procedure Code.

Messrs. *Pugh* and *G. C. Pal*, for the Appellants.

Mr. *Manak*, Government Advocate, for the Crown.

JUDGMENT.—In this case we are asked to consider the possibility of reducing the sentences passed upon 12 Hindu accused, who have been convicted under section 143 of being members of an unlawful assembly whose common object was to prevent by force the exercise by the Muhammadans of Barawan of their right to sacrifice cows upon the occasion of the *Bakr-Id* of last year. We have considered carefully the facts of the case. In our view, one of the most important considerations is the probable effect of a reduction of these sentences upon the peace of that locality. In considering that question we attach great importance to the opinion of the District Magistrate that a reduction of the sentences may result in still further difficulties in future. It is to be regretted that the District Magistrate in showing cause should have based his objections to the reduction of sentences upon an assertion that the Jury had taken too lenient a view of the matter. We are conscious of this and regard the sentences solely from the point of view of the Jury's verdict. That verdict is that the accused were members of an assembly making not a peaceful but a warlike demonstration, and the evidence shows that the assembly was armed with *lathis* and it is clear on a consideration of all the facts of the case that the only reason why the *lathis* were not used was that the Muhammadans forewent their rights to make any sacrifice that day. In the case of those accused who were either able-bodied men or were prime movers in the matter we are not disposed to interfere. There are, however, two men, Makund Singh aged 80 and Ram Partap Singh aged 71, who do not appear to have taken any very prominent part in the proceedings. Their sentences will be reduced to a sentences of three weeks' rigorous imprisonment each. Of the remaining accused Bhagwat Dubey is aged 76, Jamuna Prasad aged 19 and Sarju Prasad aged 22. Had they not taken a prominent part in the proceedings their respective age and youth might be good reason for reducing their sentences also. But it is clear from the evidence of the Police witnesses and of the *chaukidar* that these three men were prime movers in the collection of this unlawful assembly and in conducting it to Barawan for the purposes of this warlike demonstration. We are not disposed, therefore, to interfere on their behalf. With regard to the application that the orders passed under section 106 are not justified by the facts, we are satisfied from the findings of the Jury that the assembly was an assembly with an evident intention of committing a breach of the peace, and from the evidence that it was an assembly of armed men: *lathis* are undoubtedly arms within the meaning of this section. We, therefore, see no reason to interfere with the order passed under section 106.

Appeal dismissed.

DHANUKODI ASARI *v.* MUTHUSWAMY AIYAR.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 61 OF 1916.
(CRIMINAL REVISION PETITION No. 52 OF 1916).
July 14, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

DHANUKODI ASARI—COMPLAINANT —PETITIONER

versus

MUTHUSWAMY AIYAR AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 250, 537—Order awarding compensation, whether can be made after order of discharge—Failure to embody order in original judgment—Irregularity—Magistrate, whether can make provisional order of imprisonment.

An order awarding compensation must, as a rule, be part of the original judgment directing the discharge of the accused and before the order of discharge is read out, the Magistrate should make up his mind to call upon the complainant to pay compensation. But there is nothing in section 250 of the Criminal Procedure Code to show that the levy cannot be made after the order of discharge. [p. 490, col. 2.]

In the matter of the complaint of Safdar Husain, 25 A. 315, referred to.

Failure to embody an order awarding compensation to the accused in the original judgment is merely an irregularity curable by section 537 of the Criminal Procedure Code. [p. 491, col. 1.]

Ghurbin v. *Emperor*, 22 Ind. Cas. 977; 12 A. L. J. 143; 15 Cr. L. J. 193; 36 A. 132; *Lalit Mohan Singha Roy* v. *Kunja Behari Ghose*, 22 Ind. Cas. 726; 18 C. W. N. 702; 15 Cr. L. J. 150, followed.

Section 250 of the Criminal Procedure Code does not give any power to the Magistrate to order imprisonment in default of payment of fine. It is only on the failure of the attempt to recover the amount awarded as compensation that the Magistrate can pass an order directing the imprisonment of the complainant. [p. 491, col. 1.]

Lal Mahmud Shaik v. *Satcowri Biswas*, 28 C. 164; *In the matter of Byravalu Naidu*, 26 M. 127; 2 Weir 321, followed.

Where, therefore, in an order discharging the accused the Magistrate made a note to the effect that the complainant would be called upon to show cause why he should not pay compensation and after giving the complainant time to answer the charge, the Magistrate came to the conclusion that he should be directed to pay compensation and called upon him to do so or undergo imprisonment in default:

Held, (1) that the proceeding awarding compensation did not contravene the provisions of section 250 and was not illegal; [p. 490, col. 2.]

(2) that even if it was regarded as a separate order contravening section 250, the defect merely amounted to an irregularity which did not prejudice the accused and was cured by section 537; [p. 491, col. 1]

(3) that the provisional order for imprisonment was beyond the jurisdiction of the Magistrate. [p. 491, col. 1.]

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session, Tinnevelly Division, in Criminal Revision Petition No. 17 of 1915, presented against that of the Court of the Joint 1st class Magistrate, Tuticorin, in Calendar Case No. 52 of 1915.

Mr. *V. C. Seshachariar*, for the Petitioner.

The Public Prosecutor, for the Government.

Mr. *M. D. Devadoss*, for the Respondents.

ORDER.—Mr. Seshachariar has raised two points against the order of the Magistrate directing compensation to be paid by his client. The *first* is that the order is contained in a separate proceeding and it, therefore, contravenes section 250, Criminal Procedure Code. What happened is this. On the day the accused was discharged, in the same order discharging the accused, the Magistrate made a note to the effect that the complainant will be called upon to show cause why he should not pay compensation. This was read out to the complainant and the complainant asked for three days' time to answer the charge. On the 3rd day, on hearing the complainant the Magistrate came to the conclusion that he should be directed to pay compensation. It is argued that as this proceeding directing compensation is contained in a separate order, it is illegal. In *In the matter of the complaint of Safdar Husain* (1) Mr. Justice Banerjee points out that the order awarding compensation must be part of the original judgment directing the discharge of the accused. I am entirely at one with him when the learned Judge says that before the order of discharge is read out, the Magistrate should make up his mind to call upon the complainant to pay compensation. But if the judgment is intended to lay down that the levy of compensation subsequently to the judgment is opposed to section 250 unless the reasons for taking such a step are recorded in the judgment of discharge, then with all respect, I am unable to agree with the learned Judge. There is nothing in the section to show that the levy cannot be made after the order of discharge. I think there is another ground on which the lower Court's order can be justified. Following *Ghurbin* v. *Emperor* (2)

(1) 25 A. 315.
(2) 22 Ind. Cas. 977; 36 A. 132; 12 A. L. J. 143; 15 Cr. L. J. 193.

and *Lalit Mohan Singha Roy* v. *Kunja Behari Ghose* (3) I hold that even if the separate order contravenes section 250, the defect is cured by section 537. Not embodying this separate order in the original judgment is an irregularity, but the irregularity did not prejudice the accused in the least. In these circumstances, I do not think that the *first* objection is well-founded.

The *second* objection taken to the order is that the order awarding compensation provides for imprisonment in default of the payment of fine. I think Mr. Seshachariar is right in his contention that the order should not contain an alternative direction awarding imprisonment. The section itself does not give any power to the Magistrate to do so. Proviso 2 to the section says that if the fine cannot be recovered, the imprisonment to be awarded shall be simple. That is to say, steps must be taken to recover the arrears and it is only on the failure of the attempt to recover, that the Magistrate can pass an order directing the imprisonment of the complainant. The provisional order for imprisonment is, therefore, beyond the jurisdiction of the Magistrate. The decisions in *Lal Mahmud Shaik* v. *Satcowri Biswas* (4) and *In the matter of Byravalu Naidu* (5) are in point on this question. As the learned Public Prosecutor has pointed out, the fine has been paid and apart from directing the Magistrate to omit this sentence, nothing further has to be done. I order that the portion of the order which directs the imprisonment of the complainant in default of the payment of fine be deleted from the order. In other respects, the order of the Magistrate is confirmed.

Order modified.

(3) 22 Ind. Cas. 726; 18 C. W. N. 702; 15 Cr. L. J. 150.

(4) 28 C. 164.

(5) 26 M. 127; 2 Weir 321.

PATNA HIGH COURT.

CRIMINAL REVISION No. 181 OF 1916.

July 7, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

KULDIP PANDEY AND OTHERS—ACCUSED—PETITIONERS

versus

RAMNATH SINGH—COMPLAINANT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 424—Landlord and tenant—Dishonest removal of crops sown on batai system—Conviction—Bengal Tenancy Act (VIII B. C. of 1885), s. 71 (4).

The object of section 71, sub-section (4), of the Bengal Tenancy Act, is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by a tenant. If the tenant acts dishonestly in removing them, he is also liable to be convicted under section 424, Indian Penal Code. [p. 492, col. 1.]

In re Sivanupandia Thevan, 23 Ind. Cas. 503; 38 M. 793; 15 Cr. L. J. 295, referred to.

Messrs. *Yunus* and *Kailaspati*, for the Petitioners.

Messrs. *Gowhar Ali* and *Krishna Sahay*, for the Opposite Party.

JUDGMENT.

CHAMIER, C. J.—The applicants have been convicted of an offence under section 424, Indian Penal Code. The facts found are that they hold a number of fields on the *batai* system. At the time of the affair now in question, they were engaged in litigation with their landlord under section 40 of the Bengal Tenancy Act. They went to their fields in a body and cut and carried off the paddy crop despite the remonstrances of the landlord's *patwari*. The second class Magistrate who tried the case recorded a definite finding that the applicants in removing the crop had acted dishonestly. It is contended that there is no such finding in the judgment of the Magistrate who heard the appeal. But that officer after dealing with the evidence says that he affirms the findings of the first Court. There can be no question that the Appellate Court intended to find that the applicants in removing the crop acted dishonestly, nor can there be any doubt that the findings of the Courts below upon this point are correct. The applicants removed the crop from the fields in order to prevent the landlord from obtaining his due

share thereof. It is contended that even if they acted dishonestly they are not liable to be convicted under section 424 of the Indian Penal Code, because it is provided by section 71, sub-section 4, of the Bengal Tenancy Act that if a tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest. Counsel contends that this is the only penalty to which a tenant exposes himself, if he removes the crop of a field which he holds under the *batai* system and that he cannot be prosecuted under the Indian Penal Code. It is impossible to accept this contention. The object of section 71, sub-section 4, is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by the tenant. If the tenant acts dishonestly he is also liable to be convicted under section 424 of the Indian Penal Code. Counsel for the applicants says that there is no reported case in the Calcutta High Court on the subject. That, if correct, affords no reason for not convicting the applicants under the Penal Code. I fear that what generally happens when a tenant attempts to carry off a crop in this manner, is that he is resisted by the landlord and a fight ensues and the tenant is punished under another section of the Penal Code. A case not unlike the present case came before the Madras High Court in 1914, see *In re Sivanupandia Thevan* (1). In that case the accused, who was a *raiyat* under the Madras Estates Land Act and who was bound under the conditions of his tenure to share the produce of his land with the landholder in a certain proportion, dishonestly concealed and removed the produce thus preventing the landholder from taking his due share. Mr. Justice Tyabji held, that the provisions of sections 73 and 212 of the Madras Estates Land Act were no bar to a conviction of the *raiyat* under section 424, Indian Penal Code.

In my opinion the applicants were rightly convicted and I see no reason to interfere with the sentences inflicted. I would direct that the applicants surrender to their bail in order to serve out the remainder of their sentences.

SHAHFUDDIN, J.—I agree.

Petition dismissed.

(1) 23 Ind. Cas. 503; 38 M. 793; 15 Cr. L. J. 295.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 27 OF 1916.

May 15, 1916.

Present:—Mr. Justice Parlett.

MAUNG PO NYUN—APPLICANT

versus

MUTU KURPEN CHETTY—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 476, *nature of proceedings under—Preliminary inquiry—Examination of accused—Thumb-impressions—Evidence Act* (*I of* 1872), *s.* 73.

Proceedings in inquiries under section 476, Criminal Procedure Code, are judicial proceedings and the person against whom they are directed is in the position of an accused person. [p. 493, col. 2.]

Abdullah Khan v. *Emperor*, 5 Ind. Cas. 62; 37 C. 52; 14 C. W. N. 132; 11 Cr. L. J. 45, referred to.

Therefore, the examination of such a person as a witness in the course of such proceedings is *ultra vires*. [p. 493, col. 2.]

Sami Sastri, In re, 2 Weir 598, referred to.

He can only be examined under section 342, Criminal Procedure Code and cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution, nor can he be compelled to make any thumb-impressions under section 73 of the Evidence Act. An Expert's opinion regarding such impressions would also be inadmissible. [p 493, col. 2.]

Mr. *DeGlanville*, for the Applicant.

JUDGMENT.—On 13th July 1915, Mutu Kurpen Chetty sued Maung Po Nyun for Rs. 16,517-8 damages for breach of a contract in writing, plaintiff's copy of which, referred to as Exhibit A, was filed with the plaint. By it defendant agreed to sell plaintiff 10,000 baskets of paddy at Rs.106 per 100 baskets, and the plaint alleged that defendant was paid Rs. 10,600 for which he gave a receipt, Exhibit B, also filed with the plaint. On 23rd July defendant filed a written statement admitting having entered into the contract, but denying having received the Rs. 10,600 and given the receipt. On the 23rd July plaintiff administered six interrogatories to the defendant under Order XI, and as they had not been answered by 24th August the accused's defence was struck off under rule 21 of that Order on that day. The next day

defendant filed his answers, at the same time applying for the order striking off his defence to be set aside, and this was eventually done on the 4th November. On 11th November defendant filed another written statement admitting A and denying B. The 4th and 5th interrogatories were:—"Of the two thumb-impressions on Exhibit A, is not the one on the left side that of yours?" and "did you not give your thumb-impression on Exhibit B?" and to those defendant's reply was, "I am unable to answer these two interrogatories as I have not the Exhibits before me." When, therefore, defendant appeared on 11th November, the Judge put the Exhibits before him and examined him on oath, when he stated: "I gave no thumb-impression on Exhibit B. I did give a thumb-impression on Exhibit A. The one on the left side is mine." He was also questioned on the 6th interrogatory which he had previously objected to answering. On 3rd and 4th December the plaintiff and his witnesses were examined. The former stated: "On the 5th June I brought the money and paid him (defendant) * *. I took a receipt from him before actual payment of the money. Defendant himself wrote the receipt. He signed it. He put his thumb-impression on it also. * * This is the receipt, Exhibit B". Singaravelu gave similar evidence and added that he himself took Po Nyun's thumb-impression on Exhibit B. The case was adjourned till 25th January for the defence evidence, but on that day the plaintiff filed a petition stating that he had received Rs. 16,000 from the defendant in full satisfaction of his claim in the suit

The Judge, believing that Po Nyun's denials of having given the receipt Exhibit B, made in his two written statements and in his examination on the 11th November, were false, has ordered his prosecution under section 193, Indian Penal Code. Before doing so, however, he on 28th January called upon Po Nyun to show cause against prosecution, and also issued summonses to several witnesses for 7th February. Only one of them appeared a finger-print expert, who under the direction of the Judge took impressions of Po Nyun's thumbs. His Counsel objected to this being done but his objection was overruled. The witness then gave evidence of his opinion as to the impressions he had just taken and the impressions on Exhibits A and B. An order was subsequently passed sending Po Nyun before a Magistrate. Revision of that order is now sought.

It is argued that the Judge had no power to take Po Nyun's thumb-impressions against his will, and that the impressions so taken and the evidence recorded relating to them were taken illegally and without jurisdiction, and that the order based on them should be set aside. The thumb-impressions purport to have been taken under section 73 of the Evidence Act, which empowers a Court to direct any person present in Court to make finger impressions for the purpose of enabling the Court to compare them with others alleged to have been made by him. On this it is pointed out that by section 2 of the Evidence Act, nothing in that Act shall be deemed to affect any provision of any Act in force in any part of British India not expressly repealed, and that the law applicable in the present case is contained in section 342 of the Criminal Procedure Code. There is authority—if authority be needed—for the propositions that proceedings in inquiries under section 476, Criminal Procedure Code, are judicial proceedings, and the person against whom they are directed is in the position of an accused person, *Abdullah Khan* v. *Emperor* (1). Also that to examine such a person as a witness in the course of such proceedings is *ultra vires*, *Sami Sastri*, *In re* (2). I accept the argument that in such proceedings the person against whom they are directed can only be examined in accordance with the provisions of section 342, Criminal Procedure Code. He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution, nor can he be compelled to make any thumb-impressions under section 73 of the Evidence Act. I hold, therefore, that the impressions so taken and the expert's opinions regarding those impressions were illegally taken. The order is, therefore, open to revision under section 115, Civil Procedure Code. It is urged that there remain no materials on which the order for

(1) 5 Ind. Cas. 62; 37 C. 52; 14 C. W. N. 132; 11 Cr. L. J. 45.

(2) 2 Weir 598.

prosecution can be properly based. To this I cannot agree. As pointed out above, there was before the Judge in the record of the suit ample material for the opinion that there was ground for inquiring into an offence under section 193, Indian Penal Code, and had the Judge sent Po Nyun for trial without preliminary inquiry it appears to me that the order could not have been interfered with in revision. He elected to supplement the material already before him by some further inquiry. Non-appearance of some of the witnesses led to no useful result in their case, but even in the case of the one witness who did appear, his opinion that the thumb-impressions on Exhibits A and B were made by the same person was admissible and relevant. I hold that there are no grounds for interfering with the order in revision and I dismiss the application. Pages 3 and 4 of Civil Miscellaneous No. 10 of 1916 of the District Court will be removed therefrom and filed in this Court's record.

Application dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST APPEAL No. 537 OF 1916.

April 14, 1916.

Present:—Mr. Justice Rattigan.

NAWAB—INSOLVENT—APPELLANT

versus

TOPAN RAM AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 43, proceedings under, nature of—Charge to be clearly stated—Irregularity in proceedings, effect of.

Proceedings under section 43 of the Provincial Insolvency Act are in the nature of criminal proceedings and it is necessary that there should be a charge, a finding and a conviction as a foundation for a sentence. Everything should be strictly and accurately pursued and if in any one of these particulars a substantial defect should appear, it would be a ground for reversing the proceedings. [p. 495, col. 1.]

Harihar Singh v. *Moheswar Proshad*, 27 Ind. Cas. 199; 18 C. W. N. 692; 16 Cr. L. J. 135, *In the matter of Rash Behari Roy* v. *Bhagwan Chunder Roy*, 17 C. 209; *In re Vallabhdas Jairam, Khimji Jairam*, 27 B. 394; 5 Bom. L. R. 343, *Ramasamy Chetti* v. *Bank of Madras*, 30 Ind. Cas. 839, followed.

Where, therefore, no charge was framed of any specific offence punishable under section 43 of the Provincial Insolvency Act, and the insolvent was sentenced to three months' imprisonment merely on the deposition of the Receiver to the effect that the insolvent had threatened to assault any one who attempted to sell his property, which threat the insolvent, who was examined as a witness, denied to have offered:

Held, that the proceedings were wholly irregular and liable to be set aside. [p. 495, col. 1.]

Appeal from the order of the District Judge, Mianwali, dated the 16th February 1916.

Mr. *Nand Lal*, for the Appellant.

Mr. *B. N. Kapur*, for the Respondents.

JUDGMENT.—The petitioner was adjudicated an insolvent by order of the Court, dated 1st May 1915, and the Civil Nazir was appointed Receiver of the insolvent's property. On the 21st December 1915 the Receiver presented a written application to the Court to the effect that the insolvent had made certain alienations of his property which were liable to be annulled by the Court under sections 36 and 37 read with section 16 (6) of Act III of 1907, and had obstructed the Receiver in the discharge of his duties by threatening to assault any one who attempted to sell his property. The application set forth that this latter conduct on the insolvent's part did not appear to fall within the purview of Act III of 1907, and that the insolvent should, therefore, be bound down to keep the peace.

Upon this application the Court passed the following order:—"The transfers are liable to be annulled under section 36 and section 16 (6) and the insolvent is liable to imprisonment under section 43. Let him and the transferees be called, also the Receiver."

The hearing was fixed for the 16th February 1916, and on that date the Court, after taking the statements on solemn affirmation of the Receiver and the insolvent, passed an order annulling two of the transfers and finding the insolvent guilty of obstructing the Receiver and of making a false entry in the list of assets by not disclosing the fact that 77 *kanals* 4 *marlas* of land owned by him were under mortgage. It was, accordingly, ordered under section 43 of the Act that the insolvent should suffer simple imprisonment for three months.

The insolvent has appealed from the latter part of the order, and it has been urged on his behalf that the proceedings of the Court were contrary to law inasmuch as no definite charge, stating the specific offences of which the insolvent was alleged to be guilty, had been framed and the Court's proceedings were hasty and irregular.

In my opinion this objection must prevail. It has frequently been laid down that proceedings under section 43 of the Act are in the nature of criminal proceedings and that it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence. Everything should be strictly and accurately pursued and if in any one of these particulars a substantial defect should appear, it would be a ground for reversing the proceedings [see *Harihar Singh* v. *Moheshwar Proshad* (1); *In the matter of Rash Behari Roy* v. *Bhugwan Chunder Roy* (2); *In re Vallabhdas Jairam, Khimji Jairam* (3); *Ramasamy Chetti* v. *Bank of Madras* (4)].

In the present case there was no charge of any specific offence punishable under section 43 of the Act. The Receiver deposed that the insolvent threatened to assault any one who attempted to sell the *kothas*, cattle, etc., and then the insolvent, who was examined as a witness on solemn affirmation, denied that he had offered any such threat. It is true that he was also asked why he had not mentioned the fact of the mortgage in his list of assets and that he made the absurd reply that he had quite forgotten the existence of the mortgage. But it is clear from the proceedings that he had no idea that this latter fact was charged against him as an offence for which he was liable to imprisonment under section 43, and indeed there is nothing to show that he was led to understand that any particular act or omission on his part was to form a charge against him. In the circumstances I must hold that the proceedings were wholly irregular and must be set aside. I direct accordingly, but this order will not prevent the Court from taking fresh proceedings in accordance with law against the insolvent as regards the acts or omissions which, it is alleged, have rendered him liable to punishment under section 43 of the Act.

I need hardly add that my order will not affect that part of the Court's order which annulled the two transfers.

Appeal allowed.

(1) 27 Ind. Cas. 199; 18 C. W. N. 692; 16 Cr. L. J. 135.
(2) 17 C. 209.
(3) 27 B. 394; 5 Bom. L. R. 343.
(4) 30 Ind. Cas. 839.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 279B OF 1915.

November 25, 1915.

Present:—Mr. Justice Parlett.

EMPEROR—APPLICANT

versus

NGA PO AUNG—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 55 (1) (c), 110, 123—Security-bond—"Residing," meaning of—Jurisdiction.

A person residing with his wife within the jurisdiction of a Magistrate can be tried by him under section 110, Criminal Procedure Code, though he happens to be outside the jurisdiction when arrested under section 55 (1) *(c)*, Criminal Procedure Code. [p. 496, col. 2.]

Emperor v. *Bapoo Yellapa*, 9 Bom. L. R. 244; 5 Cr. L. J. 247; *In re Kora Rangan*, 17 Ind. Cas. 413; 13 Cr. L. J. 781; 36 M. 96; 23 M. L. J. 535, approved and followed.

Ketaboi v. *Queen-Empress*, 27 C. 993; *Sona Ram R. Sangma* v. *King-Emperor*, 3 C. L. J. 195; 3 Cr. L. J. 246, not followed.

Review of the order of the Sub-Divisional Magistrate, Thaton, dated the 16th June 1915, passed in Criminal Miscellaneous No. 101 of 1915.

ORDER.—On 9th June 1915, the Sub-Divisional Magistrate of Thaton ordered Nga Po Aung to enter into a bond for Rs. 500 with two sureties for his good behaviour for three years, under section 110, Criminal Procedure Code, and as security was not furnished, he submitted the proceedings to the Sessions Judge under section 123 (2). The Sessions Judge discharged the accused, *first*, because he was arrested in Rangoon and on that ground the prosecution was bad, and *secondly*, because he thought the order of the Magistrate was not justified on the evidence. The Local Government has moved this Court in revision against the Sessions Judge's order and the accused has shown cause through Counsel.

EMPEROR *v.* NGA PO AUNG.

The Sessions Judge, on the first point, purported to follow the case of *Ketaboi* v. *Queen-Empress* (1). In that case it appears that a dacoity having been reported to have taken place in the District of Naraingunge, the Sub-Inspector Police of Naraingunge arrested the petitioners who were inhabitants and residents of the village of Nalchar in the District of Tipperah, and while they were in confinement, proceedings were taken against them under section 110, Criminal Procedure Code, by the Sub-Divisional Magistrate of Naraingunge. It was held that only when a person within the limits of a Magistrate's jurisdiction, *i.e.*, who is residing within the limits of such jurisdiction, is found to be a person of the description given, the Magistrate can take action. The proceedings were, therefore, held to be without jurisdiction and the order was set aside. Even if that ruling were followed, however, it would not apply to the present case, for here the accused is a resident of Thaton, that is to-say, within the jurisdiction of the Magistrate making the order. The Sessions Judge, however, quoted the extract from the Calcutta case as making the proceedings bad, namely, that it is not contemplated that the Magistrate should issue a warrant so as to pursue the persons concerned into another jurisdiction. That observation was clearly an *obiter dictum*, for the report shows that the Magistrate issued no such warrant in that case, nor was it even ruled that such action would have vitiated the proceedings; they were held bad simply for want of jurisdiction by reason of the accused's non-residence within the limits of the Magistrate's jurisdiction. That ruling has been expressly dissented from by both the Bombay [*Emperor* v. *Bapoo Yellappa* (2)] and Madras [*In re Kora Rangan* (3)] High Courts, who point out how it would tend to defeat the object of section 110, Criminal Procedure Code, and their criticisms commend themselves to me as eminently sound. Even, therefore, were the Calcutta case applicable to the present one, which it is not, I should not be disposed to follow it. Another case, *Sona Ram R. Sangma* v. *King-Emperor* (4), has also been quoted on accused's behalf. There it appears that the petitioner was not within the local limits of the Magistrate's jurisdiction when proceedings were taken against him under section 110. He had been in Calcutta and he was arrested at Goalpara. He was not found within the Garo Hills. The Magistrate there had, therefore, it was held, no jurisdiction in these circumstances to conduct proceedings under section 110 and his order was set aisde. The circumstances in the present case are not similar. Here accused usually resides with his wife in a house in Thaton. On 9th April 1915 the Sub-Divisional Magistrate of Thaton received information against him and sanctioned the institution of proceedings. He seems then to have disappeared from Thaton and on 16th May he was arrested in Rangoon by the officer in charge of a Police Station, as being by repute an habitual robber and thief, under section 55 (1) (*c*), Criminal Procedure Code. He was taken before a Magistrate with a view to his conveyance to Thaton and the Magistrate, released him on bail to appear on 22nd May, before the Sub-Divisional Magistrate, Kyaikto, which appears to have been a mistake. The bail-bond was sent to Kyaikto. He did not appear before the Court at Kyaikto on 22nd, but was produced in custody before the Sub-Divisional Magistrate, Thaton, on 24th, having been arrested in Thaton by the Thanton Police on 22nd. He said that he went to the Thanton Police Station to enquire the date fixed for his case: this may be true; he had, however, clearly failed to comply with his bail-bond and that bond was clearly not before the Thaton Police, and they doubtless believed he was liable to arrest under section 55 (1) (*c*), Criminal Procedure Code, and I am not disposed to hold the contrary. The accused was clearly within the jurisdiction of the Thaton Magistrate when he was arrested and when the Magistrate took proceedings against him. I am of opinion that the proceedings were valid.

Turning to the evidence, I am bound to say

(1) 27 C. 993.
(2) 9 Bom. L. R. 244; 5 Cr. L. J. 247.
(3) 17 Ind. Cas. 413; 13 Cr. L. J. 781; 36 M. 96; 23 M. L. J. 535.
(4) 3 C. L. J. 195; 3 Cr. L. J. 246.

that I think a strong case for putting the accused on security was made out. A large number of witnesses of high standing who had known him and lived near him for years, deposed to his reputation among the bulk of his fellow-townsmen as an habitual thief and robber, an organizer of such crimes, and a person upon whom suspicion frequently fell when thefts occurred and that this reputation persisted up to the time of trial since accused's release from jail three years before. He was represented by a Pleader, but most of the witnesses were not cross-examined at all, and such as were cross-examined were in no way shaken. When questioned the accused told the Magistrate that he was liable to furnish security and was ready to do so and he declined to call witnesses in his defence.

I, therefore, order Nga Po Aung to enter into a bond for Rs. 500 with two respectable sureties, to be approved by the Sub-Divisional Magistrate, Thaton, for his good behaviour for three years from 9th June 1915, and that unless such security be given, he be committed to prison and undergo rigorous imprisonment until such period expires or until within such period he gives the security required.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 176 AND 177 OF 1916.
CRIMINAL REVISION CASES NOS. 238, 239 AND 235 OF 1916.
(CRIMINAL REVISION PETITIONS NOS. 200, 201 AND 197 OF 1916.)
April 28, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts Trotter.

FREDERICK EDMED HOOPER—ACCUSED—APPELLANTS IN BOTH APPEALS AND RESPONDENT IN CRIMINAL REVISION CASES

versus

EMPEROR—PETITIONER IN CRIMINAL REVISION CASES.

Commercial Intercourse with Enemies Ordinance (VI of 1914), s. 3—"Obtaining," meaning of—Receiving goods ordered before Ordinance, whether offence—"Attempt to obtain", rule of law applicable to—Penal Code (Act XLV of 1860), s. 511—Interpretation of penal Statutes.

The accused was charged with contravening the Royal Proclamation of the 9th September 1914 at Madras between the 21st and 26th November by obtaining and attempting to obtain goods from an enemy and from an enemy country. It appeared that on the 28th July the accused had cabled to his agent (who afterwards became an enemy) an order for 28 bales of tobacco leaf and on the 31st July the agent wrote saying that he had executed the order. These bales were shipped at Amsterdam on the 7th October and consigned to the London agents of the accused, who paid the freight, took them out and re-shipped them for Madras where they arrived on the 21st November. The Ordinance prohibiting commercial intercourse with the enemy had come into force on the 14th October. It further appeared that on the 26th November accused wrote two letters, one to his Amsterdam agents and the other to Blum Bros., an enemy firm in Goch. In these letters the accused sought to get his tobacco stored with Blum at Goch in Germany sent to Amsterdam and undertook to pay the incidental charges:

Held, (1) that inasmuch as the goods in question were shipped before the 14th October 1914, the date when the Ordinance came into force, the accused could not be convicted of "obtaining" enemy goods within the meaning of section 3 of the Ordinance. [p. 500, cols. 1 & 2; p. 505, cols. 1 & 2.]

(2) (*Coutts Trotter, J*, dissenting) that the charge could not be altered into one of obtaining goods at Madras from his London agents by way of transmission from an enemy, as, if the accused be held to have obtained the goods in London, he could not again be convicted of obtaining them from himself. [p. 500, col. 2.]

Reg. v. *Griffiths*, (1891) 2 Q. B. 145; 60 L. J. M. C 93; 39 W. R. 719; 56 J. P. 87, distinguished.

(3) that the conduct of the accused in sending the letters of the 26th November 1914 amounted to an attempt within the meaning of section 511, Indian Penal Code, which also applied to cases punishable under some other law, and that it could not be contended that it was no offence for the accused to send for his own goods, as the removal of merchandise, even though acquired before the war, from the enemy country after knowledge of the war without a Royal license is illegal. [p. 501, col. 1; p 506, col. 1.]

Reg. v. *Ring*, 61 L. J. (N. S.) M. C. 116; 66 L. T. 300; 17 Cox C C. 491; 56 J. P. 552; *Rex.* v. *Oppenheimer and Colbeck*, (1915) 2 K. B. 755; 84 L. J. K. B. 1760, followed.

Per *Wallis, C. J.*—A Penal Statute has no retrospective operation, unless the intention of the Legislature that it should have such effect is clearly indicated. [p. 499 col. 2.]

The word "obtaining" in section 3 of the Commercial Intercourse with Enemies Ordinance VI of 1914, includes procuring, or ordering the goods from the enemy as well as taking delivery of them on arrival. [p. 500, col. 1.]

Though the provisions of the Indian Penal Code do not in terms apply to offences created by special laws, there is no reason why the same rule

should not apply to cases of attempts which are punishable under some other law. [p. 501, col. 1.]

Reg. v. *Ring*, 61 L. J. (N. S.) M. C. 116; 66 L. T. 300; 17 Cox. C. C. 491; 56 J. P. 552, distinguished.

Rex. v. *Oppenheimer and Colbeck*, (1915) 2 K. B. 755; 84 L. J. K. B. 1760, followed.

Per *Coutts Trotter*, J.—The same goods could be "obtained" twice within the meaning of the section and such an act would constitute a second offence under the latter part of the sub-section, but as the accused had not been charged under it, the charge could not be altered, especially in view of the fact that the accused acted without realising that he might be breaking the law. [p. 505, col. 2.]

Whenever the Legislature declares a series of acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand, and if he proceeds to the completion of the series of acts, he is guilty of the crime. [p. 505, col. 1.]

Breaches of law enacted to safeguard the welfare and safety of the Empire in war time must be punished, if only as a warning to others. [p. 506, col. 1.]

Appeals against the orders of the Court of the Chief Presidency Magistrate, Egmore, Madras, in Cases Nos. 23718 and 19956 of 1915.

Petitions under section 439 of the Code of Criminal Procedure, 1898, and section 3 of Ordinance No. VI of 1914, to revise the orders of the Court of the Chief Presidency Magistrate, in Cases Nos. 23718, 19956 and 19957 of 1915, respectively.

These appeals and the criminal revision cases coming on for hearing on the 17th and 18th April 1916, upon perusing the grounds of appeals and the petitions and the orders of the lower Court and the record in the cases and upon hearing the arguments of Mr. *E. R. Osborne*, Counsel, instructed by Messrs. *Short Bewes and Co.*, Attorneys for the Appellant in the appeals and Respendent in the Criminal Revision Cases, and of the Hon'ble the Advocate-General, the Crown Prosecutor and Mr. *S. Satyamurti Aiyar*, Vakil on behalf of the Crown, and the cases having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—The accused in these cases has been convicted by the Chief Presidency Magistrate on two charges of contravening the Royal Proclamation of the 9th September 1914 against trading with the enemy by obtaining and attempting to obtain at Madras goods from an enemy and from an enemy country, offences punishable under section 3 of the Commercial Intercourse with Enemies Ordinance, VI of 1914, as continued and amended by Acts I and XIV of 1915. He has been discharged by the Presidency Magistrate on a complaint of further contravening the said Ordinance by conspiring at Madras with one other to obtain goods from a firm in Germany. The accused has appealed against the convictions, and the Crown Prosecutor has filed a revision petition against the order of discharge. Though the illegality of trading with the enemy was established in the eighteenth century by the decisions of the Prize Court administering the Law of Nations, which are collected by Sir William Scott (afterwards Lord Stowell) in *The Hoop* (1) and were followed by the Courts of Common Law in *Bristow* v. *Towers* (2); *Potts* v. *Bell* (3); *Esposito* v. *Bowden* (4) and *Zinc Corporation, Lim.* v. *Hirsch* (5), there is no record of any prosecution for this offence before the outbreak of the present war. In *Gist* v. *Mason* (6), Lord Mansfield said that Lord Hardwicke had given him a note, which had been destroyed with the rest of his library during the Gordon riots, of a reference to all the Judges in the reign of King William the Third on the question, "Whether it were a crime at the Common Law to carry corn to the enemy," who were of opinion that it was a misdemeanour. There can be very little doubt that trading with the enemy in contravention of the Royal Proclamation would be held to be a misdemeanour in England if not also in India, for, as observed by Willes, J., delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden* (4), "the force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's license," and in the Royal Proclamation of September 9th 1914, it is expressly stated that such contraventions are criminal. It was not, however, thought desirable to rely solely on the Common Law, and both in England and in India after the issue of the Proclamation of the 9th September

(1) 1 C. Rob. Adm. Reports 196.
(2) 6 T. R. 35; 3 R. R. 113*n*; 101 E. R. 422.
(3) 8 T. R. 548; 2 Esp. 612; 5 R. R. 452; 101 E. R. 1540.
(4) 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N. S.) 1209; 5 W. R. 752; 119 E. R. 1480; 29 L. T. (O. S.) 295; 110 R. R. 822.
(5) (1916) 1 K. B. 541; 85 L. J. K. B. 565.
(6) 1 T. R. 88; 1 R. R. 154; 99 E. R. 987.

legislation was passed making it an offence to contravene the provisions of any Proclamation against trading with the enemy, and it is under this legislation that the accused has been convicted as already stated.

In the *first* case the accused Mr. F. E. Hooper, Managing Director of McDowell and Co., Madras, is charged with contravening the Royal Proclamation of the 9th September at Madras between the 21st and 26th November 1914 by obtaining 34 bales of tobacco leaf per *SS.* "Mombassa" from an enemy, one E. C. Ruppell residing in Hamburgh, and also with obtaining 26 of the aforesaid bales from Goch in the German Empire, an enemy country. Prior to the outbreak of war the accused's firm had purchased and stored certain bales of tobacco partly at Amsterdam and partly at Goch, a German town on the Dutch frontier not far from Dusseldorf. The purchases were arranged by, and the goods stored in the name of Mr. Ruppell, a former partner who after his retirement took up his residence in Hamburgh and became an enemy by virtue of the declaration of war on August 4th, 1914. On July 28th the accused had cabled to Mr. Ruppell an order for 28 bales, and on July 31st Mr. Ruppell wrote saying that he had executed the order and hoped to send the documents next week. It is proved that 18 bales were sent from Goch to Antwerp for shipment and were never heard of again in consequence of the outbreak of hostilities. The consignment now in question consisted of 28 bales of the descriptions ordered, of which 18 bales were admittedly purchased after the outbreak of war, and the other 10 supplied from stock at Amsterdam or Goch, together with 6 bales of another description which had not been ordered. The Presidency Magistrate has found, and we see no reason for differing from his finding, that the whole 34 bales to the knowledge of the accused came from Ruppell, an enemy. He has also found that to the knowledge of the accused 26 of these bales came as charged from Goch; but though there is evidence before the Court which points to their having in fact come from Goch there is evidence as to some of the bales that the accused had every reason to believe that they came from Amsterdam, and as to the rest that he had no information that they came from Germany.

It is proved that on or about the 7th October 1914 these bales were shipped at Amsterdam by Downer and Hiemink, the Madras firm's agents in Amsterdam, free on board to London consigned to Lancelot and Dent, the firm's London agents, who paid the freight, took them out of bond and re-shipped them by the "Mombassa" consigned to the firm in Madras, and at the same time drew upon the firm in the usual course but only for their own charges as they had not been called upon to pay for the goods. The bales must in the ordinary course have been put on board the Mombassa, which arrived in Madras on the 21st of November, about the 14th of October, the date when the Ordinance came into force, and, as the prosecution has not established that they were shipped on or after that date, it may be taken in favour of the accused that they may have been shipped before that date. In this state of facts, two objections are taken for the accused. It is said that the goods were not obtained in Madras on the dates specified from an enemy or an enemy country, but at the worst were obtained from an enemy or an enemy country by Lancelot and Dent, the innocent agents of the accused in London, before the 14th October when the Indian Ordinance came into force, and that after that date there was no obtaining within the meaning of the section. It is quite clear that a Statute and above all a Penal Statute has no retrospective operation, unless the intention of the Legislature that it should have such an effect is clearly indicated, which is not the case here. The question then arises, how far a Statute creating a new offence applies to offences begun before the passing of the Act but completed subsequently. In *Reg.* v. *Griffiths* (7) which came before the Court of Crown Cases Reserved, it was scarcely contended that the statutory provision in question could affect acts done before it was passed, but it was said that, as the Act was passed in July and only came into force in January following, this indicated an intention on the part of the Legislature that it should apply to offences against its provisions which had been committed after

(7) (1891) 2 Q.B. 145; 60 L. J. M. C. 93; 39 W. R. 719; 56 J. P. 87.

it had been passed and before it came into force. The Court did not think fit to dispose of the case on the ground that the complete offences had been committed before the Act came into force, and thought it right to lay down and expressly to decide the case on the broader rule that all the ingredients of the offence must have been committed after the coming into force of the Act. To illustrate this, one of the offences in question in that case was obtaining money by false pretences, and it is clear to my mind that the Court intended to lay down that if the false pretences were made before the coming into force of the Act and the goods received afterwards, the conviction would be bad. I should feel bound in any case to follow the rule which was then laid down by the Court of Crown Cases Reserved for the guidance of Criminal Courts, and I do so the more willingly because it seems to me in accordance with principle and also in accordance with the view of the learned Judges who decided the earlier case of *Reg.* v. *Vine* (8), where a provision disqualifying every person convicted of felony from holding a license to sell spirits was held, (Lush, J., *dissentiante*), to have a retrospective operation and to apply to persons convicted before as well as after the passing of the Act, on the express ground that the object was not to punish offenders but to protect the public against public houses being kept by persons of doubtful character. I may add that I do not think the rule laid down in *Reg.* v. *Griffiths* (7) is likely to give rise to inconvenient results, as the more serious and obvious forms of crime are already punishable under the existing law, and as to newly created offences it is open to the Legislature to make the enactment retrospective if there are sufficient reasons for so doing.

Now as regards the charge of obtaining these goods from an enemy of which the accused has been convicted, it seems to me that giving the word "obtaining" its ordinary meaning, it includes procuring or ordering the goods from the enemy as well as taking delivery of them on arrival, and that the conviction on the charge must be held bad on the ground that the ordering or procuring was before the 24th October, when the Ordinance came into force; and I think it is also bad on the further ground that the obtaining by the accused from the enemy was in London through Messrs. Lancelot and Dent, the firm's agents, an offence we have no jurisdiction to try.

As regards the suggestion made for the Crown that the charge should be altered into one of obtaining the goods at Madras from Messrs. Lancelot and Dent by way of transmission from an enemy (which is also forbidden by the Royal Proclamation), such a charge, in my opinion, would be open to the same objection that the obtaining must have taken place at least in part before the 14th October when the Ordinance came into force. This objection would not apply to a charge of obtaining the goods at Madras from the master of the "Mombassa" by way of transmission from an enemy between the 21st and 26th November, but there is a further objection to both the amended charges, *viz.*, that if the accused be held to have obtained the goods in London, he cannot be convicted of again obtaining them in Madras as that would be convicting him of obtaining them from himself. This question is by no means free from doubt, and in these circumstances I am not prepared to make any alteration in the charge at this late stage, and would accordingly set aside the conviction and acquit the accused of this charge and direct the fine, if paid, to be refunded. As the acquittal is not on the merits, I think it right to say that as it is not shown that the accused knew these bales came from Germany, the fact that he obtained them through his agent Ruppell would not, in the exceptional circumstances of the case and having regard to the novelty of the offence, have necessitated a sentence of imprisonment but would have been adequately punished by a fine.

The *next* appeal is from a conviction of attempting to trade in goods coming from an enemy country and from an enemy, and of entering into a commercial obligation for the benefit of an enemy. This charge arises out of two letters of the 26th November 1914 signed by the accused and addressed to Downer and Heimink, the firm's agents in Amsterdam, and to Blum Brothers at Goch in which the accused sought to get his tobacco

(8) 10 Q. B. 195; 44 L. J. M. C. 60; 31 L. T. 842; 23 W. R. 649; 13 Cox. C. C. 43.

stored with Blum at Goch in Germany sent to Amsterdam and undertook to pay the incidental charges. These letters were found in a large cover addressed to Downer and Heimink, which also contained a smaller cover addressed in the accused's handwriting to Blum Brothers, in which was a letter of his assistant Hermans which is the subject of the next charge. The first objection to the conviction is that the accused cannot be convicted of an attempt, because it is not shown that the firm had any goods at Goch when he wrote the letters. Though the provisions of the Indian Penal Code do not in terms apply, I see no reason why we should not apply the same rule to cases of attempts which are punishable under some other law. The conduct of the accused amounted to an attempt under section 511 of the Indian Penal Code and the English authorities on which Mr. Osborne relies are contrary to the illustrations to the section and to the later English decisions such as *Reg.* v. *Ring* (9), which must be treated as overruling them. The next objection is that it was no offence for the accused to send for his own goods from an enemy and an enemy country. In *Esposito* v. *Bowden* (4) already referred to, Willes, J., observed that there was very high authority, which he refers to, for saying that the removal of merchandise, even though acquired before the war, from the enemy's country after knowledge of the war without a Royal license is generally illegal, and the Royal Proclamation of 9th September 1914 appears to proceed on the same view, as it prohibits generally the obtaining of goods from an enemy or an enemy country and makes no exception in the case of goods acquired by a subject before the outbreak of war. Further it was so expressly ruled by Atkin, J., in a recent case under this very Proclamation and the ruling was upheld by the Court of Criminal Appeal, *Rex.* v. *Oppenheimer and Colbeck* (10). The objection, therefore, fails. Having regard, however, to the novelty of the law and the misconceptions as to his position under which the accused appears to have laboured, I think the fines may be reduced to Rs. 250 in each case and so direct.

The *third* complaint on which the accused was discharged was of a much more serious character and arose out of the fact that a letter dated 26th November 1914 from the accused's assistant Hermans to Blum Brothers was found in the envelope addressed in the accused's handwriting to Blum Brothers, which envelope, as already stated, was found by the Censor in the larger cover addressed to Blum Brothers, while the accused's own letter to Blum Brothers which was the subject of the *second* charge was found pinned to the accused's letter to Downer and Heimink in the same cover. Hermans' letter purported to order further goods from Blum Brothers on the authority of the accused, and if brought home to the accused, would have amounted to a serious offence and necessitated a severe sentence. As against this, however, there is only the evidence that Hermans' letter was found inside the envelope addressed by the accused to Blum Brothers and Hermans, who has been called as a witness, has deposed that he put his letter there without the knowledge of the accused. In these circumstances, we are not prepared to interfere with the Presidency Magistrate's order of discharge and dismiss the revision petition. We also dismiss the revision petitions praying for enhancement of sentence.

COUTTS TROTTER, J.—This is an appeal by Frederic Edmed Hooper against a conviction and sentence of the Acting Chief Presidency Magistrate, Madras, under section 3 of the Commercial Intercourse with Enemies Ordinance, 1914. That section makes it an offence punishable with imprisonment to contravene any of the provisions of any Proclamation or Order in Council of His Majesty for the time being in force, relating to trade, commercial intercourse or other dealings with any subject of any State at war with His Majesty.

The Ordinance is dated 14th October 1914, the day of its publication in the Gazette; and by section 15 of Act XIV of 1915 words are inserted in the section which make attempts to commit these offences themselves punishable if committed since the 14th October 1914, the date of the Ordinance. The relevant Proclamation in this case is the Proclamation of the 9th

(9) 61 L. J. (N. S.) M. C. 116; 66 L. T. 300; 17 Cox. C. C. 491; 56 J. P. 552.

(10) (1915) 2 K. B. 755; 84 L. J. K. B. 1760.

FREDERICK EDMED HOOPER *v.* EMPEROR.

September 1914. Paragraph 5 runs as follows: "From and after the date of this Proclamation the following prohibitions shall have effect ..... and we do hereby accordingly warn all persons resident, carrying on business or being in our Dominions .....not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy any goods, wares or merchandise, not directly or indirectly to supply to or for the use or benefit of, or obtain from, any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy ..... And we do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime and will be liable to punishment and penalties accordingly." The charge against the accused is that he between the 21st and 26th November 1914 during a state of war between His Majesty and the German Empire, at Madras, unlawfully did contravene the provisions of the Proclamation by obtaining goods, wares and merchandise, to wit 34 bales of various tobacco leaves, per *SS.* "Mombassa" from an enemy, to wit E. C. Ruppell, trading and carrying on business in Hamburg in the said German Empire, and by obtaining 26 of the abovesaid bales of tobacco also from an enemy country, to wit Goch, in the said German Empire.

The accused was the Managing Director of the firm of Messrs. McDowell and Co., Ltd., carrying on business in Madras as general merchants and dealing among other things in tobacco and spirits and importing the same from Europe. Some years ago there was a German partner in the firm, namely, E. C. Ruppell; but in 1908 he retired from India and started business in Germany where he acted as agent for the firm in which he retained considerable interest as a share-holder. In particular he used to purchase consignments of tobacco for Messrs. McDowell and Company, Limited, and pay for them by drawing upon the firm's account at the Chartered Bank of India in London. The course of business appears to have been this: Messrs. McDowell from time to time communicated to Ruppell the quantity and kind of tobacco that they required. He would fulfil the orders sometimes by fresh purchases there and then, sometimes by drawing on stock which he had accumulated in Europe. This stock appears to have been stored in two places. Some of it he bought at Government auctions at Amsterdam. At these auctions only sworn Government brokers are allowed to bid, and the brokers employed for the purchase of McDowell's goods were a firm of Downer and Heimink of Amsterdam. That stock was stored at a warehouse in Amsterdam belonging to a storage Company called Naamlooze Vennootschap Purperhoedenveem. It was stored in the name of Ruppell and apparently could be released only on his orders. Other tobacco was bought by Ruppell in Germany and was stored with a firm styled Gebruder Blum at Goch in the Rhineland close to the Dutch border. It is not quite clear on the evidence what Blum's exact business was and what they did to McDowell's tobacco. It seems fairly evident that Ruppell bought some tobacco from them, and it is certain that McDowell's German stocks accumulated there, though it is not clear that they were paid any sums of money by way of storage or warehousing charges. At least no record of such charges can be found in McDowell's books. The relations between the two firms of McDowell and Company and Blum were obviously friendly and a man called Hermans who held a responsible position in McDowell's business had been, for many years before he came to India, in the employment of Blum. It is suggested by the defence that Blum allowed McDowell's stock to remain in their premises until wanted merely as an act of courtesy to suit their business convenience without making any charge. When tobacco was forwarded to McDowell's in India, it was consigned by shipment to a London firm, Messrs. Lancelot Dent and Company, who were McDowell's London agents. At the close of each year Ruppell forwarded to McDowell and Company a statement of the stock he held for them in Amsterdam and Goch respectively. By comparing this with the statement of the previous year they could check the invoices relating to the consignments they

had received during the current year. The present charge relates to a consignment of 34 bales of tobacco which arrived in Madras on the *SS.* 'Mombassa' on the 21st November 1914, and were received into stock by McDowell on that date. Hermans in his evidence gave the 26th November as the date of receipt, but this is obviously the date at which the goods came under his charge as foreman of the Tobacco Department. The composition of these bales is important and is as follows:

5 bales Brazil mild.
5 bales Brazil strong.
13 bales Vorstenlanden (in two consignments of 8 and 5 respectively).
5 bales of Borneo (in two consignments of 2 and 3 bales) and 6 bales of Sumatra.

The order for these goods was by a telegram on the 28th July 1914, from Messrs. McDowell to Ruppell in the following terms: "Ship at once 8 bales Vorstem Umblatt, five each Sumatra, Borneo, Brazil, mild, strong", making in all 28 bales. The stock records show clearly what tobacco there was at Amsterdam and Goch respectively available to fulfil these orders, and the matter is not really in dispute. There were only two bales of Borneo at Amsterdam and there were nine at Goch, so that Ruppell could only execute the order from stock by taking at least 3 from Goch. With regard to the 6 bales of Sumatra—for although 5 were ordered 6 were in fact despatched—it is not suggested that they were ever in Germany or came out of it. With regard to 5 bales of Vorstenlanden these were not ordered. The balance of 18 bales, 10 Brazil, mild and strong, and 8 Vorstenlanden, are the most important goods in the subsequent history of the transaction. On the 31st July Ruppell sent a letter to McDowell's which was received by them on the 12th November. This enumerates the order contained in the telegram and concludes as follows: "I have executed these orders as quickly as possible for shipment per *SS.* "Wachtfels." I hope to be able to send you the documents by the next or following post." A gool deal of discussion appears to have taken place in the Court below as to what action on Ruppell's part these words must be supposed to imply. The 'Wachtfels' was a German ship lying at Hamburg preparing to make a voyage to London calling at Antwerp on the way. Antwerp is almost equidistant from Amsterdam and Goch and would be a natural port of shipment for goods from both of these places. The natural commercial meaning of Ruppell's letter is that he had contracted to purchase the goods he could not supply from stock, had given orders for the forwarding of those goods for shipment at Antwerp, had given similar orders in respect of the goods he was supplying from stock and had contracted with the steamship owners to ship and carry the goods to London. Ruppell on the 31st July sent another letter to McDowell and Co., also received on the 12th November, which after setting out a summary of his account up to date goes on to state: "business is completely disorganised owing to the war which seems to be going to break out and it is very difficult even to transact the smallest business. The local branch of the Chartered Bank has almost given up business." In fact on the 31st July Germany had declared war on France and Russia and on the 4th of August, at 11 o'clock P. M. she was also at war with England. The next document is a letter from Ruppell at Hamburg dated the 5th September, which was received by McDowell on the 15th October and from this letter we can ascertain what had happened. 18 bales, namely, the 10 Brazils and 8 Vorestenlanden had gone to Antwerp. The "Wachtfels" had been unable to leave Hamburgh. Antwerp was in a complete state of disorganisation and for practical purposes the 18 bales may be treated as having been lost there. The letter goes on to state: "the ten bales of Sumatra and Borneo tobacco which you ordered by telegram had not left Amsterdam when hostilities broke out and are lying safely there." The defence contends that it should be inferred from this that 3 bales of Borneo tobacco had been transferred from Goch before the outbreak of hostilities. The Chief Presidency Magistrate has rejected this inference on the ground that if the goods were shipped from Antwerp they would be kept at Goch to be sent directly to Antwerp, at any rate until the outbreak of war, demonstrated the impossibility of that course. This seems to me to overlook the fact that, as soon as war broke out between Germany and France, every businessman

must have realised the danger of its spreading and Ruppell may very naturally have thought it advisable to get the goods he was forwarding out of stock into Holland as soon as possible. In the face of the plain statement in his letter—and I cannot see why it should be supposed that at that time he saw any reason to conceal what he was doing—it would be unreasonable to draw any inference adverse to the prisoner based on mere general considerations. The letter contains the following sentence: "As at present no goods from Germany to Belgium can be forwarded I am trying with the help of some friends to replace these 18 bales (*i.e.*, those that had gone to Antwerp) by other goods in Amsterdam and to send you a consignment of different tobaccos (Vorstenlanden and Brazil, Sumatra and Borneo) from Amsterdam to Madras *via* England." On the 14th of September Ruppell wrote another letter from Hamburg, Exhibit P, which was received on the 12th of October. This repeats the statement that the 10 bales of Borneo and Sumatra were lying at Amsterdam and says that Ruppell will try to ship the goods through a neutral port. On the 9th October, Downer and Heimink sent 3 invoices to McDowell & Co., and a covering letter. This shows that the whole of the 34 bales which arrived in Madras on the *SS.* 'Mombassa' had, by that date, been shipped by Downer and Heimink from Amsterdam to Lancelot Dent & Co. in London. The first invoice, Exhibit E, relates to two bales of Borneo and six bales of Sumatra which are stated to be from "Amsterdam stock." The second, Exhibit D, relates to the balance of 3 bales of Borneo which are stated in the letter to be from Goch stock. I have already given my reasons for thinking that these three bales had been transferred to Amsterdam before the outbreak of hostilities. The 3rd invoice, Exhibit C, relates to 18 bales which were obviously bales sent to re-place the 18 bales held up at Antwerp and at the foot of the invoice are the words: "From Blum." It is obvious that these 18 bales were obtained considerably after the outbreak of hostilities, because Ruppell had not got them when he wrote the letter of the 5th September, Exhibit O. In that letter he says no doubt that he is trying to replace them in Amsterdam with the help of some friends, presumably Dutch friends. The suggestion for the prosecution is that in the result he got them from Blum and sent them to Downer and Heimink for shipment by a neutral port. Having regard to the care with which the invoices specify the place of origin of the goods, the conclusion is irresistible that the 18 bales in question were bought in Germany between the 5th September and 9th October and accordingly had an enemy origin. I think that there can be little doubt that the accused must have known that these 10 bales came from and were despatched by an enemy, namely, Ruppell. That is the finding of the learned Chief Presidency Magistrate and I am not disposed to hold that he was wrong.

It is urged on behalf of the accused that as the Ordinance only came into operation on the 14th October, he cannot be convicted of an offence some ingredients of which took place before that date, and for that proposition reliance is placed on the case of *Reg.* v. *Griffiths* (7). In that case a trader was charged under the Debtors' Act of 1869, 32 and 33 Vict. C. 62, with obtaining goods on credit under the false pretence of carrying on business and dealing in the ordinary way of his trade with intent to defraud on various dates in November 1890. The Debtors' Act made these offences misdemeanours if committed within four months next before the presentation of bankruptcy proceedings against him. The Bankruptcy Act of 1890, 53 and 54 Vict. C. 71, for the first time extended the operation of the penal sections of the Debtors' Act to a period of four months next before the presentation of a bankruptcy petition by the debtor himself, and the defendant filed his own petition on the 14th January 1891. The Court held that he could not be convicted under the Debtors' Act inasmuch as the acts of obtaining had taken place before the Act came into operation and the Statute must not be construed as being retrospective in operation With the broad principle that in general Criminal Statutes ought not to be construed as being retrospective, I am in entire agreement. But I am unable to hold that there is anything in the decision in *Reg.* v. *Griffiths* (7) to govern this case. There all the acts that constituted the alleged offence had been completed before the Bankruptcy Act of 1890 came into operation. All that was done by the defendant after it came into force was to file a bankruptcy petition, an act not only lawful in itself but expressly provided by the Legislature as a method of

relief to embarrassed debtors. The position contended for here is quite a different one. It is said that a man may start on a course of action and notwithstanding the fact that in the middle of it the completed act is declared by the Legislature to be criminal, he may proceed to complete it with impunity, because, when he began the act, it had not been declared by the Legislature to be a crime. That seems to me to be a dangerous doctrine and one to which I cannot accede. Suppose a man to mix what he believes to be a medicinal draught but which at the moment of administration he ascertains to be poisonous, can he with impunity proceed to administer it and complete the act merely because in its earlier stages it was innocent? In my opinion, whenever the Legislature declares a series of acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand, and if he proceeds to the completion of the series of acts, he is guilty of a crime. I may add that in the instance of this particular offence I have no doubt myself that trading with the enemy was a Common Law offence both in England and in India, apart altogether from the Ordinance or the corresponding English Legislation. It is quite true that there is no direct decision to that effect in the Common Law Courts, but I cannot doubt that any Judge before whom the matter had arisen would have held it to be a misdemeanour, and I act in conformity with the principles laid down by Lord Stowell in *The Hoop* (1)and Mr. Justice Willes in *Esposito* v. *Bowden* (4). In my opinion it affords no defence in this case to say that some of the acts constituting the alleged obtaining took place before the date of the Ordinance.

Mr. Osborne's next argument seeks to carry the matter still further and to contend that the whole course of acts constituting the obtaining was complete before the 14th October. If that contention be sound, it is fatal to the prosecution in two ways. In the *first* place, even although the offence was a Common Law misdemeanour apart from the Ordinance, no such charge was brought against this accused, but he is charged under the Ordinance alone. In the *next* place, the offence would have taken place in England and the Courts of this country can have no jurisdiction to try it. The contention is, that when Lancelot Dent and Co. received the goods in London as agents of McDowell and Co., that completed the obtaining, and no further offence could be committed by McDowell in relation to the same goods. I agree with Mr. Osborne that the offence defined by the first words of section 5, sub-section (7), of the Proclamation was completed when Lancelot Dent and Co. took delivery of the goods in London. But I am not prepared to hold, though the matter is not free from difficulty, that the same goods can never be "obtained" twice by the same person. Suppose that the accused had obtained the goods in London and disposed of a portion of them there and had then shipped the balance consigned to himself in India and had come out to India and taken delivery of them from the ship here, I am not prepared to hold that that would not constitute a second offence; but the offence, if it was one, committed in this case by the accused was an offence under the latter part of the sub-section, which makes it an offence to obtain from any person any goods by way of transmission from an enemy country, the person in this case obviously being either the owners or the master of the "Mombassa." He has not been charged under that portion of the section and in order to convict him under it, it would be necessary for this Court to alter the charge preferred against the accused. I am not prepared to take that course in a case like the present, where I am satisfied that the accused acted without realising that he might be breaking the law and without conscious disregard of the interests of his country. I, therefore, agree with my Lord in the result that the conviction and sentence should be set aside.

The *next* charge is that of attempting to trade in goods coming from an enemy country and from an enemy, and of entering into a commercial obligation for the benefit of an enemy; and is based on two letters of the 23th November, 1914, Exhibits EE and FF, one addressed to Downer and Heimink and the other to Blum Brothers. In these letters a request is made that the respective persons to whom they are addressed should endeavour

to get hold of McDowell's stores of tobacco lying at Blum's place of business at Goch in Germany and forward them to McDowell in India. The first contention put forward by Mr. Osborne is that there is nothing to show that at the date these letters were written there were in fact any goods belonging to McDowell in Blum's hands, and that the accused was, therefore, attempting to do that which was impossible of performance and cannot be convicted. The English Courts at one time had some difficulty over this question. But in my opinion it was finally settled in *Reg.* v. *Ring* (9) adversely to the present contention on behalf of the accused. Section 511 of the Indian Penal Code and the illustrations to it leave no doubt in my mind that the law in India is the same as *Reg.* v. *Ring* (9) settled for England.

Mr. Osborne also argued that the accused could not be convicted of an attempt to obtain from an enemy country goods which were at all material times his own property. The Court of Criminal Appeal in England in *Rex* v. *Oppenheimer and Colbeck* (10) has negatived this contention, and this is a matter on which it seems to me that all the Courts of the Empire should be in agreement and should accept the rulings of the highest Criminal Court in England.

The conviction must, therefore, stand, but I agree with my Lord that the fine may without impropriety be reduced. I do so for this reason, that I do not for a moment suppose that it was present to the mind of the accused that in seeking to obtain his own goods from an enemy country he was infringing the law, as no possible benefit could result to the enemy from the transaction. But he has in fact infringed it and breaches of laws enacted to safeguard the welfare and safety of the Empire in war time must be punished, if only as a warning to others. I also think it right to say that though I have held the action of the accused to be a breach of the law, I do not think it need leave any stigma either upon his commercial honour or his patriotism.

With regard to the *third* charge, I need only say that I think the learned Chief Presidency Magistrate is quite right in refusing to act upon evidence which, in my opinion, could not at the most create anything more than vague suspicion. Particularly wrong would it be to act upon slender evidence in a country where the accused person is not afforded the opportunity of denying and explaining the accusation brought against him upon oath in the witness-box.

I agree with my Lord that the revision petitions should be dismissed.

Appeal No. 176 *allowed*; *Appeal No.* 177 *and Revision Petitions dismissed*; *Sentence modified.*

V. R. P.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 17 OF 1916.

March 31, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

SRIKISHEN LAL AND ANOTHER—PETITIONERS

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (*Act V of* 1898), *s.* 436—*Order of discharge—Revision by District Magistrate—Committal to Court of Session on grounds of expedency—Illegality.*

A District Magistrate, acting under section 436, Criminal Procedure Code, set aside an order of discharge of a Police Officer on a charge of extortion, on the ground that the charge related to the conduct of a Police Officer and that it was desirable that the case should be tried by the Court of Session:

Held, that it was incumbent on the District Magistrate to record his own finding on the evidence before committing the case to the Court of Session and that the gravity of the charge was not a sufficient reason for interfering with the lower Court's order of discharge. [p. 507, col. 1.]

Criminal revision against an order of the Deputy Commissioner, Hazaribagh, dated 6th March 1916.

Mr. *Mazharul Haque*, for the Petitioners.

JUDGMENT.—In this case a Magistrate of the first class enquired into a charge that had been made against two Police Officers under section 330, Indian Penal Code, and after recording a quantity of evidence came to the conclusion that the story told by the witnesses for the prosecution was untrue. He, therefore, discharged both the accused. The District Magistrate under section 436, Criminal Procedure Code, has ordered that both the accused be committed to the Court of Session. The District Magistrate after setting out that the Deputy Magistrate, had come to the conclusion that the allegations against the

accused were false, said that he had considered not merely the evidence but also the circumstances under which that evidence had been given, and he was of opinion that the case was eminently one which should be tried by a Court of Session. He said that the evidence was of a character which required for a proper appreciation of its value very great experience of judicial work, and that the charges related to the conduct of Police Officers and were of a character which Government regarded with great solicitude. He concluded by saying that every consideration pointed to the desirability of having the case decided by the Judicial Commissioner, that is, by the Sessions Judge. So far as can be gathered from the District Magistrate's order, his reasons for setting aside the order of discharge are that the case is of an important character which ought to go before the Court of Session. He does not say that he considers with reference to the evidence that the accused had been improperly discharged, and his order contains no materials which enable this Court to decide whether the order was a reasonable one or not. The order strongly suggests to our minds that the real reason for setting aside the order of the Deputy Magistrate is that a charge of such a character should, in the opinion of the District Magistrate, be considered by a Court of Session. That is not a sufficient reason for interfering with the order of discharge.

We set aside the District Magistrate's order, leaving him to take any further action which he may think proper.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 102 OF 1916.
CRIMINAL REVISION PETITION No. 85 OF 1916.
July 13, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

VITOBA RAO AND ANOTHER—PETITIONERS

versus

T. NARASINGA RAO AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Attachment, when can be withdrawn—Opposing claims to mesne profits—Procedure.

In order to enable a Magistrate to withdraw an attachment ordered under section 146 of the Criminal Procedure Code, it is not necessary that there should be a decree in favour of all the parties, and if there is an adjudication by a Civil Court in favour of some of the parties that is sufficient for the purpose; of enabling the Magistrate to walk out of the property unless this is done the parties will have no remedy. [p. 508, col. 1.]

Maharaja of Venkatagiri v. *Ambarkana Srinivasa Row*, 29 Ind. Cas. 321; 17 M. L. T. 392; 16 Cr. L. J. 481, followed.

Where, in an application made under section 145 of the Criminal Procedure Code, a Magistrate, in consequence of a dispute with regard to the ownership of certain properties, attached them as he was not satisfied that any one of the parties was in possession, and then the counter-petitioner and another brought several suits and obtained decrees for certain shares in the property:

Held, that as the applicants would not be able to bring a suit to recover possession of the property more than six years having elapsed since the Magistrate took possession, the proper course for him to follow was to withdraw the attachment as there had been a civil adjudication in favour of some of the parties; [p. 508, col. 1.]

Rajah of Venkatagiri v. *Isakapalli Subbiah*, 26 M. 410, followed.

(2) that the Magistrate would have no jurisdiction to pass an order with regard to mesne profits and the proper course for him to follow was to deposit the money in Court and allow the parties to litigate their rights in respect of the share due to them for mesne profits. [p. 508, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the proceeding, dated the 3rd August 1915, of the Court of the Deputy Magistrate of Gooty, in Miscellaneous Case No. 7 of 1913.

Mr. *V. S. Narasimhachariar*, for the Petitioners.

Messrs. *R. Shadagopachariar* and *K. Sankara Sastri*, for the Respondents.

ORDER.—It is to be regretted that the proceeding in this case which commenced

in the year 1904 should have been allowed to continue all these years. The dispute, which culminated in the order of 1904, began by the assertion of Narasinga Rao son of of Ramappa that he was entitled to the whole of the property in dispute by virtue of a release from the sons of Ranga Row and also because he was himself entitled to a share in the property. The release was denied by the sons of Ranga Rao and as a result the Magistrate who has cognizance of the dispute attached the property, as he was not satisfied that any one of the parties was in possession of the property in dispute; that was, as I said, in the year 1904. After that, a suit was brought by Narasinga Rao in which he obtained a decree for a sixth share of the properties. He says in his plaint that he reserves his right to recover the property belonging to the half share of Ranga Rao's in a separate suit. Admittedly, that separate suit has not been filed up to date. Subsequent to the suit of Narasinga Rao, Kesava Rao who claimed to have purchased the share of Ramappa's brother brought a suit and obtained a decree for an one-fourth share in the property. Having regard to the decision in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1), the present petitioners will not be able to bring a suit to recover possession of the property as more than six years have elapsed since the Magistrate took possession. The proper course is for the Magistrate to withdraw the attachment, as there has been a civil adjudication in favour of some at least of the parties. The result of such withdrawal would be to enable Ranga Rao's sons to bring a suit to recover possession against anybody who may have possession of the property. As pointed out in *Maharaja of Venkatagiri* v. *Ambarkana Srinivasa Row* (2), it is not necessary that there should be a decree in favour of all the parties to enable the Magistrate to withdraw the attachment, and if there is an adjudication by a Civil Court in favour of some of the parties, that is sufficient for the purpose of enabling the Magistrate to walk out of the property. Unless this is done the parties will have no remedy.

As regards the right to mesne profits, I am clear that the Magistrate will have no jurisdiction to pass any order in regard to it, because there is already a reservation by Narasinga Rao in his plaint in the suit of his right to bring a suit against Ranga Rao's sons for the half share of the properties. It would be too much to expect the Magistrate to dispose of nice questions of *res judicata* in awarding mesne profits. This is a matter which will have to be considered by the Civil Court. The proper course for the Magistrate is to deposit the money in Court and to allow the parties to litigate their rights in respect of the shares due to them for mesne profits. I find that there was a prayer in the petition presented by the petitioner for the withdrawal of the attachment. I think this is a proper case in which the Magistrate should be directed to withdraw the attachment. I, therefore, direct him to do so. I make no order as to costs.

Petition allowed.

V. R. P.

(1) 26 M. 410.

(2) 29 Ind. Cas. 321; 17 M. L. T. 292; 16 Cr. L. J. 481.

PATNA HIGH COURT.

CRIMINAL REVISION No. 11 OF 1916.

April 3, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

GAJANAND THAKUR AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *ss.* 423 428, 537—*Appellate Court, remand by, of case for re-trial with direction to record additional evidence and give decision after consideration of original and fresh evidence Illegality—Prejudice to accused—High Court —Revision.*

On appeal against a conviction by a Sub-Divisional Magistrate under sections 147 and 148 of the Penal Code, a Sessions Judge set aside the conviction and sentence and ordered a re-trial, with a direction that the Magistrate should take further evidence and should record a fresh decision on the evidence already recorded and also on the additional evidence. After remand the Magistrate recorded additional evidence, but after considering the entire evidence on the record again convicted the accused and passed the same sentence as before. On appeal against the second conviction by the Magistrate, the Sessions Judge, at the request of both parties, discarded the additional evidence but confirmed the conviction on the evidence originally recorded:

GAJANAND THAKUR *v.* EMPEROR.

Held, per *Chamier, C. J.*—that it was not necessary for the High Court to order a re-trial by the Magistrate even if the order of the Sessions Judge was not merely irregular but illegal. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence and the Sessions Judge had already recorded his findings on the original evidence only, it was unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment. [p. 510, col. 1.]

Per *Jwala Prasad, J.*—The first order of the Sessions Judge, in appeal, setting aside the convictions and sentences, ordering a re-trial of the accused, and directing the Magistrate to take additional evidence but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was wholly illegal; but as the accused had not been prejudiced in any way by such order, a re-trial was, under the circumstances of the case, not necessary. [p. 510, col. 2; p. 511, col. 1.]

Mir Sarwarjan v. *King-Emperor*, 3 C. L. J. 303; 3 Cr. L. J. 304, referred to.

Criminal revision from an order of the Sessions Judge, Monghyr, dated the 22nd February 1916.

Mr. *Hasan Imam* (with him Messrs. *K. P. Jayaswal* and *Abani Bhusan Mukherji*), for the Appellants.

Mr. *S. Ahmad*, Assistant Government Advocate, for the Crown.

JUDGMENT.

CHAMIER, C. J.— These are applications for revision of an order of the Sessions Judge of Purnea confirming a conviction recorded by the Sub-Divisional Magistrate of Araria. The applicants after a lengthy trial were convicted by the Sub-Divisional Magistrate on 27th March 1915 of offences under sections 147 and 148 of the Indian Penal Code. The first applicant Gajanand Thakur was sentenced to rigorous imprisonment for 6 months and to pay a fine of Rs. 1,000 or, in default, to undergo rigorous imprisonment for six months more. The applicant Badri was sentenced to rigorous imprisonment for six months and to pay a fine of Rs. 200 or, in default, to undergo rigorous imprisonment for six months more. The remaining four applicants were sentenced to 8 months' rigorous imprisonment apiece.

On appeal to the Sessions Judge it was contended that the Magistrate had omitted to record important evidence for the prosecution. The Sessions Judge accepted this contention and, thinking that it was not desirable that the Sessions Court should decide the case without having the advantage of the opinion of the Magistrate on the evidence as a whole, he directed that the Magistrate should record a fresh decision on the evidence already on record and on the additional evidence which he, the Sessions Judge, directed him to record. The Sessions Judge ordered what he called a "re-trial from the point at which the additional evidence should have been taken". He set aside the convictions and sentences, remanded the case to the Magistrate and directed him to take additional evidence for the prosecution and any additional evidence that the accused might tender, and he said that the evidence, oral and documentary, already on the record should be treated as evidence at the re-trial. On the case being returned to the Magistrate 13 more witnesses were examined for the prosecution and 25 for the defence, and the Magistrate recorded a fresh judgment arriving at practically the same conclusions as at the first trial and imposing the same sentences less the periods of imprisonment already undergone by some of the accused. Again there was an appeal to the Court of Session. This time the appeal came before a different Sessions Judge. After a careful examination of the evidence the learned Judge came to the conclusion that the convictions were warranted by the evidence and he declined to interfere with the sentences. All the persons convicted have applied to this Court in revision.

The *first* point taken on their behalf is that the order of the Sessions Judge, setting aside the conviction, ordering fresh evidence to be taken, and requiring the Magistrate to decide the case on the evidence already on the record and on the additional evidence, was illegal and was calculated to prejudice the accused persons seriously. The order of the Sessions Judge is a curious mixture of an order setting aside a conviction and directing further enquiry under section 423, and an order directing a Subordinate Court to take additional evidence under section 428. As the case went back to the Magistrate who had recorded the evidence in the first instance, the irregularity, or, as the accused contend, the illegality in the Sessions Judge's order could hardly have prejudiced the accused. In the events which happened it is certain

that the accused were not prejudiced, for when the case came before the Sessions Judge the second time it was conceded on all hands that the additional evidence was of no value whatever, and both the prosecution and the defence asked the Sessions Judge to try the case on the evidence originally recorded, and this was done. As already explained, it was urged before us that the order of the Sessions Judge was illegal and we were invited to set it aside and order a fresh trial by the Magistrate. It seemed to me that this Court was not called upon to order a re-trial by the Magistrate, even if it was of opinion that the order of the Sessions Judge was not merely irregular but illegal. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence and the Sessions Judge had already recorded his findings on the original evidence only, it seemed to me unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment. As, however, it was strenuously urged before us that the accused had been prejudiced we decided to look into the evidence for ourselves and we put the case off till to-day in order that Counsel might have time to do the same. To-day Counsel for the accused elected to address us only on the question of sentence. I was satisfied before, and I am still more satisfied now, that the accused were in no way prejudiced by the failure of the first Sessions Judge to make an order in strict compliance either under section 423 or under section 428, Criminal Procedure Code. It only remains to consider whether there is any ground for interference with the sentences which have been imposed. The case for the prosecution, which has been found to be true, has already been stated not less than four times, and it is unnecessary to set it out here at any length. It is sufficient to say that the case arose out of a family dispute between a widow named Janakbati and her husband's nephew, Gajanand Thakur, who is the first applicant here. It has been proved that on January 6th, 1915, a large body of men headed by Gajanand Thakur and his relative Badri, who were both riding on an elephant and both of whom carried a gun, went to the *Maina Kamat* where Janakbati was living. Janakbati had anticipated trouble and she had retained a number of men for her own protection. Gajanand ordered Janakbati's men to leave the *Kamat*, but his orders were not obeyed. Gajanand thereupon ordered his men to assault them and both Gajanand and Badri fired off their guns. Some of Janakbati's men were hit with *lathis* and brickbats and others were hit with shot. It is quite clear that Gajanand and his party anticipated considerable resistance and that they went to the place in question determined to override any opposition that might be offered. Counsel for Gajanand, in pleading for a reduction of the sentence on his client, said that Gajanand was a man of good social position and he impressed on us the fact that imprisonment means much more for a man of Gajanand's position than it does for men in the position of the other applicants. This is no doubt true, but, on the other hand the offence committed by Gajanand is a very serious one and might easily have resulted in the loss of several lives. It is commonly argued in cases of this kind that a man for whose benefit a riot is committed does not himself take part in it. In the present case it is proved beyond doubt that Gajanand actually took part in the riot and himself used violence. He cannot complain if he is treated in the same way as his servants and followers. In view of the facts which have been proved in the present case I think it would be wrong for this Court to interfere with the sentences. I would dismiss these applications.

JWALA PRASAD, J.—I agree in maintaining the convictions of the applicants and also the sentences passed on them.

It appears to me that the order of the Sessions Judge dated the 6th May 1915, setting aside the convictions and sentences, ordering a re-trial of the accused, and directing the Magistrate to take additional evidence, but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was

wholly illegal. In *Mir Sarwarjan* v. *King-Emperor* (1) an exactly similar order passed by the Sessions Judge of Bakarganj, in appeal, setting aside the finding and sentence, remanding the case to the Magistrate for taking additional evidence and for recording his judgment on the whole evidence that was previously on the record and on the additional evidence taken, was set aside by the High Court and the case was remanded to the Magistrate for re-trial. In the present case it is clear that the accused have not in any way been prejudiced by the order complained of for the case has been decided on the evidence originally recorded. Under the circumstances, a re-trial by the Magistrate is not necessary. We might have set aside all the proceedings subsequent to the first order of the Sessions Judge and called upon some other Sessions Judge to hear the appeal against the Magistrate's order, but even that seemed to be unnecessary, as the Sessions Judge who heard the case after the remand put out of consideration all the additional evidence taken. We gave Counsel an opportunity of addressing us on the evidence, but he elected to address us only on the question of sentence.

I agree with the order proposed by the learned Chief Justice.

Application dismissed.

(1) 3 C. L. J. 303; 3 Cr. L. J. 304.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 169 OF 1916.

March 28, 1916.

Present:—Mr. Justice Twomey.

NGA TUN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 300, Excep. (2), 304—Private defence—Absence of warning, effect of—Sentence.

The right of private defence arises when a man is seen with a stick trailing in his hand and for the purpose of committing theft. But when the person exercising the right is with a companion who is armed, it is the duty of the former to warn the person to drop the stick and to surrender, and the failure to do so brings the case under the 2nd exception to section 300, Indian Penal Code. Firing the first shot in the air is not sufficient warning for this purpose. A long term of imprisonment is not called for in in such cases. [p. 511, col. 2; p 512, col 1.]

The second part of section 304, Indian Penal Code, refers only to cases in which the offender has no intention of injuring any one in particular [p. 512, col. 1.]

Shwe Ein v *King-Emperor*, 3 L. B. R. 122, referred to.

Obiter dictum:—Leniency may well be shown where the accused has acted in good faith, for the protection of his person or property, and has erred only in the degree of force or violence used or in acting too hastily. [p. 512, col. 1.]

Appeal from the order of the Sessions Judge, Tharrawaddy, dated the 19th February 1916, passed in Sessions Trial No. 116 of 1915.

JUDGMENT.—The Sessions Court found sufficient grounds for believing that the deceased Shwe Zan and another man went to the accused Maung Tun's paddy fields at night for the purpose of stealing Maung Tun's seedlings, that Maung Tun saw the two thieves and fired his gun to frighten them away, that the deceased then came towards Maung Tun trailing a long bamboo in his hand and Maung Tun thereupon fired another shot, aiming at Shwe Zan and aiming low. After reading the evidence I see no reason to differ from these findings. The gun had been given to Maung Tun by Government, Maung Tun being the village headman. It was loaded with No. 4 shot and the charge took effect on Shwe Zan's right forearm. Some of the pellets passed through the radial and ulnar arteries so that the wounded man soon bled to death.

The learned Sessions Judge disallowed the plea of self-defence, because he considered that the accused ought to have warned the thief before firing at him and that the omission to give warning precluded the accused from pleading self-defence. It is argued for the appellant that this view is incorrect, for warning had already been given by firing the 1st shot in the air and the deceased by coming in the direction of the accused appeared to have disregarded that warning.

This argument is not without force. But on full consideration I think the Sessions Judge was right in holding that the accused acted too precipitately in firing at the man as he did. It may be conceded that the right of private defence arose when he saw the man approaching him with a stick trailing in his hand, for he might expect the man to hit him with the stick. But Maung Tun and his son-in-law Maung Nwe were two to one, and Maung Nwe who was close by was armed with a fish spear. I think that in the circumstances Maung

SARJUG PRASAD SINGH *v.* EMPEROR.

Tun before firing at the man should at least have called on him to drop his stick and surrender and that in failing to do so he exceeded his right of private defence. The case falls within the 2nd exception to section 300, Indian Penal Code.

The learned Sessions Judge's finding that the accused is guilty under the second part of section 304, Indian Penal Code, is incorrect. As explained in *Shwe Ein* v. *King-Emperor* (1), the second part of section 304 refers only to cases in which the offender has no intention of injuring any one in particular, I alter the conviction to one under the 1st part of section 304, culpable homicide not amounting to murder.

In a case of this kind a long term of imprisonment is not called for and the sentence of a year's imprisonment is, in my opinion, excessive. Leniency may well be shown where the accused has acted in good faith for the protection of his person or property and has erred only in the degree of force or violence used or in acting too hastily, as in this case. I alter the sentence to imprisonment undergone by the appellant Nga Tun and a fine of Rs. 200 or in default rigorous imprisonment for a further term of four months. The amount of fine, if recovered, will be paid to the widow of the deceased as compensation under section 545 (*b*), Code of Criminal Procedure.

Sentence reduced.

(1) 3 L. B. R. 122.

PATNA HIGH COURT.

CRIMINAL REVISION PETITION No. 27 OF 1916.

April 6, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

SARJUG PRASAD SINGH—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, award of—Statement made at Police enquiry, whether 'complaint.'

A statement made by a person at a Police enquiry, which results in the institution of criminal proceedings against another, is not a 'complaint' made by him within the meaning of section 250, Criminal Procedure Code, when the case is not instituted either on his complaint or on information given by him but as a result of enquiry by the Police.

Criminal revision from an order of the Sessions Judge, Muzaffarpur, dated the 21st January 1916

Mr. *Rajendra Prasad*, for the Petitioner.

JUDGMENT.—The petitioner in this case has been ordered under section 250 of the Criminal Procedure Code to pay Rs. 300 to six accused persons as compensation for a frivolous and vexatious complaint made against them by him. The *first* point taken in support of this petition is that the case was not "instituted by complaint as defined in this Code or upon information given to a Police Officer or to a Magistrate" (section 250 of the Criminal Procedure Code). It is not suggested by any one that the case was instituted on complaint, and on looking into the record we are not satisfied that the case was instituted upon information given by the petitioner to a Police Officer or to a Magistrate. The facts appear to be that the petitioner was not at home at the time of the occurence; On his way home he met three of his servants who had been injured. He went on to the village where the occurrence had taken place and that evening his statement was taken down by the Police. He handed to the Police a letter which he had received earlier in the day warning him that the other side were bent upon mischief. He gave the names, no doubt, of a number of persons supposed to have taken part in the affair, but the names were given not on his own knowledge but on information supplied to him by other persons. It appears to us that proceedings were instituted against the accused not upon the information given by the petitioner which was on the face of it worthless, but on evidence which was obtained by the Police on an enquiry instituted by them. It is important to note that the Police went to the village not because a riot had been reported, but because it had been reported that a riot was imminent. They arrived in the village too late and they at once set to work to enquire into the circumstances of the riot.

There is nothing before us to justify the conclusion that the institution of the proceedings against the accused persons was due to any action taken by the petitioner. In these circumstances he should not have been ordered to pay compensation under section 250 of the Criminal Procedure Code. We set aside the order. If the money has been paid into the Court it must be refunded to the petitioner.

Order set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 45B OF 1916.

March 3, 1916.

Present:—Mr. Justice Twomey.

EMPEROR—PROSECUTOR

versus

NGA PO KET—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 337, 339—Approver, prosecution of, on forfeiture of pardon—Procedure.

If the trying Magistrate thinks that an approver has not made a full disclosure of the facts and that he should forfeit his pardon, he must discharge him at the termination of the trial; he has no power to direct his prosecution. He can only record his opinion that the approver has wilfully concealed something essential or given evidence which is positively false, and let the District Magistrate take action to prosecute the approver under section 339, Criminal Procedure Code, if he thinks fit. If so advised, the Crown may proceed against him for the offence in respect of which he was given a conditional pardon. When put on his trial for that offence he may plead to a competent Court his pardon in bar, and that is a plea that the Court is bound to hear and decide upon before going further and putting him on his defence. If he be committed to the Sessions, he can plead it again in the Sessions Court and the Judge will decide it before putting him on trial for the substantive offence. [p. 514, col. 2; p. 515, col. 1.]

Emperor v. *Kothia*; 8 Bom. L. R. 740; 4 Cr. L. J. 346; 30 B. 611; *Emperor* v. *Gangua*, 29 Ind. Cas. 323; 3 A. L. J. 424; 16 Cr. L. J. 483; 37 A. 331; *Emperor* v. *Abani Bhushan Chuckerbutty*, 8 Ind. Cas. 721; 37 C. 845; 11 Cr. L. J. 702, followed.

Nga To Gale v. *Emperor*, 20 Ind. Cas. 225; 7 L. B. R. 1; 6 Bur. L. T. 96; 14 Cr. L. J. 401, distinguished.

Review of the order of the Sessions Judge, Toungoo Division, ordering commitment of the accused to Sessions, and of the order of the Sub-Divisional Magistrate, Nayaunglebin, committing the accused to Sessions to be tried for an offence under section 395, Indian Penal Code, Criminal Miscellaneous Case No. 26 of 1915 of the Sessions Court in Criminal Regular No. 73 of 1915 of the Sub-Divisional Magistrate.

ORDER.—The Order of Reference in this case by the Sessions Judge, Toungoo Division, is as follows:—

In the Sessions Trial No. 73 of 1915 of this Court Nga Po Ket was examined as approver. After the trial was concluded, I opened out Criminal Miscellaneous No. 26 of 1915 in which I called upon Po Ket to show cause why he should not forfeit his pardon on grounds stated fully in the proceedings. His answer was recorded, and on the 28th July, I passed an order, in which I held that Po Ket had forfeited his pardon and I directed his commitment to Sessions. Po Ket has been committed to Sessions by the Sub-Divisional Magistrate, Nyaunglebin, Criminal Regular No. 73 of 1915, and the proceedings are now before me. I am of opinion that in view of my proceedings, I ought not in any case to try Po Ket. But this is not the only point I wish to raise. At the time I wrote my order in Criminal Miscellaneous No. 26 of 1915, I had before me the case of *Nga To Gale* v. *Emperor* (1) in which Mr. Justice Twomey said: "The mere expression of opinion by the Sessions Judge is not enough. The approver should be given an opportunity of meeting the allegation that he has failed to make the full and true disclosure required under section 337. The proper course was to draw up an order setting forth specifically the alleged breach of the condition of pardon and to call upon the approver to show cause on a future date why he should not be tried for the dacoity as provided in section 339. On the date fixed for the hearing, unless the approver admits the alleged breach of condition, the Magistrate or Judge should hear the evidence relied upon as establishing the breach and any rebutting evidence which the approver may offer, and should then record a definite finding as to whether there has been a breach or not. A definite finding arrived at in this manner is essential *before the approver can be placed on his trial for the original offence.*" From this ruling I concluded that the learned Judge intended to lay down the proposition that the Magistrate or Judge having seisin of the case in which the approver was giving evidence, is the authority who should decide whether the pardon is forfeited. In view, however, of two Indian rulings which I have since seen, I am doubtful whether my interpretation is correct or not. These rulings are *Emperor* v. *Kothia* (2) and *Emperor* v. *Gangua* (3). I may also refer to *Emperor* v. *Abani Bhushan Chuckerbutty* (4), and there is

(1) 20 Ind. Cas. 225; 7 L. B. R. 1; 14 Cr. L. J. 401; 6 Bur. L. T. 96.

(2) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.

(3) 29 Ind. Cas. 323; 37 A. 331; 3 A. L. J. 424; 16 Cr. L. J. 483.

(4) 8 Ind. Cas. 721; 37 C. 845 at p. 847; 11 Cr. L. J. 702.

also a case reported as *Sashi Rajbanshi* v. *Emperor* (5). If those rulings are followed, my proceedings appear to have been *ultra vires*. In the Allahabad case it was said that the proper course for the Sessions Judge to take is merely to record an opinion that the approver had forfeited his pardon and to invite the attention of the District Magistrate to such opinion, or possibly to suggest the propriety of a prosecution. I, therefore, submit the proceedings to the Chief Court for such orders as may be deemed fit, both on the question of the legality of my proceedings, and on the transfer of the case to another Court for trial, if the commitment is not quashed."

In *Nga To Gale* v. *Emperor* (1), it was not intended to rule that the Magistrate or Judge trying the case in which the approver was giving evidence is the proper authority to decide whether the pardon is forfeited. The question as to which authority should decide this point was not specially considered, but the present reference shows the need of definite instructions.

The question has been fully discussed by the Indian High Courts. In the Bombay case, *Emperor* v. *Kothia* (2), the accused was one of several persons accused of murder. He accepted a tender of pardon under section 337 and made a full disclosure before the Committing Magistrate. In the Sessions Court he resiled from his statements in cross-examination. At the close of the trial the Sessions Judge ordered the accused to be committed for trial for the same murder and he was tried and convicted. The High Court on appeal from the conviction held that the Sessions Judge's procedure was illegal and that he had no authority to direct the commitment of the accused on the ground that he had forfeited his pardon. Beaman, J., said: "At the termination of the trial in which the pardon was given the accomplice (*i. e.* the approver) must be discharged by the Court. Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence he may plead to a competent Court his pardon in bar, and that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence." The conviction and sentence were set aside and it was left to the Crown, if so advised, to institute a prosecution in proper form against the accused appellant.

The Bombay ruling was cited with approval in the Calcutta case, *Emperor* v. *Abani Bhushan Chuckerbutty* (4).

The Allahabad High Court in *Emperor* v. *Gangua* (3) also followed *Emperor* v. *Kothia* (2), in holding that a Sessions Judge before whom an approver is examined has no power to direct the prosecution of the approver. He can only record his opinion that the approver has wilfully concealed something essential or given evidence which is positively false, and let the District Magistrate take action to prosecute the approver under section 339, Code of Criminal Procedure, if he thinks fit.

In the present case the commitment proceedings against the approver Po Ket were initiated by the Sessions Judge's order of 23rd July 1915, declaring Po Ket's pardon to be forfeited and directing his commitment. For the reasons stated in the Bombay and Allahabad cases I think it is clear that the order was illegal and that the proceedings which followed were without jurisdiction.

The approver Po Ket should have been discharged at the close of the Sessions Trial in which he was examined as a witness. In discharging him it was open to the Sessions Judge to express his opinion on the question whether the approver had forfeited his conditional pardon under section 339. It would then have been for the District Magistrate on behalf of the Crown to take action for the prosecution of Po Ket, if he thought fit. On being brought before the Magistrate with a view to committal to Sessions Po Ket could plead his pardon in bar and thereupon the Magistrate would have to proceed as indicated in *Nga To Gale* v. *Emperor* (1) and in *Emperor* v. *Gangua* (3).

The Magistrate would have to satisfy himself that there was *prima facie* ground for holding that Po Ket had forfeited his pardon and to include in his commitment order a statement of the evidence on which

(5) 26 Ind. Cas. 657; 42 C. 856; 19 C. W. N. 295; 16 Cr. L. J. 65.

be relied as establishing this fact. On the case reaching the Sessions Court the accused could again plead his pardon, and the Sessions Judge would have to entertain this plea and decide it before putting the accused on his trial for the substantive offence.

The Sessions Judge's order of the 23rd July 1915 is set aside as illegal. It follows that the commitment proceedings were held without jurisdiction and the order dated 29th January 1916 of the Sub-Divisional Magistrate, Nyaunglebin, committing the accused Po Ket to Sessions is, therefore, quashed under section 215, Criminal Procedure Code.

The accused Po Ket will be discharged forthwith. It will be for the District Magistrate to decide on behalf of the Crown whether fresh proceedings should be instituted against him.

Commitment quashed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 77 OF 1916.

May 29, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Sheepshanks.

AKSHOY SINGH AND ANOTHER—PETITIONERS

versus

RAMESWAR BAGDI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 439, 345, 423, scope of—Compoundable offence—High Court—Power of, in revision, to sanction composition of offence—Interpretation of Statutes—Penal Code (Act XLV of 1860), s. 447—Trespass, when offence.

Section 439 of the Criminal Procedure Code, which defines the powers of the Court of Revision, does not confer on it the power to sanction the composition of offences, and a Revisional Court cannot, therefore, sanction the composition of a compoundable offence after conviction of the accused. [p. 517, col. 2; p. 518, col. 1.]

Adhar Chandra Dey v. *Subodh Chandra Ghosh*, 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 C. W. N. 848, *Sankar Rangayya* v. *Sankar Ramayya*, 31 Ind. Cas. 350; 29 M. L. J. 521; 18 M. L. T. 381; 16 Cr. L. J. 750; followed.

Ram Piyari v. *Emperor*, 5 Ind Cas. 696; 32 A. 153; 11 Cr. L. J. 203; 7 A. L. J. 103; *Naqi Ahmad* v. *Emperor*, 18 Ind. Cas. 270; 14 Cr. L. J. 46; 11 A. L. J. 13; *Ram Chandra* v. *Emperor*, 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247; *Nidhan Singh* v. *King-Emperor*, 67 P. L. R. 1904; 1 Cr. L. J. 509; *Ram Sarup* v. *Emperor*, 7 Ind. Cas. 539; 11 Cr. L. J. 496; 13 O. C. 161 and *Lalla* v. *Emperor*, 24 Ind. Cas. 975; 17 O. C. 92; 15 Cr. L. J. 567, referred to.

An order for composition is in no sense a consequential or incidental order within the meaning of section 423 (*d*), Criminal Procedure Code. [p. 517, col. 2]

When a special provision, obviously exhaustive in its scope, has been made for a special topic, as in section 345, Criminal Procedure Code, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in section 423 (*d*). [p. 517, col. 2.]

Section 439, Criminal Procedure Code, empowers a Court of Revision, not to exercise all the powers of an Appellate Court, but only such powers as are conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428. [p. 517, col. 2.]

The criminal revisional jurisdiction of a High Court is not included in its criminal appellate jurisdiction, although its civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction. [p. 516, col. 2.]

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intention to intimidate, insult or annoy the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass. [p. 518, col. 1.]

Empress v. *Budh Singh*, 2 A. 101, *Srishcedhur Paroey* v. *Indrobhoosun Chuckerbutty*; 9B. L. R. App. 19; 18 W. R. 25 Cr., *Jurakhan* v. *King-Emperor*, 7 C. L. J. 238, referred to.

Reference under section 438, Criminal Procedure Code, by the Sessions Judge, Burdwan, dated the 17th May 1915, against an order of the Deputy Magistrate, Burdwan, dated the 30th March 1916.

JUDGMENT.—This reference, under section 438, Criminal Procedure Code, raises an important question of law which has led to some diversity of judicial opinion.

The petitioners Akshoy Singh and Akhil Singh were prosecuted on the complaint of one Rameswar Bagdi before the Deputy Magistrate of Burdwan for offences under sections 447 and 508, Indian Penal Code. They were convicted only under the former section and were sentenced to pay a fine of Rs. 10 each, in default to suffer rigorous imprisonment for two weeks. There was also an order under section 545, Criminal Procedure Code, that Rs. 5 out of the fine, if realised, be paid to the complainant as compensation. This sentence, which was passed on the 30th March 1915, was non-appealable. On the 14th April the petitioners moved the Sessions Judge to call for the record and to recommend to this Court that the conviction be set aside

the ground amongst others that the case was one of civil dispute and not of criminal trespass. The Sessions Judge called for the record and fixed the 12th May for hearing. On that date the complainant filed a petition to the effect that the matter in dispute between the parties had been settled by the intervention of the gentlemen of the locality, that as the case was compoundable it had been compromised and that his prayer was for leave to withdraw the case. The Sessions Judge reserved his order, and subsequently made this reference with the recommendation that permission may be given to the parties to compound the case. The question thus arises, whether, when an accused has been convicted of a compoundable offence, it is competent to the High Court in the exercise of its powers of revision under section 439 (1), Criminal Procedure Code, to grant leave to the parties to compound the offence.

Section 345, Criminal Procedure Code, treats of the compounding of offences and consists of seven clauses. The *first* clause specifies the offences which may be compounded and mentions the persons who may compound. The *second* clause specifies certain other offences which may be compounded only with the permission of the Court before which any prosecution for such an offence is pending. The *third* clause makes compoundable the abetment of or the attempt to commit a compoundable offence. The *fourth* clause provides that in the case of a person under disability another person competent to contract on his behalf may compound. The *fifth* clause defines the stage of the proceeding when an offence may be compounded and is in the following terms: "When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, before which the appeal is to be heard". The *sixth* clause lays down that the composition of an offence under the section shall have the effect of an acquittal of the accused. The *seventh* clause finally provides that no offence shall be compounded except as provided by the section. This analysis of section 345 shows clearly that it deals exhaustively with the subject of the composition of offences; with regard to this matter, it defines the persons who may compound, the nature of the offence compoundable, the stage when composition may be made and the conditions under which compositions may be effected in the case of some of the offences. The inference is legitimate that when the Legislature provided in clause 7 that no offence shall be compounded except as provided by the section, the intention was that each of the requirements just mentioned must be fulfilled. Now the fifth clause allows a composition with the leave of the Court when an accused has been committed for trial, or, when, after conviction, an appeal by him is still pending. There is no reference to a case where after conviction (whether by the first Court or by the Appellate Court, where an appeal is allowed by law) an application for revision is pending before the High Court. It cannot be contended for a moment that the criminal revisional jurisdiction is included in the criminal appellate jurisdiction. It is remarkable that although the Letters Patent divides the civil jurisdiction into original and appellate, thus indicating that the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction [*Secretary of State* v. *British India Steam Navigation Company* (1)], clauses 22, 27 and 28 of the Letters Patent clearly differentiate between the original, the appellate and the revisional jurisdiction in criminal cases. The Code of Criminal Procedure also plainly distinguishes between appeals and revisions, which form the subject of separate chapters (Chapters XXXI and XXXII). By no stretch of language can we, consequently, hold that clause 5 of section 345 authorises a composition, not merely during the pendency of an appeal, but also during the pendency of an application for revision. We must accordingly answer in the negative the question formulated above.

The view we take is in accord with that adopted by this Court in *Adhar Chandra Dey* v. *Subodh Chandra Ghosh* (2) and by the Madras High Court in *Sankar Rangayya* v. *Sankar Ramayya* (3). The Allahabad High Court, however, is clearly not of one mind

(1) 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848.

(2) 26 Ind. Cas. 176; 18 C. W. N. 1212; 15 Cr. L. J. 728.

(3) 31 Ind. Cas. 350; 29 M. L. J. 521; 16 Cr. L. J. 750; 18 M. L. T. 381.

upon this point. The question arose in *Ram Piyari* v. *Emperor* (4). Richards, J., who heard the case in the first instance, thought it very doubtful whether the High Court, in exercise of its powers of revision, had any jurisdiction to allow a composition, and directed a reference to a Bench of two Judges for determination of the question. Knox and Karamat Hussain, JJ., were satisfied that the High Court had the power and based their view on *Abadi Begam* v. *Ali Husen* (5), a case under section 517 and by no means analogous. No reference was made to the terms of section 345, but reliance was placed on section 423, clause (*d*), read with section 439. The question arose again in *Naqi Ahmad* v. *Emperor* (6), where Tudball, J., doubted the correctness of the decision in *Ram Pyari* v. *Emperor* (4), as inconsistent with section 345 (5), but as a single Judge he felt bound to abide by that ruling. The question came up for consideration again in *Ram Chandra* v. *Emperor* (7), where Knox, J., held, without reference to his previous decision to the contrary effect in *Ram Pyari* v. *Emperor* (4), that a Court of Revision cannot allow the composition of an offence which had already resulted in a conviction before the proposed settlement. In the Chief Court of the Punjab the question was considered in *Nidhan Singh* v. *King-Emperor* (8). Chatterjee, J., doubted the correctness of the view that a composition could be sanctioned by a Court of Revision, but felt bound to follow two unreported precedents to the contrary. The matter has formed the subject of discussion in two recent cases before the Court of the Judicial Commissioner of Oudh, *Ram Sarup* v. *Emperor* (9) and *Lalla* v. *Emperor* (10), where the decision in *Ram Piyari* v. *Emperor* (4) was followed without examination of the terms of section 345. It is thus plain that the view that a Court of Revision is competent to grant leave for composition of an offence which has already resulted in conviction has been followed either with doubt or reluctance, and always without consideration of the true effect of the provisions of section 345. The supporters of this view have, on the other hand, invoked the aid of section 423, clause (*d*), which authorises a Court of Appeal to make any amendment or any consequential or incidental order that may be just or proper; but this is clearly of no real assistance. An order for composition can in no sense be said to be a consequential or incidental order. There are further two weighty considerations against the applicability of section 423 (*d*). In the *first* place, it is an elementary rule for the construction of Statutes that when a special provision, obviously exhaustive in its scope, has been made for a special topic as in section 345, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in section 423 (*d*). In the *second* place, clause 5, was introduced into the Code for the first time in 1898 to meet the effect of the decision in *Empress* v. *Thompson* (11), and clause (*d*) was also introduced into section 423 at the same time; if the Legislature had intended that composition of offences should be allowed during the pendency of an application for revision, section 345, clause (5), might have been suitably framed; it is inconceivable that compositions during appeals should have been expressly mentioned and compositions in revision should have been left to be inferred from section 423, clause (*d*). The position then is that section 439 empowers a Court of Revision, not to exercise all the powers of an Appellate Court, as is sometimes loosely expressed, but only such powers as are conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428, that the power to sanction composition of an offence is conferred on a Court of Appeal, not by sections 423 (*d*) or any of the other sections just mentioned, but by section 345, clause (5), and that consequently section 439, which defines the powers of the Court of Revision, does not confer on it the power to sanction the composition of offences. We hold accordingly that this Court, in the exercise of its revisional jurisdiction under section 439, is

(4) 5 Ind. Cas. 696; 32 A. 153; 11 Cr. L. J. 203; 7 A. L. J. 103.
(5) A. W. N. (1897) 26.
(6) 18 Ind. Cas. 270; 11 A. L. J. 13; 14 Cr. L. J. 46.
(7) 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247.
(8) 67 P. L. R. 1904; 1 Cr. L. J. 509.
(9) 7 Ind. Cas. 539; 13 O. C. 161; 11 Cr. L. J. 496.
(10) 24 Ind. Cas. 975; 17 O. C. 92; 15 Cr. L. J. 567.
(11) 2 A. 339

not competent to grant leave to compound an offence under section 345, when such composition has been entered into after the conviction of the accused. We are, therefore, unable to accept the recommendation of the Sessions Judge and to grant leave to the parties to compound the case.

In the view we take, it becomes necessary to consider the propriety of the conviction which, as already stated, is assailed on the ground that the case is already one of civil dispute and not of criminal trespass. The allegation of the complainant was that the accused had put up a fence on his land and blocked his way out and that they had done so with a view to insult and annoy him. The case for the accused was that the fence had been erected on their own land. The accused were accordingly charged under sections 447 and 504, Indian Penal Code. The Magistrate held that the evidence was not sufficient to justify a conviction under section 504, Indian Penal Code. He then proceeded to consider the charge under section 447, Indian Penal Code. Upon the evidence, oral and documentary, he came to the conclusion that the fence had been erected on the land of the complainant and that the accused had thereby encroached on his land. He held accordingly that the accused were guilty of criminal trespass. The view cannot be supported. To sustain a conviction under section 447, it is necessary to prove, as required by section 441, not only that the accused entered upon the property in the possession of the complainant, but that they did so with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property. No such intent has been proved in this case, the intent which was imputed and was made the foundation of a charge under section 504 has not been established. It is well settled that if a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intention to intimidate, insult, or annoy, the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass, *Empress* v. *Budh Singh* (12), *Sristeedhur Paroee* v. *Indrobhoosun Chuckerbutty* (13) and *Jurakhan* v. *King-Emperor* (14). The case before us is clearly one of civil dispute and the Magistrate has not found the elements essential to sustain a conviction under section 447, Indian Penal Code. The result is that we set aside the convictions and sentences and direct that the fines, if paid, be refunded.

Convictions quashed.

(12) 2 A. 101.
(13) 9 B. L. R. App. 19; 18 W. R, 25 Cr.
(14) 7 C. L. J. 238.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 284B OF 1915.
November 19, 1915.

Present:—Sir Charles Fox, KT., Chief Judge.

BOYHENJ CHANDRA—APPLICANT
versus
RANGOON MUNICIPALITY—
OPPOSITE PARTY.

Burma Municipal Act (III of 1898), s. 142 (r), bye-law under—'Keep', meaning of.

The word 'keep' in the bye-law made by the Rangoon Municipal Committee under section 142 (r) of the Burma Municipal Act means the keeping for some lengthened time. [p 519, col. 1.]

Where, therefore, the accused took a goat to a Hindu temple to be sacrificed and tied it up in the temple awaiting the sacrifice ceremony for about two hours and was thereupon convicted for breach of the bye-law:

Held, that the conviction was bad and should be set aside. [p. 519, col. 1.]

Mr. *Palit*, for the Applicant.

JUDGMENT.—The applicant was convicted of having contravened the following bye-law made by the Rangoon Municipal Committee: —"Except with the permission in writing of the Municipal Committee, which shall not be refused except for reasons to be stated in writing, no person shall keep cows, oxen, cattle or sheep or goats within the following limits, namely :—

North.—Montgomery Street and Commissioners Road.

West.—Keighly Street.

South.—The Rangoon River.

East.—Eden Street."

What the applicant apparently did was to take a goat to a Hindu temple to be sacrificed, and it was tied up in the temple awaiting the sacrifice ceremony for about two hours.

The contention on behalf of the applicant is that in so doing he did not "keep" the goat within the meaning of the prohibition of the bye-law.

There is probably no word in the English language used in such various and numerous senses as the word "keep." The subject in reference to which it is used, the context, and the ordinary sense understood when it is used in connection with each particular matter must be the guide in determining what it means in the bye-law.

In one sense the applicant undoubtedly kept the goat in the temple by tying it up there, but to my mind "keep cows," etc., means in ordinary parlance and sense keeping such animals for some lengthened time. No doubt the word is used when only a short period is referred to as, for instance, in such an expression as "he kept his cow in my stall for an hour," but any ordinary person being told that a man "keeps his cows under the house" would understand that the cows were kept under the house habitually or at least for a considerable time.

The bye-law did not, in my opinion, apply to what the applicant did, and he was not liable to conviction for having infringed it.

I set aside the conviction and acquit the applicant. The fine, if paid, will be refunded.

The Magistrate considered that if he did not adopt the, in his view, strict meaning of the word "keep," he would have to consider the length of time in very many cases, and he instanced the case of a man prosecuted for having his motor lamp unlit when it ought to be alight. I confess to not being able to trace the connection or analogy between not having a motor lamp alight and keeping a goat, nor do I see at present how even the strictest logic need force him into the trouble he anticipated.

I may add that the Municipal Committee did not appear by Advocate in this Court to support the construction of the bye-law put before the Magistrate on its behalf, and from this I gather that on further consideration the Committee does not wish to press for such construction.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 215 OF 1916.

May 17, 1916.

Present:—Mr. Justice Walsh.

BADRI PRASAD AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Sentence—Perverse finding—Misconduct in procedure—Penal Code (Act XLV of 1860), ss. 147, 152.

In charges for "riot" and "obstruction of the Police" against the accused, which were not proved and which were of a trivial and venial character, all the accused were ordered to undergo 3 years and 9 months' rigorous imprisonment, bound over for a further year in their own bonds of Rs. 200 and two sureties of Rs. 100 each and fined Rs. 100 each, and in default of payment of the fine they were ordered to undergo 3 months' further rigorous imprisonment:

Held, setting aside the convictions, that under the circumstances of the case, these savage sentences were the combined result of erroneous views of the law, unjustifiable and perverse findings of fact and misconduct in procedure. [p. 523, col. 1.]

Mr. *Ananda Prasad Dube*, for the Applicants.

Mr. *Malcolmson*, for the Crown.

JUDGMENT.—This is a criminal revision, in which I reserved judgment; not because the case presented any legal difficulty, but because the circumstances of the convictions, the course of the proceedings and the nature of the punishments are unusual and, I trust, exceptional.

The trouble arises out of a dispute over a crop of *moong* in a certain village said to be about 20 miles from Allahabad. There had been some litigation about the land in the Revenue Court. One Beni Madho had been put in possession. Ram Dulare, the complainant in this case, claims to hold as sub-tenant of Beni Madho. One Badri, the principal accused, claims to hold a share by arrangement with Ram Dulare, and to have cultivated his share of the crop.

Disputes having begun some few days before between the complainant and Badri as to Badri's right to any share in the crops, Badri brought matters to a head on November 30 by beginning to cut his alleged share. There was no concealment about it. Badri employed two men Ram Kumar and Gaya Prasad to assist him in cutting. It was all done openly, and the portions cut were openly removed to the threshing floor.

BADRI PRASAD *v.* EMPEROR.

As there was no suggestion that the cutting was improper as an agricultural enterprise, and the crop was openly and properly dealt with when cut, it is little difficult to see what ground there was for invoking the aid of the criminal law. Ram Dulare, however, reported the matter to the Police. At first they took what was obviously the correct view and declined to interfere.

Next day Ram Dulare lodged a complaint before the 1st class Magistrate. In that complaint he stated that Badri claimed the right to cut the crop. On his own showing, therefore, at that stage, the dispute was one for a Civil Court.

The Magistrate, however, directed the Police to investigate the matter. By an order in writing he directed a copy of the complaint to be sent to the local Police for a report to be made thereon, and the case to be put up on 13th December. He further directed the Police not to let the three accused, Badri, Ram Kumar and Gaya Prasad, remove the crops until further order, but to entrust the crops to the custody of some third person. No ground was alleged for anticipating any breach of the peace, and this further direction was clearly without jurisdiction.

On the day following, namely on the 2nd December, the 2nd officer arrived at the field and found the two subordinates, Ram Kumar and Gaya Prasad, in charge of the cutting of the crops. He had taken with him another constable, the complainant, and three other men, a show of force hardly consistent with a mere investigation. The two men stopped the cutting when called upon to do so. Learning that the cut crops were at the threshing floor, the 2nd officer went off there with his men, and with Ram Kumar and Gaya Prasad. No physical restraint appears to have been used, but I am satisfied that the 2nd officer took these men temporarily into custody. The Magistrate in his judgment says that "he took them" to the threshing floor. On the way Gaya Prasad, to use the officer's own language, "made off". As the procession got near the *bagh* Gaya Prasad returned with Badri and four other men, who were subsequently convicted with them and are now applicants in this revision. There is no doubt that Badri was angry and resented the interference of the Police. All the men who returned with Badri carried *lathis* and no doubt presented a threatening appearance. The evidence of an alleged savage attack upon Ram Dulare is so palpably theatrical and exaggerated that it is difficult to form an estimate of what actually happened. It is probable that Ram Dulare was struck a slight blow in the face by Badri. It is certain that he reached the ground, but having regard to his injuries it is unlikely that he was knocked down. The 2nd officer says in the evidence that he "fell down". He was examined on the 5th December by a Doctor, who found a simple bruise with slight swelling under his right eye, one on the bridge of his nose and one on the left side of the small of his back. Not only the injuries but the blows must have been of a trivial description. Ram Dulare himself when he gave evidence on the 19th January had apparently forgotten his injuries altogether. At least he did not mention them. If half the evidence of the 2nd officer and himself had been true, he ought to have been covered with bruises from head to foot and to have suffered very severely. The 2nd officer himself was not touched, although he says that the men showed readiness to beat him. His own evidence suggests that he was himself in some fear, but I am satisfied that it is much exaggerated and that he had no cause for alarm. Having by this time, in consequence of his own injudicious conduct, put every one against him, he found himself unable to collect any information. He made a fruitless attempt to secure the assistance of the leading *zamindar*, but by this time a large number of villagers had congregated, and as they seemed disposed to resent any further attempts against the liberties of other villagers in the interests of Ram Dulare, the 2nd officer retired to a temple with the complainant where he took from him a further statement. In substance this is the result of the day's proceedings. So far as the evidence of any theft was concerned the visit of the Police was unproductive. It ought to have been fairly evident by this time that the charge of theft was misconceived. The report which the officer was directed to make to

the Magistrate was not forthcoming before me.

On the 7th of December Badri went and filed a complaint against the Police for their conduct on the 2nd December. On the 8th of December the Police charged Badri, and the six other men now applicants before me, with riot under section 147 and interfering with the Police in the execution of their duty under section 152.

On the 9th of December the Magistrate issued a proclamation against Badri for having absconded, and directing attachment of his property, under sections 87 and 88 of the Criminal Procedure Code.

There was no evidence of his having absconded, and it was not the fact.

This proceeding was wholly without either jurisdiction, or justification in fact. In view of the complaint filed by the alleged absconder himself against the Police a few days before it was a monstrous proceeding.

On the 22nd December the alleged absconder came to the Court to file a list of his witnesses for the charge of theft, the hearing of which was fixed for the 6th January. The application was made by his Pleader.

On the 6th January the day fixed for hearing, he was arrested on his arrival at Court, and detained in custody until released on bail by the Chief Justice of this Court, pending the trial of the case.

His application for bail had been refused by the Magistrate and was again refused by him after the order of the Chief Justice, and it was necessary to go to the Sessions Judge, in order to obtain the release.

On the 25th February all three men were convicted of theft, and as will hereafter appear, heavily sentenced and fined. On the same day the same three, together with the other four already mentioned, were convicted of riot and obstruction of the Police and heavily sentenced as I will point out hereafter, such sentences in the case of Badri, Ram Kumar and Gaya Prasad being cumulative with those already inflicted.

On the 6th March they were released on bail by order of the Sessions Judge.

On the 18th March the Sessions Judge quashed the conviction for theft, and also for obstruction (which Counsel for the prosecution declined to support) and reduced the sentences for riot.

The accused were again compelled to come to this Court in order to get bail which was granted by my brother Rafique on the 1st April.

They now apply for revision of the proceedings under which they have been convicted of riot.

It does not much matter now that they have already served far more imprisonment than the nature of the case demanded, but they are entitled to my judgment upon the point, and I hold that there was nothing approaching a riot.

The applicants must clearly understand that they have no right to take the law into their own hands. It was wrong to strike Ram Dulare, and Badri might well have been convicted of this offence. A small fine would have met the justice of the case. But they had a perfect right to protest against the treatment of Ram Kumar and Gaya Prasad by the 2nd officer. They had no right to threaten the Police, if they did so. I do not believe they did. The 2nd officer admits that they said nothing disrespectful to him. They did not touch him, or attempt to do more than protest. They had a perfect right to express their opinion of Ram Dulare's conduct and also of the Police, provided they conducted themselves peaceably. With the exception of the unimportant chastisement inflicted upon Ram Dulare, there was no attempt at violence or any breach of the peace. In my opinion they did not assemble for an unlawful purpose, or do, or betray any intention of doing anything within the section. The constable who went off to report to the officer-in-charge merely reported that "Badri and his companions made a row and showed readiness for disturbance."

They are, therefore, entitled to have their convictions and all orders made thereunder quashed. As they are at liberty already this disposes of their case.

It is, however, impossible for this Court sitting in revision to leave it there without noticing the judgment of the Magistrate in these two cases. It ought to have been obvious from what had already taken place when the cases came on for hearing that the complaint of theft was in the nature of a civil dispute, and the charges and counter-charges relating to the proceedings on the land on 2nd

December demanded a careful and impartial investigation.

The evidence for the complainant in the theft case was of the flimsiest character. Ram Dulare and his son were called but no independent evidence. The *patwari's* papers did not assist him. The only independent evidence in the case was called on behalf of the accused. A canal patrol and a *patwari*, both of them public officials, spoke to having seen bullocks and other implements being used by Badri in the cultivation. The evidence showed that whatever were the rights of the parties the case altogether lacked any criminal character.

The judgment of the Magistrate covers thirteen pages. The first four are devoted to acquitting the Police of allegations made against them in respect of their conduct on 2nd December. Inasmuch as the question of theft depended upon facts anterior in date, this question was irrelevant to the charge. The Magistrate decided it against the accused, and held that it was an afterthought, by dating it from the day when Badri filed his complaint, and not from the events which he complained of. This irrelevant issue was decided against the accused on insufficient grounds, as a preliminary to the decision of the charge against them.

The judgment then discusses the equally irrelevant issue of the title to the field, and whether Badri had a right to share in the crop. In deciding this issue against the accused, two of whom Ram Kumar and Gaya Prasad had nothing to do with it in any view of the dispute, he finds that Ram Dulare had been put into possession by the *amin* under the orders of the Revenue Court. This was contrary to the evidence, as the Sessions Judge subsequently pointed out on appeal. The Magistrate in rejecting the evidence called by the accused threatens the canal patrol with proceedings for perjury, and the *patwari* with a departmental enquiry.

He next holds that "it is admitted that Badri cut the crops without any right." No such admission was made by any one. It was stoutly contested from first to last, and the finding is a perversion of the evidence.

He next holds that Badri's "confession" proves his guilt. The so-called "confession" was in fact a denial. So far from proving guilt it was an assertion of a right.

If by any straining of the evidence a conclusion of guilt could have been legitimately reached, which is to my mind wholly out of the question, a light, almost nominal, sentence was the most that could reasonably have been passed. Without any attempt to discriminate between Badri who made the claim, and the other two men who could have been no more than his tools, or dupes, he sentenced all three to 18 months' rigorous imprisonment and a fine of Rs. 100 each, with three months' further imprisonment each if the fine was not paid. These sentences speak for themselves.

In his judgment in the second case the Magistrate holds that the Sub-Inspector was "abused and threatened". This is contrary to the evidence of the Sub-Inspector himself who said that the accused "used no disrespectful words to me," and further that he only "inferred" that Badri was ready to beat him "as it appeared from his attitude."

He further holds that at a later stage in the day's proceedings "the Sub-Inspector was in a precarious condition and was again threatened to be beaten by the accused;" and also that "they used criminal force to the Sub-Inspector." There is not a word in the Inspector's evidence to justify any one of these findings.

The Magistrate says that he admits facts against Ram Dulare, using language appropriate only to an Advocate, and inadmissible in a Judge, and he introduces evidence supposed to be within his own knowledge, which he could not possibly have known, as to Badri's attendance when his Pleader filed his application for witnesses, thereby making himself a witness against one of the accused upon a controversial matter of fact.

There are other topics in the judgment which seem to have little if any bearing on the case, but I do not think it necessary to deal with them all.

By the side of the matters to which I have already referred, a finding that Badri is a "desperate and dangerous man' because he gets Rs. 4 'per mensem from the *zamindar*, causes no astonishment. It is needless to add that Badri's complaint against the Police was brushed upon one side as being founded upon obviously false evidence and

was not seriously entertained by the Magistrate at all.

For this so-called "riot" and "obstruction of the Police", which in my view are not proved and which in any case were of a trivial and venial character, all seven men were sentenced to two years, three months' rigorous imprisonment. They were further condemned under section 107 to furnish bonds of Rs. 200 each, and two sureties of Rs. 100 each to keep the peace for one year after their release.

The cumulative result of the Magistrate's proceedings on the 25th February, as far as Badri, Ram Kumar and Gaya Prasad were concerned, the two latter being in the most prejudiced view of the case mere subordinates, and little more than spectators of a trivial assault, was that they were ordered altogether to undergo 3 years and 9 months' rigorous imprisonment in any case, bound over for a further year in their own bonds of Rs. 200, and two sureties of Rs. 100 each fined Rs. 100, with the possibility if not the certainty of another three months' rigorous imprisonment and the additional penalty of remaining still further in confinement until, after having served nearly 4 years in jail and paid a fine of Rs. 100, they managed to find security to the amount of Rs. 400.

These savage sentences are the combined result of erroneous views of the law, unjustifiable and sometimes perverse findings of fact, and misconduct in procedure. The conviction for obstruction under section 152, for which the accused received 18 months each, was actually thrown over board by the prosecution when the appeal was heard before the Sessions Judge. It is due to the accused to say that I can find in all the evidence very little trace of moral obliquity in their conduct, and that they have shown in trying circumstances more self-control than their Judge. It would be some consolation to feel that this lamentable miscarriage of justice was merely the result of a series of judicial blunders. But it is impossible to take this view. I am satisfied that the accused not only never had a chance, but were never intended to have a chance and that they have been the victims, for some reason unknown to me, of deliberate and vindictive injustice of such a kind as to constitute a public danger in any tribunal charged with dealing with the liberties and characters of humble persons.

The order of the Court is that the conviction of the applicants under section 147 of the Penal Code, and the order of the Sessions Judge affirming it, and all proceedings thereunder, be set aside.

A copy of my judgment to be sent to the Collector.

Conviction and proceedings set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 746 OF 1915.

December 15, 1915.

Present:—Mr. Justice Twomey.

EMPEROR—APPELLANT

versus

NGA KALA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 149—Police Act (V of 1861), s. 23—Police officers, power of, whether restricted to prevention of cognizable offences—Stopping pwe held without license, whether illegal.

The preventive action of the Police is not restricted to the prevention of cognizable offences under section 149, Criminal Procedure Code. The Criminal Procedure Code and the Police Act together define the extent of their preventive powers. [p. 524, cols. 1 & 2.]

Section 23 of the Police Act gives wide powers to Police Officers for preventing offences or breaches of the law generally, and it is not outside their power to stop a *pwe* which is held without a license. [p. 524, col. 2.]

Maung *Kin*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused Nga Kala in this case was sentenced by the Sub-Divisional Magistrate, Myaungmya, to suffer rigorous imprisonment for six months under section 332, Indian Penal Code, for striking a Head Constable of Police at a *pwe* after the Head Constable had stopped the performance as being held without a license and while the Head Constable was in the act of disarming a man who had a formidable *dah*. It is clear that the Head Constable Maung Po Yeik was struck several blows after he had stopped the *pwe*. The village headman Yan Gin, who was holding the unauthorised *pwe*, admits that when he went to the spot he was told that the Police Sergeant (Head Constable) had been beaten though the assailants' names

were not mentioned to him. No medical evidence was taken, but it appears that Po Yeik attended hospital only once as an outdoor patient. There were bruises and swellings on his head and neck and his head was bleeding, but he has probably exaggerated the severity of the beating. If he had been assaulted by several men with sticks and beaten, so that he fell down unconscious as he says, he would have more to show for it. In his first information report he went so far as to say that he was attacked with a *dah*. There is sufficient evidence that Nga Kala was one of those who struck the Head Constable. The witnesses who support Maung Po Yeik in identifying Nga Kala are from the village where Po Yiek's outpost is situated, but I cannot regard that as a sufficient reason for disbelieving them. They were at the *pwe*, where there must have been plenty of light to distinguish one man from another and there is no reason why they should give Nga Kala's name falsely. The witnesses Po Tun and Maung Paing knew him well before. Thet Hnin says they mentioned Nga Kala's name at once.

On appeal to the Sessions Court the conviction and sentence were set aside and Nga Kala was acquitted. The Local Government have now appealed against the order of acquittal.

The learned Sessions Judge, starting from the assumption that the Head Constable was not acting in the discharge of his official duty in stopping the *pwe*, went on to assume that the Head Constable was beaten by the villagers for stopping the *pwe* and that the story of disarming a man who was carrying a *dah* was concocted to give an appearance of legality to the Head Constable's proceedings and to distract attention from his illegal action in stopping the *pwe*. The Sessions Judge remarked :—

"The offence of holding a *pwe* without a license is non-cognizable and the Police, therefore, have not the power to stop an unlicensed *pwe*, but only to report it. The Head Constable's action was quite illegal."

The Sessions Judge cites no authority for the proposition that the Police are empowered to prevent only cognizable offences. Some colour is given to this proposition by section 149, Code of Criminal Procedure, which provides only for the prevention of cognizable offences by the Police. But section 23 of the Police Act, 1861, appears to give wider powers for preventing offences in general.

The word "offences" in that section is not defined in the Act, and it does not appear to be governed by the definition of "offence" in section 40 of the Indian Penal Code (enacted in the previous year 1860). The Police Act was clearly intended to give the Police force, then newly formed, extensive powers of preventing breaches of the law, and I am not prepared to hold that it is outside their powers to stop a *pwe* which is being held without a license. At any rate, the Head Constable Maung Po Yeik might very well believe that he had power to stop the *pwe*, and the Sessions Judge's assumption that the disarming incident was invented because the Head Constable knew he had been acting illegally, can only be described as fanciful.

Nga Kala has not appeared in support of the acquittal order. His defence in the Magistrate's Court was an *alibi*, and the Magistrate gave good reasons for disbelieving it.

The order of acquittal passed by the Sessions Judge is set aside and the conviction of Nga Kala under section 332 is restored. Although there is no medical evidence as to the extent of Po Yeik's injuries, I cannot regard the offence as anything but serious and the sentence of rigorous imprisonment for six months was not too heavy. The sentence is re-imposed and Nga Kala will be arrested and sent to prison to undergo the unexpired portion of it.

Appeal allowed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 97 OF 1916.
June 14, 1916.
Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.
NEMDHARI SINGH AND ANOTHER—
PETITIONERS
versus
RAM TAHAL RAI AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 148, 439—Possession proceedings—Award of costs—Dis-

cretion of Magistrate—High Court, revisional jurisdiction of.

A Magistrate should, in awarding costs in proceedings under section 145, Criminal Procedure Code, hold an enquiry as to the expenditure in costs actually incurred by the party in whose favour the order is made.

The High Court, however, has no jurisdiction to interfere with an award of costs in such proceedings either under section 107 of the Government of India Act, 1915, or under section 439, Criminal Procedure Code.

Rajendra Narain Roy v. *Mahomed Arzumand Khan*, 1 C. L. J. 331; 9 C. W. N. 887; 2 Cr. L. J. 408, followed.

Babu *Baidyanath Narayan Sinha*, for the Petitioners.

Babu *Rajendra Prasad*, for the Opposite Party.

JUDGMENT.—In this case the applicant was a party to a proceeding under section 145 and is aggrieved by an order directing that he pay Rs. 160 as costs. A Rule has been issued upon the opposite party to show cause why this order in respect of costs should not be revised. The opposite party has filed an application, in which it is said that they engaged three Mukhtears who appeared on all the dates on which the case was heard and spent considerable sums on their fees and on account of costs of witnesses. They are careful not to disclose what sums were spent. This in our view is an admission that the sum expended by the opposite party was not in fact as much as Rs. 160. Section 148/3 clearly contemplates that a Magistrate shall direct payment only of such costs as have been actually incurred. The proceedings of the Sub-Divisional Magistrate were defective in that he made no enquiry as to the expenditure in costs actually incurred. Nevertheless, we are not disposed to interfere, for the reason that it being conceded that the proceedings of the Magistrate under section 145 were not void for want of jurisdiction the proceedings in regard to costs fall clearly under Chapter XII of the Criminal Procedure Code and are, therefore, not open to revision, either under section 107 of the Government of India Act of 1915 or under section 439 of the Criminal Procedure Code. We have no hesitation in accepting the decision on this point in *Rajendra Narain Roy* v. *Mahomed Arzumand Khan* (1).

The application is rejected.

Application rejected.

(1) 9 C. W. N. 887; 1 C. L. J. 331; 2 Cr. L. J. 408.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 17 OF 1916,

March 31, 1916.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

BEGRAJ BASHARAM—APPLICANT

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 437—Order of discharge—Revision—Misapprehension of evidence—Power of Court of Revision to order fresh inquiry—Procedure—Notice to accused.

The revisional jurisdiction conferred by section 437, Criminal Procedure Code, in cases of orders of discharge, may be exercised on the ground of misapprehension of evidence by the lower Court, and the Court of Revision is justified in ordering a re-consideration of the evidence already taken. [p. 526, col. 1.]

Narayanaswamy Naidu, In re, 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233 (F. B.); 9 Cr. L. J. 192; 19 M. L. J. 157, referred to.

Before an order under section 437 is made, it is not obligatory to give notice to the accused. [p. 526, col. 1.]

Application against the order of the District Magistrate, Sukkur.

Mr. *F. J. de Verteuil*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application for revision of an order passed by the District Magistrate, Sukkur, directing re-trial of the applicant Begraj who had been discharged of an offence under section 211, Indian Penal Code, by the first class Magistrate, Mirpur.

The order made by the District Magistrate is an order under section 437, Criminal Procedure Code, and the use of the expression "re-trial" is technically incorrect. This is, however, a matter of form rather than of substance, for the "further enquiry" which the District Magistrate may order under section 437, is (it is now well settled) identical with the "fresh inquiry" referred to in section 436 and implies a setting aside of the order of discharge.

The powers of a District Magistrate and the Sessions Judge in making orders under section 437, Criminal Procedure Code, have been fully discussed in the recent case of *Narayanaswamy Naidu, In re*, (1) and we

(1) 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233 (F. B.); 9 Cr. L. J. 192; 19 M. L. J. 157.

fully concur in the view expressed by the majority of the Full Bench in that case that the revisional jurisdiction in cases of orders of discharge may be exercised on the ground of misapprehension of evidence and that the Court of Revision is justified in ordering a re-consideration of evidence already taken.

The District Magistrate in the exercise of his revisional jurisdiction has ordered a fresh prosecution. He has given substantial reasons for his order.

The first is that there were injuries on the body of Ahmed against whom the applicant had lodged his information and if these injuries indicated that Ahmed was not the assailant but the victim of an assault, then the Magistrate was incorrect in coming to the conclusion that these injuries were caused not by beating but by a fall. Another reason given by the District Magistrate is that the conduct of the applicant was indicative of guilty knowledge, for there was no occasion for him to rush off to the Telegraph Office and send a telegram to the Police.

We do not express an opinion upon these points nor does the District Magistrate. But there is another reason which makes an enquiry before another Magistrate desirable and that is the very judgment of the Magistrate. It is full of bombastic irrelevancies and is not calculated to inspire confidence in the correctness of his appreciation of the evidence.

We would, no doubt, have preferred that the District Magistrate should have issued notice to the applicant and given him a hearing before making this order. But this is a formality which section 437 does not make obligatory.

The application is rejected.

Application rejected.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 273 OF 1916.

June 1, 1916.

Present:—Mr. Justice Walsh.

JAGANNATH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), ss. 87, 128—Pump, erection of—Proceedings under s. 87, legality of.

Proceedings against a person, who erects a pump in a public street, brought under section 87 of the U. P Municipalities Act, 1900, are wholly misconceived. [p. 527, col. 1]

Semble.—A Municipality under section 128 of the Municipalities Act can make rules for the control and management of the streets vested in it under section 55, and anybody who erects a pump or refuses to remove a pump which is maintained in breach of one or other of such rules is liable to penalty under section 147. [p. 527, col. 1.]

Any member of the public, who either resides in the street or uses the street, can bring an action in a Civil Court for the removal of such pump by saying that his user of the public way as a member of the public is prejudiced by such pump, [p. 527, col. 1.]

Whether or not a pump is a building is a question of fact. [p. 527, col. 1.]

Mr. *Nihal Chand*, for the Applicant.

Mr *Malcolmson*, for the Crown.

JUDGMENT.—In this case the applicant has erected a pump and a *chabutra* connected therewith in what must be taken to be for the purposes of this case clearly established as a public way and street within the meaning of the Municipalities Act. He has erected it outside the house of one Ghasi Ram and, it is suggested, has erected it as a sort of counter-blast to the door which that person had obtained permission to open into the street from the Municipal authority.

Now it is quite clear that if this is a street, neither the applicant nor any other private individual can erect a pump upon it for his own or even for public purposes without permission of the Municipal authority and in the order I am compelled to make, having regard to the terms of the Statute under which this proceeding has unfortunately been brought, I desire to make it quite clear that nothing in this case must be taken to qualify or discourage the exercise by the Municipal authority of their undoubted right to prevent such an encroachment upon the public highway; but the applicant has been charged, convicted, and fined under section 87 (5) of the Municipalities Act, I of 1900, read with section 147 of that Act, that is to say, the

Municipality issued a notice against him requiring him to remove the pump, being a building erected by him without their sanction and in contravention of the provisions of section 87. Now it is quite clear that whether or not a pump is a building, as to which I say nothing except that it is a question of fact, and it is conceivable that an elaborate pump might be erected under such circumstances as to come within the description of a building, the pump in question is not a building within the meaning of section 87 or of anything contemplated by that section. That section clearly deals with new buildings of the nature of dwelling-houses, sheds, or other constructions intended for residence or occupation and intended to be erected by a person either upon his own land or upon some land in respect of which he has a right to set up such erection. It follows, therefore, that proceedings against a person who erects a pump in a public street brought under this section are wholly misconceived.

There are various ways in which the mischief complained of in this case may be dealt with. The Municipality under section 128 of the Municipalities Act can make rules for the control and management of the streets vested in it under section 55, and anybody who erected a pump or refused to remove a pump which is maintained in breach of one or other of such rules would be liable to penalty under section 147.

Secondly, Ghasi Ram or any other member of the public who either resides there or uses the street, could bring an action in a Civil Court for the removal of the pump by saying that his user of the public way as a member of the public was prejudiced by such pump.

This order, however, must be set aside. The fine, if paid, must be refunded to the applicant.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 344 OF 1916.

May 18, 1916.

Present:—Mr Justice Walsh.

GOKUL SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence—Torture resorted to to extract evidence—Evidence, value of—Police officers, duty of.

Evidence obtained by torturing the deponent has no value. [p. 528, col. 1.]

The conduct of Police officers guilty of such practices condemned. [p. 528, col. 1.]

Criminal appeal against the order of the Sessions Judge, Moradabad, dated the 5th April 1916.

Mr. *Alston*, for the Appellant.

Mr. *Sital Prasada Ghosh*, Government Pleader, for the Crown.

JUDGMENT.—This is a very grave case of brutal, unjustifiable and determined assault, by persons in authority whose duty, as the Judge has rightly pointed out, it is to afford protection to the person and the property of the public, committed presumably in the name of the law upon an unprotected and apparently defenceless cultivator of feeble constitution. Nothing could be said, and Mr. Alston has rightly refrained from attempting to say one word, in mitigation of their conduct, which has been established by clear evidence and their own admission. The circumstances are that the principal accused Gokul Singh, a young constable of 28 years with 11 years' experience in the force and whose record has presumably been a good one, went to a village with a view to investigating a theft and in particular to obtain, if he could, information from the deceased man who was supposed to know something about it. The deceased denied all knowledge of the matter. It is found that the constable Gokul Singh directed his two subordinates, who were village *chaukidars* and who are also two of the convicted in this case, to inflict punishment upon the deceased. The Sessions Judge holds that it was done with a view to extracting information from the deceased, which the Police believed he was able to give. Gokul Singh, the constable chiefly concerned, says that it was done for insolence, although he does not say what the insolence was. I do not think it matters much. The effect upon the public mind is just the same in

either case; for in my view this punishment was inflicted because the Police had failed in their effort, not without hope, that the deceased would repent and give them what they wanted. It is difficult to select language apt to describe one's detestation of such methods of obtaining evidence. It defeats its own ends. Evidence so obtained has no value; but its effect is likely to spread far beyond the particular persons immediately concerned in an incident of that kind. Such conduct, unchecked and left unpunished with some severity when discovered, is certain, as certain as human affairs can be, to create in the minds of ignorant and timid villagers a disposition to volunteer evidence which, whether true or untrue, leads to the complaint constantly re-iterated of the amount of perjury which exists even on the side of the prosecution in this country in criminal cases and creates a spirit of distrust in the very body of men to whom the public ought to look with absolute confidence, at any rate, for honest dealings and straightforwardness, if not success, in their efforts to deal with crime. I, therefore, say that conduct of this kind cannot be too severely condemned, and when it has directly or indirectly produced the death of an apparently innocent, law-abiding and unoffending villager, one is not surprised to find the Judge visiting it with severe term of imprisonment. There is one further feature in the case to which I feel bound to allude before I come to the question I have to decide, and which leaves an unpleasant feeling behind. The injuries in this case were not sufficient to cause death. Although the constitution of the deceased was apparently feeble, that in itself combined with the injuries was apparently not sufficient. It looks as though a poisonous drug had been administered. The medical evidence points in that direction. The Judge below was of that opinion and I agree with it. The deceased after receiving the flogging was in the custody of the Police for several hours, until unconsciousness supervened which was followed by death. An abnormal quantity of opium recently taken was discovered in his stomach. It is difficult to see how it got there, if it was not administered by somebody while the deceased was in the custody of the Police. These accused may consider themselves fortunate that they were not charged with causing the death of this unfortunate man. If the positions had been reversed, I incline to think that they would have been charged with causing the death. It is perfectly true that before matters became serious, or there was anything to indicate that the deceased was likely to be seriously ill, the principal accused Gokul Singh had left. I dismiss from my mind altogether, so far as its bearings upon the punishment are concerned, the suspicion which remains as to the administration of opium. I take into account on behalf of the two young men the fact that they were apparently only carrying out the orders or at least following the example of their superior, although it is pitiable to note that in dealing with the matter when it became the subject of a criminal charge, each in that cowardly fashion, so characteristic of bullies, tried to shift his responsibility on to the other. As to the gravity of the offence and the necessity of serious example being made, I recognise that what was done was done by these men in the heat of human passion. Disappointed, irritated and annoyed at the failure of their mission, they did what they could not possibly have done if they had not occupied the position of authority which they did. One cannot but feel particularly in the case of Gokul Singh that if his mind was not the originator of the idea, such occurrence would be impossible, if it did not exist to his knowledge, I will not say as a practice, but as an occurrence from time to time in the force to which he belongs. It is for that reason that I regard this case as one of serious public example. On the other hand, these accused will lose all chance of re-employment in the force which has passed from them for ever. They will lose their pensions and will come out from prison, so far as the Police force is concerned, as disgraced men. I take that into account, and after considering all the circumstances and not desiring to discount in the slightest degree the grave view which the Judge below took of this offence, I think justice will be done by reducing the sentence in the case of Gokul Singh to three years' rigorous imprisonment and in the case of his two subordinates to nine months each. The convictions are affirmed and the sentences are reduced, as stated above, to take effect from the date of their conviction in the Court below.

Convictions affirmed; Sentences reduced.

PUNJAB SINDH BANK, LTD. *v.* RAM KISHEN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1071 OF 1913.

May 9, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

THE PUNJAB SINDH BANK, LTD., LYALLPUR—PLAINTIFF—APPELLANT

versus

RAM KISHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review, application for, maintainability of, when Appellate Court seised of case—Review application, pendency of, if bars Appellate Court from hearing appeal—Second appeal—Discretion, interference with—Costs, award of.

Where an Appellate Court is seised of a case, and is empowered by law to grant the relief claimed by an applicant, the latter should have recourse to the Appellate Court and not to the Original Court. [p 530, col. 1.]

Therefore, where a party to an appeal can present his case to the Court of Appeal by way of cross-objection or otherwise, an application for review to the original Court is incompetent and cannot be maintained. [p. 530, col. 1.]

The pendency of an application for review in the riginal Court does not preclude the Appellate Court rom hearing the appeal and if the Appellate Court in its discretionary power refuses to entertain an application for extending time for filing cross-objections, the Chief Court on second appeal will not interfere without adequate reason. [p. 530, col. 1.]

There is nothing unreasonable or contrary to law in awarding full costs to a successful co-defendant. [p. 530, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 8th April 1913, varying that of the District Judge, Lyallpur, dated the 9th November 1912.

Bhagat *Govind Das*, for the Appellant.

Rai Sahib Lala *Moti Sagar* and Mehta *Bahadar Chand*, for the Respondents.

JUDGMENT.

SHADI LAL, J.—The relevant facts of this case are simple and may be stated in a few words. Three actions were brought by three Banks separately against the firm of Devi Ditta Mal-Chokha Ram; and as the pleadings and issues were common, the District Judge tried all the suits together, and decreed them against four defendants, but holding that the remaining three defendants, namely, Ram Kishen, Shankar Das and Haidar Khan, were not partners in the firm, he dismissed the suits with costs against these defendants. The learned Judge, however, allowed only one-third of the costs to each of the successful defendants in each case. It appears that one Bank then adjusted its dispute privately with the defendants, and against the remaining two Banks, namely, the Punjab Sindh Bank, Limited, and the Punjab National Bank, Limited, Ram Kishen appealed to the Divisional Court claiming full costs in each case. The notices of the appeals were served on the Banks on the 5th February 1913, and on the succeeding day they applied to the Court of first instance for review of its judgment on the ground of the discovery of new and important evidence, which would make the defendants Ram Kishen and Shankar Das liable as partners. The applications for review remained pending in the Court of first instance; and when the appeals came up for final decision on the 8th April 1913 the learned Divisional Judge was asked to adjourn the hearing pending the decision of the review applications, and upon his refusal to grant the prayer he was requested to extend the period for filing cross-objections against the decree of the Court of first instance. To this request also he declined to accede, and after accepting the appeal of Ram Kishen as regards costs he passed a fresh decree modifying the terms of the original decree.

The two Banks have preferred second appeals to this Court from the decision of the Divisional Judge, and have also filed applications for revision against the order subsequently passed by the District Judge returning the petitions for review. Now it seems to us clear that the decree of the District Judge had merged in that of the Divisional Judge, and that the former had consequently no jurisdiction to adjudicate upon the applications for review, the grant of which would have had the effect of modifying the decree of the Appellate Court. This proposition of law is not disputed by the learned Counsel for the petitioners. The order passed by the District Judge is fully justified by the circumstances existing at that time and the applications for revision must, therefore, be dismissed.

Coming now to the appeals, we observe that Order XLVII, rule 1, sub-rule (2), lays down that a party, who is not appealing from a decree, may apply for a review of judgment, notwithstanding the pendency of an appeal by some other party, except where the

ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case, on which he applies for the review. Now, it is perfectly plain that the ground of appeal preferred by Ram Kishen was not common to him and the applicants for review, and it is a question whether the applicants, as respondents, could present to the Appellate Court the case on which they applied for review. If they could present the same case to the Court of Appeal by way of cross-objections or otherwise, it is manifest that the applications for review were incompetent and could not be made. The principle of law, upon which the sub-rule is based, is to the effect that when an Appellate Court is seised of the case, and is empowered by law to grant the relief claimed by the applicant, the latter should have recourse to the Appellate Court, and not to the Subordinate Court.

We consider it, however, unnecessary to determine the question whether the Banks as respondents could present to the Appellate Court the case contained in the applications for review; because we are of opinion that, even if the applications for review could be made on the 6th February 1913, the Divisional Judge was not bound either to postpone the hearing of the appeals pending in his Court, or to extend the period prescribed for filing cross-objections. No doubt the judgment in *Ramanadhan Chetti* v. *Narayanan Chetty* (1), cited by him in support of the view that the pendency of the appeal operated as a bar to the entertainment of the review applications, has been overruled by a Full Bench in *Chenna Reddi* v. *Pedda Obi Reddi* (2), but it seems to us that the pendency of applications for review in the original Court could not preclude the Appellate Court from hearing the appeals.

It was discretionary with the Divisional Judge to grant or refuse the prayer of the Banks, and we see no adequate reason for interfering, on second appeal, with his order refusing to exercise his discretion. The appellants before us were fully aware of the pendency of Ram Kishen's appeals and could file cross-objections within thirty days from 5th February 1913, the date on which they were served with the notices of the appeals. But they did not choose to avail themselves of that remedy and confined themselves to the applications for review, which have now proved ineffectual. In these circumstances it cannot be seriously argued that the Divisional Judge was wrong in refusing to extend time for filing objections which were not even before him at that time.

Having refused to adjourn the hearing, the learned Judge proceeded to final judgment, and neither in that judgment, nor in the decree which followed upon it, is there any error of law or procedure, which would warrant the exercise of our jurisdiction as a Court of Second Appeal. The order awarding full costs in each suit proceeds upon reasonable grounds, and does not infringe any principle of law applicable to such cases.

Accordingly we decline to interfere, and dismiss the appeal with costs.

Appeal dismissed.

(1) 27 M. 602.

(2) 2 Ind. Cas. 802; 32 M. 416; 6 M. L. T. 135 (F. B.); 19 M. L. J. 388.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION NO. 215 OF 1915.

January 26, 1916.

Present:—Mr. Pratt, J. C.

PRAGJI KALA—PLAINTIFF

versus

ASSA JALAL—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—"Entitled to share in rateable distribution," "whose interests are affected by the sale", meaning of—"Setting aside an execution sale," right of insolvent judgment-debtor to apply for—Conspiracy of auction-purchaser with other bidders to put down price, whether sufficient ground for setting aside sale.

A judgment-debtor who has been adjudged an insolvent and whose property has been vested in an Official Receiver, has no interest to apply for setting aside an execution sale of his property under Order XXI, rule 90, Civil Procedure Code. [p. 531, col. 1.]

An allegation that the bidders at a Court auction conspired with the auction-purchaser to put down the price, is no ground for setting aside the sale. [p. 530, col. 1.]

PRAGJI KALA v. ASSA JALAL.

Mahomed Mira Ravuthar v. *Savvasi Vijaya Raghunadha Gopalar*, 23 M. 227; 27 I. A. 17; 4 C. W. N. 228; 10 M. L. J. 1; 2 Bom. L. R. 640; 7 Sar. P. C. J. 661, referred to.

The words "entitled to share in rateable distribution of assets" in rule 90 of Order XXI, Civil Procedure Code, refer to decree-holders who are entitled to a rateable distribution under section 73 of the Code. The right to receive dividend before the Official Receiver is not contemplated by the rule. [p. 531, col. 2.]

The words "whose interests are affected by the sale" in the same rule, refer to existing interests in the property sold and not to the claims of alleged creditors. [p. 531, col. 2.]

Kathiresan Chettiar v. *Ramasawamy Chettiar*, 26 Ind. Cas. 93; 27 M. L. J. 302; (1914) M. W. N. 871, referred to.

Miscellaneous Application in Suit No. 393 of 1914.

Mr. *Rupchand Bilaram*, for the Plaintiff.

Mr. *Lalchand Hassomal*, for the Defendant.

Mr. *Kimatrai Bhojraj*, for the Creditors.

JUDGMENT.—These are two applications under Order XXI, rule 90, to set aside a sale of land belonging to the judgment-debtor Assa Jalal.

A preliminary objection has been raised that neither application is maintainable and that objection disposes of them both. The first application is that of the judgment-debtor Assa Jalal himself. On the 11th October he filed a petition to be adjudged insolvent. On the 25th October the sale was held. On the 2nd November he made this application to set aside the sale. On the 3rd November he was adjudged insolvent. The adjudication order related back to the 11th October, so that on the 2nd November when the application was made the judgment-debtor was divested of all his interest in the property sold. Perhaps the Official Receiver might have applied for permission to continue the application under Order XXII, rule 10, but no such application has been made by the Receiver. It is not likely that the Official Receiver will apply, for the application specifies no material irregularity and the allegation that the bidders conspired with the auction-purchaser to put down the price is no ground for setting aside the sale, *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1). It is not necessary, therefore, to postpone disposal of the petition for the benefit of the Official Receiver.

(1) 23 M. 227; 27 I. A. 17; 4 C. W. N. 228; 10 M. L. J. 1; 2 Bom. L. R. 640; 7 Sar. P. C. J. 661.

The other application is by certain creditors of the judgment-debtor. One of them has a decree, but it is admitted, that he is not entitled to rateable distribution as he had not made an execution application before receipt of assets by the Court. Mr. Kimatrai nevertheless contends that all the creditors interested are affected because the sale reduces the fund available to pay them dividends on the insolvency and that they are also persons entitled, to a share in rateable distribution; as they will prove their debts and get a share of the assets available for distribution by the Receiver. Neither contention is admissible. The words in rule 90 "entitled to a share in a rateable distribution of assets" refer to decree-holders who are entitled to a rateable distribution under section 73 of the Civil Procedure Code. The right to dividend before the Official Receiver is not contemplated by the rule. It is a right contingent on proof of debt before the Official Receiver and was not established at the time of the application.

Again the words in rule 90 "whose interests are affected by the sale" refer to existing interests in the property sold. It would be absurd to extend the phrase to the claims of creditors, for that would involve (1) the proof of claim in the execution proceedings and (2) a construction which would make the words "the decree-holder or any person entitled to share in a rateable distribution of assets" redundant. This has been well pointed out by the Madras High Court in the case of *Kathiresan Chettiar* v. *Ramasawmy Chettiar* (2).

I, therefore, dismiss both applications with costs.

Application dismissed.

(2) 26 Ind. Cas. 93; 27 M. L. J. 302; (1914) M. W. N. 871.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 786 OF 1910.

December 17, 1915.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat BAKHTAWARI—DEFENDANT—APPELLANT

versus

SHIBBAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s. 9 (3)—Reference to Deputy Commissioner—Civil Courts, whether can interfere afterwards—Jurisdiction.

A Civil Court is *functus officio* and has no further jurisdiction in a case after it has made a reference to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act, for such action as he might think fit, and after the Deputy Commissioner has taken such action.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 9th April 1910.

Rai Sahib Lala *Moti Sagar*, for the Appellant.

Mr. *Sundar Das*, for the Respondents.

JUDGMENT.

RATTIGAN, J.—By our order dated 3rd February 1912*, we held that the mortgage in favour of plaintiffs still subsisted and was not open to objection on the ground of failure of consideration or absence of necessity, and we referred the case to the Deputy Commissioner under section 9 (3) of the Punjab Land Alienation Act, 1900, for such action as he might think fit to take. We further added that in the event of the Deputy Commissioner deciding to take no action under section 9 of the Act, the record should be returned to this Court for further orders.

It appears that the Deputy Commissioner did take action under section 9 of the Act and offered the mortgagees a lease of half the land mortgaged for a period of six years but that the mortgagees were not willing to accept the terms offered to them. Mr. Sundar Das states that the mortgagees did not understand their position or the Deputy Commissioner's proposal, but be that as it may, we are, as matters stand, *functi officio* and have no further jurisdiction in the case. The mortgagees may have a right of appeal under section 19 of the Act from the order of the Deputy Commissioner to the proper Revenue Authority, but that again is a matter upon which we can give no opinion. The record has been returned to us under a mistake and we accordingly direct that it be sent back to the Deputy Commissioner with a copy of our present order.

As neither party appears to be responsible for this further reference to this Court, we leave them to bear their own costs of the present hearing.

Record sent back.

*See *Bakhtawari* v. *Shibban Lal*, 13 Ind. Cas. 621.—*Ed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 491 OF 1912.

April 7, 1916.

Present—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

BALLI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BINDESWARI TEWARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Mortgagee purchasing property in execution of mortgage decree—Purchaser of property sold for arrears of revenue—Suit for possession by mortgagee-purchaser—Decree, nature of, to be given.

A mortgagee purchased the mortgaged property in execution of the decree upon his mortgage. In the meantime the property had been sold off for arrears of revenue. The mortgagee-purchaser sued the purchaser at the revenue sale for possession:

Held, that the plaintiff was not entitled to possession, but was entitled to put the property to sale if the defendant did not redeem him within the specified period. [p. 534, col. 1.]

Second appeal from a decision of the District Judge, Shahabad, dated the 1st November 1911, modifying that of the Subordinate Judge, Arrah, dated the 28th June 1910.

Mr. *Pravash Chandra Mitter* (with him Mr. *Susil Madhab Mullick*), for the Appellant.

Mr. *Chandra Sekhar Prasad Singh*, for the Respondents.

JUDGMENT.—It is necessary in this appeal to state a few facts in order to make clear the question which we have to decide. In February 1900 the ancestor of the two ladies, impleaded in the present suit as defendants Nos. 1 and 2, mortgaged to the plaintiff, Bindeswari Tewari, a 2-annas share in *Mauza* Pepra, a 2-annas 8-pies share in *Mauza* Jalalpur, a 2-annas 8-pies share in *Mauza* Inglish and a

garden in Arrah. The plaintiff brought a suit against the two ladies upon the mortgage and obtained a decree, in execution of which he purchased the mortgaged property and obtained formal delivery of possession in 1906, but in the meantime the mortgaged property, except the garden at Arrah, had been sold for arrears of revenue and had been purchased by defendants Nos. 3 to 12. The present suit was instituted in November 1907. The plaintiff's case was that the revenue sale had been procured by fraud and was null and void as against him. That point has been held against him and no question now arises as to it. The revenue sale must be taken to have transferred the property to defendants Nos. 3 to 12.

The plaintiff further contended that if the revenue sale was valid, defendants Nos. 3 to 12 had purchased the shares in the villages subject to the plaintiff's mortgage. It is conceded on all hands that in the circumstances the purchase at the revenue sale was subject to the plaintiff's mortgage. The plaintiff claimed in his plaint possession of the shares in the three villages as against the purchasers at the revenue sale. Plaintiff compromised with the defendants other than Nos. 3, 6 and 9, and has obtained a decree against them which cannot now be questioned. Defendant No. 6 in the course of the suit transferred all his interest to defendant No. 9, so that we are concerned now only with the plaintiff and defendants Nos. 3 and 9. It appears that at the revenue sale a much larger share in each of the villages was put up to auction than was covered by the mortgage. It is unnecessary to go into all the details. It is sufficient to state with regard to the purchase that defendant No. 3 purchased a 3-pies 15-*krants* share in Pepra subject to the plaintiff's mortgage, and defendant No. 9 has become the proprietor of a 9-pies share in Pepra and 1-anna share in Jalalpur subject to the plaintiff's mortgage. The two defendants with whom we are now concerned conceded in this Court at all events that the property was liable for its proportionate share of the amount due on the mortgage. The amount chargeable against the shares of these two defendants was ascertained by the first Court and the calculation must be taken to be correct. The only alteration made in the first Court's decree by the lower Appellate Court was the addition of interest to the amounts found chargeable against the different shares. Both Courts below have given the plaintiff a decree for possession in case the defendants fail to pay within six months their proportion of the sum due on the mortgage. In second appeal it is contended that the plaintiff is not entitled to a decree for possession, but is only entitled to a decree for sale of the property in case the defendants do not redeem the property purchased by them by payment of their proportionate amount of the mortgage money. On behalf of the plaintiff-respondent it is vigorously contended that in a case of this kind the plaintiff is entitled to a decree for *khas* possession, and we were referred to a number of cases on the subject. In all the cases referred to, it will be found that the person occupying the position of the plaintiff in the present suit was entitled to possession of the mortgaged property at the date of the suit. I take a common instance. *A* makes a simple mortgage in favour of *B* and subsequently a similar mortgage in favour of *C*. *B* sues *A* on the mortgage without impleading *C*. He obtains a decree, brings the property to sale and purchases it himself. By that purchase he acquires the right to possession of the mortgaged property which up to that time had been enjoyed by the mortgagor. *C*, not having been made a party to the suit brought by *B*, had no opportunity of redeeming *B*, and in a subsequent suit brought by *B* to enforce possession of the property, *C* must be given an opportunity of redeeming *B*, but if he fails to redeem, *B* will have a decree for possession of the property, not for sale of the property. The reason why he gets a decree for possession of property is that at the date of the suit he was entitled to possession of the property against all the world. In the present case the suit brought by the plaintiff on his mortgage was brought against the original mortgagors, but the interest of

the original mortgagors in the villages with which we are now concerned had at that time passed at the revenue sale to defendants Nos. 3 to 12, so that the purchase at the execution sale of the rights of the mortgagor did not give the present plaintiff a right to possession of the property against the purchasers at the revenue sale. Consequently, if defendants Nos. 3 and 9 fail to redeem, the plaintiff is not entitled to a decree for possession, but he is entitled to the ordinary remedy of a mortgagee, namely, to have the mortgaged property put up for sale. The result is that the appeal must be allowed in part and the decree of the lower Appellate Court varying the decree of the first Court must itself be varied. The suit will stand decreed against defendants Nos. 3 and 9 with proportionate costs in the way indicated in the Subordinate Judge's judgment as modified by the judgment of the District Judge, that is, defendant No. 3 shall pay to the plaintiff Rs. 152 with interest at the rate of 6 per cent. per annum from the date of the Subordinate Judge's decree up to the date of payment, in order to redeem his 3-pies 15-*krants* share in Pepra and his 5-pies share in Jalalpur. If the amount is not paid within six months from this date, the two shares just mentioned will be sold. Similarly defendant No. 9 shall pay Rs. 394-3-0 with interest thereon at the rate of 6 per cent. per annum from the date of the Subordinate Judge's decree to the date of payment, in order to redeem his 9-pies share in Pepra and his 1-anna share in Jalalpur. If he fails to pay the amount within six months from this date, the shares just mentioned will be put up for sale. The ordinary decree *nisi* for sale will be prepared. There will be no order as to costs in this appeal.

Decree varied.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 901 OF 1913.

May 3, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

RAM CHAND—PLAINTIFF—APPELLANT

versus

ALI AKBAR—DEFENDANT—RESPONDENT.

Custom—Necessity—Mortgage, suit on—Proof of necessity after 30 years—Part of consideration money shown to be for necessity—Mortgagee entitled to hold land as security—Adjournment of case on payment of costs—Non-payment, effect of.

Where in a suit by a mortgagee for possession of the mortgaged land, the plea of want of legal necessity was raised but it appeared that a fair proportion of the amount was for such necessity:

Held, (1) that the plaintiff could not be expected to prove details of transactions some thirty years old, specially when the mortgage was registered and the mortgagor was literate; [p. 535, col. 1.]

(2) that he was at any rate entitled to hold the land as security for such amount as he had shown to be for valid necessity. [p. 535, col. 1.]

When a suit is adjourned on payment of costs and such costs are not paid, the suit is liable to be dismissed. [p. 534, col. 2.]

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 18th January 1913, reversing that of the Munsif, 2nd class, Raya, District Sialkot, dated 19th February 1911.

Mr. *Nihal Chand Mehra*, for the Appellant.

Mr. *Badr ud-Din Kureshi*, for the Respondent.

JUDGMENT.—By two deeds, one for Rs. 300, the other for Rs. 1,800, defendants' father in 1887 mortgaged certain land to plaintiff's father. Plaintiff's father in 1900, by a suit, which terminated in this Court, obtained possession of the mortgaged area, but shortly after was dispossessed once more of the area now in dispute, which is a little less than the one half of the area mortgaged.

In the 1900 litigation the only plea advanced by the defendants' father was that the whole of the consideration had not passed, but it was decided that Rs. 1,975 had passed, *i.e.*, the whole of Rs. 2,100 less an item of Rs. 125.

The defendants in this case at first made no mention of want of necessity and contended merely that plaintiff had never secured possession in 1900.

It was only after the lapse of some nine months that they entered the plea of necessity, but they failed to pay the costs as ordered by the first Court, which very properly decreed

the suit. However the learned Divisional Judge on appeal remanded the case for inquiry into necessity.

The Munsif reported that necessity for only Rs. 700 was established, and the Divisional Judge expressed his concurrence in this view, yet strangely enough dismissed the suit, although plaintiff was clearly entitled to hold the land at any rate as security for Rs. 700.

After hearing Counsel for both sides, we find that this appeal must succeed.

We find indeed no force in appellant's contention that the plea of necessity could not be raised in this case, for defendants clearly could defend their possession by setting up the title which they have adverse to their father, but on the merits the plea is a poor one.

Defendants urge that they knew nothing of the mortgages and consequently could bring no suit to challenge them but this is a plain falsehood, for the senior defendant defended the case in 1900 as his father's attorney.

Next we hold that the lower Appellate Court has applied wrong principles in deciding the case, inasmuch as it expected plaintiff to prove details of transactions some thirty years old. Such a course merely invites perjury. The plaintiff is an employee and is not engaged in his father's business. The mortgages are registered documents, the mortgagor was literate and an *ala lambardar* and the worst that has been said of him is that he indulged in opium, which is not necessarily a worse habit than tobacco smoking.

Bonds and prior mortgages making up the mortgage amount less Rs 125 have been produced and more than this could not be reasonably expected. Finally the defendants pleaded want of necessity by a mere afterthought.

In these circumstances we find that necessity for Rs. 1,975 is established.

We accept the appeal and decree for plaintiff, but allow him no costs to mark our disapproval of his great delay.

Parties shall bear their own costs throughout.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3792 OF 1914.

April 7, 1916.

Present:—Mr. Justice Mullick.

Maharaja KESHO PRASAD SINHA BAHADUR—PLAINTIFF—APPELLANT

versus

LALJI RAY—DEFENDANT—RESPONDENT.

Rent-decree—Court, power of, to specify manner of execution—Landlord, right of, to choose manner of execution—Equity.

It is not competent to a Court to direct in what manner a landlord shall execute his decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the tenant. [p 536, col. 1.]

Second appeal from the decision of the District Judge, Saran, dated the 27th August 1914, confirming that of the Munsif, Chapra, dated the 30th April 1914.

Mr. *Krishna Sahai* for Mr. *Provash Chandra Mitter* (with him Mr. *Susil Madhab Mullick*), for the Appellant.

Mr. *Harnarayan Prasad*, for the Respondent.

JUDGMENT.—The plaintiff is the landlord; the defendant is the tenant. The Munsif found that the defendant was in possession of the holding and decreed the suit directing, however, that the landlord should proceed in execution first against the holding and then against the person of the tenant. On appeal the learned District Judge found that the landlord had dispossessed the defendant from the holding but, instead of dismissing the suit outright, he proceeded to affirm the decree of the Munsif.

The plaintiff now appeals before me and urges that the direction restricting his right to proceed at his discretion, either against the holding or against the person of the tenant, is wrong. This contention must prevail. All the authorities in our Courts have laid down that it is not competent to a Court to direct in what manner the landlord shall execute his decree for rent and that he cannot be compelled to proceed first against the holding and then against the person of the tenant.

On the other side there is no authority whatever and the learned Vakil for the respondent relies on equity. He urges that as the tenant has been dispossessed by the landlord, it is only fair that the landlord should proceed against the holding first.

But if the tenant has been dispossessed by the landlord, then no decree for rent can be made against him at all and it was competent to the tenant to prefer an appeal against the whole decree. Not having appealed against the decree, which is a decree for rent to which section 65 of the Bengal Tenancy Act applies, the tenant cannot now say that we should restrict the operation of the decree in any particular way. Section 65 must take its course. The decree of the learned Judge below is set aside and it is directed that the suit be decreed with costs for the arrears of rent and cesses claimed, with 10 per cent. damages. The appeal is decreed with costs.

Appeal decreed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 46 OF 1914.

July 26, 1915.

Present:—Mr. Crouch, A. J. C.

FIRM OF DHANPATMAL DIWANCHAND —APPLICANTS

versus

FIRM OF KISHINLAL INDRAJ—OPPONENTS.

Arbitration Act (IX of 1899), ss. 4, 5, 19—"Submission", meaning of—Reference, one of parties to, filing suit regarding same subject-matter—Stay of proceedings under s. 19—Civil Procedure Code (Act V of 1908), s. 151—Court, inherent power of, to stay proceedings—Procedure, where valid reference subsists between parties

The definition of "submission" in section 4 of the Arbitration Act covers both what is ordinarily termed an arbitration clause, and also what is commonly called a reference. [p. 536, col 2.]

Sawyer, H. v. *Louis Dreyfus & Co.*, 20 Ind. Cas. 504; 7 S. L. R. 1, referred to.

Where one of the parties to a reference files a suit in respect of the same subject-matter, the proceeding in the suit cannot be stayed under section 19 of the Arbitration Act, but the Court has inherent power to stay such proceedings if it be necessary to do so for the ends of justice. The Court should either adjourn the trial of the suit until an award has been published, or insist on the plaintiff obtaining leave of the Court to revoke the reference. [p. 537, col. 1.]

The authority delegated to an arbitrator cannot be revoked except by leave of the Court, and so long as it is not revoked he has power to make an award, and there would be no impropriety of conduct on his part in proceeding with the reference after suit filed, unless he has notice that there has been an application for leave to revoke the authority conferred on him to some Court competent to grant such leave. [p. 537, cols. 1 & 2.]

Even where it appears desirable to have the matter tried in Court, the proper course would be not to ignore the arbitration and proceed forthwith with the suit, but to direct the defendant to take necessary steps to revoke his submission. [p. 537, col. 2.]

Mr. *Tolasing Khushalsing*, for the Applicants.

Mr *Isardas Godharam*, for the Opponents.

JUDGMENT.—This is an application under section 19 of the Indian Arbitration Act and section 151, Civil Procedure Code, to stay proceedings in Suit No. 378 of 1914.

The firm of Kishinlal Indraj in January 1914 instituted a suit in the Court of the District Judge, Hissar, against the firm of Dhanpatmal Dewanchand of Karachi. The suit was on a commission agency account: the plaintiffs claimed Rs. 1,800.

On the 5th June 1914 the District Judge, Hissar, ruled that his Court had no jurisdiction to try the suit and directed that the plaint be returned for presentation in a Court of competent jurisdiction.

On the 29th August 1914 the parties signed a reference to arbitration of all matters in dispute between them, including the matters in dispute in the above-mentioned suit.

On the 4th September 1914 the firm of Kishinlal Indraj filed Suit No. 378 of 1914 in this Court. The plaint which had been returned by the Hissar Court (which was in the vernacular) accompanied the English plaint tendered to this Court.

Mr. Tolasing for the present applicant argues that section 19 of the Arbitration Act is applicable and suggests that in the judgment recorded in *Sawyer, H.* v. *Louis Dreyfus & Co.* (1), the definition of submission in section 4 of the Act had been ignored. This is not so The definition of "submission" in section 4 covers both what is ordinarily termed an arbitration clause, and also what is commonly called a reference. The former is a contract to refer; the latter is delegation of authority to a named arbitrator, and an agreement to be bound by his award. The contract is not revocable unless there be special circumstances which make it voidable under the Contract Act; but, until the passing of the Arbitration Act, it could not be specifically enforced. On the other hand the delegation of

(1) 20 Ind. Cas. 504; 7 S. L. R. 1.

authority to the arbitrator could, until the passing of the Arbitration Act, be revoked. Section 19 provides machinery for indirectly compelling a recalcitrant party to an "arbitration clause", or other contract to refer, to fulfil his contract. Section 5 enables a party to apply to the Court for leave to revoke the authority conferred on the arbitrator. It may, quite fairly, be contended that the word "submission" both in section 5 and in section 19 can, if necessary, be construed as either a contract to refer, or a reference; but where there has been a valid reference to a named arbitrator before suit, section 19 is not the appropriate section under which the defendant should seek stay of the suit; for, both historically and by the effect of the actual wording of the section, it is intended to afford means of indirectly compelling a reference where there has been none, and where the Court is satisfied that there is no sufficient cause why the matter should not be referred. But though section 19 of the Arbitration Act is not, in my opinion, intended to confer power on the Court to stay proceedings after a reference, the Court has inherent power to stay proceedings if it be necessary for the ends of justice.

In the present case, the Court has intimation that the parties had prior to the institution of the suit referred all matters in dispute to an arbitration, that is to say, that the matters in dispute were already in issue before another tribunal, a tribunal to which the law gives full recognition. On such intimation this Court should either adjourn the trial of the suit until an award has been published, or insist on the plaintiff obtaining leave of the Court to revoke the reference.

Mr. Isardas for the opponent states that the reference was signed by one only of the partners and that it is apprehended that the arbitrator will not act fairly. But, if this be the case, the proper course is to apply under section 5, Arbitration Act. At present I am treating the application as one made in the suit under section 151, Civil Procedure Code. So long as the authority delegated to the arbitrator is not revoked, and it cannot be revoked except by leave of the Court, he has power to make an award, and as indicated in my judgment in *Sawyer, H. Louis Dreyfus & Co.* (1) there would, in my opinion, be no impropriety of conduct on the part of the arbitrator in proceeding with the reference after suit is filed, unless he has notice that there has been an application for leave to revoke the authority conferred on him to some Court competent to grant such leave. There can be no indecent competition between the two tribunals so long as the Court exercises towards the private tribunal that courtesy which section 10, Civil Procedure Code, compels it to exercise towards another Court. Where it appears desirable that the matters in dispute should be tried in Court, the proper course is not to ignore the arbitrator and proceed forthwith with the suit, but to direct the defendant to take necessary steps to revoke his submission. Where an application under section 5 has been filed before a competent Court the arbitrator might, in my opinion, be guilty of improper conduct in proceeding with the reference so long as the propriety of his doing so was still *sub judice*.

The proceedings in the suit will be stayed until the reference is disposed of. I make no order as to costs.

Proceedings stayed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No 570 OF 1915.

December 17, 1915.

Present:—Mr Justice Rattigan.

SOHAN LAL AND OTHERS—PLAINTIFFS—PETITIONERS

versus

PURAN SINGH—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 134—Original agreement void—Creditor withdrawing his claim against legal representatives of deceased principal—Surety, liability of.

Where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor and is not discharged by the creditor withdrawing his claim against the legal representatives of the deceased principal. [p. 538, col. 2.]

The plaintiff sued to recover a sum of money alleged to be due from the ancestor of defendants Nos. 1 to 6 on a *bahi* account, defendant No. 7 being impleaded as a surety. All the defendants filed a joint written statement to the effect that the contract was void on account of the minority of the principal debtor at the time. Plaintiff then withdrew his claim against the legal representatives of the deceased

debtor (defendants Nos. 1 to 6) and elected to proceed against the surety only:

Held, that the surety, having subscribed to the written statement filed by the defendants Nos. 1 to 6, must himself be taken to have urged the non-liability of the latter and that it was, therefore, with his implied assent that they were discharged from liability. [p. 538, col. 2.]

Civil revision from the order of the Senior Subordinate Judge, Gurdaspur, dated the 25th March 1915.

Mr. *Nanak Chand*, for the Petitioners.

Mr. *Daulat Ram*, for the Respondent.

JUDGMENT.—Plaintiff sued for recovery of a specified sum of money on the allegations that one Nathu was indebted to him to that extent on the basis of a *bahi* account; that Nathu had died; that defendants Nos 1—6 were his legal representatives and that defendant No. 7, Puran Singh, had stood surety for the due payment of the money. The seven defendants filed a joint written statement to the effect that Nathu at the time of the contract was a minor; that his contract was void; that his legal representatives were not bound by his contract; that repayments had been made to plaintiff; and that Puran Singh had not stood surety for the payment of the money. During the pendency of the case, the plaintiff withdrew his claim against the legal representatives of the deceased debtor and elected to proceed only against Puran Singh as surety. The Courts below have concurred in finding that Nathu was a minor at the time of the contract and in holding that as the plaintiff had by his conduct discharged the legal representatives of the principal debtor from liability, the surety was equally discharged under section 134 of the Indian Contract Act. The Munsif further held that inasmuch as the contract made by Nathu was void, he being a minor, the contract of the surety was equally void. Neither Court has given any definite finding as to whether Puran Singh did in fact undertake to stand surety, or as to the amount actually due to plaintiff. Plaintiff's suit having been dismissed, an application for revision has been filed on his behalf and I have heard Counsel on both sides.

Mr. Daulat Ram for Puran Singh did not contend before me that his client had not agreed to stand surety for the minor's due performance of his contract; on the contrary, he argued on the assumption that he had agreed to stand as such, but that he was released from liability on the grounds given in the judgments of the lower Courts.

In my opinion those grounds are untenable. In the *first* place, Puran Singh who subscribed to the written statement filed by Nathu's legal representatives, must himself be taken to have urged the non-liability of the latter, and it was, therefore, with his implied assent that they were discharged from liability. And in the *second* place, to quote from Pollock and Mulla's Indian Contract Act (page 378):* "Where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor, for in such a case the contract of the so-called surety is not a collateral, but a principal, contract." Puran Singh, then, in the present circumstances must be regarded as the principal debtor, and the fact that the plaintiff withdrew his claim against Nathu's legal representatives (a claim which had no foundation in law as being based on a *void* contract) cannot affect Puran Singh's liability to pay whatever amount is found due to plaintiff on the basis of the contract.

I hold, therefore, that Puran Singh, if he really stood surety for Nathu, would be liable to pay plaintiff whatever was legally due to the latter on the contract. But the questions whether Puran Singh did consent to act as surety, and if so, what amount is due to plaintiff on the contract, have not been tried and determined by the Courts below and the case must accordingly be remanded for decision on the merits (Order XLI, rule 23, Civil Procedure Code).

I remand it accordingly. Costs will abide the event.

Petition allowed; Suit remanded.

*This appears to be a mistake for p. 457 of Pollock and Mulla's Indian Contract Act, 3rd Edition.—*Ed.*

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION No. 36 OF 1914.

January 19, 1916.

Present:—Mr. Pratt, J. C.

In the matter of A PETITION BY MESSRS. FLEMING SHAW & Co. TO DECLARE THE FIRM OF SHADIRAM JAMNADAS INSOLVENTS.

Provincial Insolvency Act (III of 1907), s. 7—Withdrawal of insolvency petition after adjudication.

Under section 7 of the Provincial Insolvency Act, a petition for insolvency cannot be permitted to be withdrawn after the making of an order of adjudication.

Mr. *Rupchand Bilaram*, for Insolvents Nos. 1 and 4.

Mr. *Khubchand T. Ojha*, for Insolvents Nos. 2 and 3.

Mr. *T. G. Elphinston*, for the Petitioning Creditors.

JUDGMENT.—The petition of insolvency was filed by the creditors on the 1st December 1914 and an adjudication order was made on the 25th April 1915, under which the four partners of the debtor firm were adjudged insolvent and their property vested in the Official Receiver.

The petitioning creditors with the consent of the insolvents and all the other creditors, except two who do not oppose, apply for leave to withdraw the petition under section 7 of the Act.

Mr. Rupchand represents that the withdrawal will be beneficial to the creditors, but I need not discuss the question for I am of opinion that leave to withdraw cannot be given under section 7 after an adjudication order has been made.

It is urged that under the English Bankruptcy Act, leave to withdraw may be given after a receiving order has been made. But, even if that is so, that is not an analogous case, for a receiving order does not make the debtor a bankrupt or deprive him of legal title to his property. Here the withdrawal of a petition would be of no avail unless it implies an annulment of adjudication. The Act has specified in section 42 the conditions on which the Court may annul an adjudication, and it is impossible that it was intended that this same result could be produced by the simple device of withdrawing the original petition.

The position of the section in the Act shows that it was intended that the power of withdrawal should be exercised before the stage of sections 15 and 16 has been arrived at. No suit can be withdrawn after judgment has been pronounced and a decree made, and it seems to me that it would be equally absurd to allow an insolvency petition to be withdrawn after an adjudication order has been made. The application is, therefore, rejected.

Application rejected

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1500 OF 1913.

April 10, 1916.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

DARPAN KOER—PLAINTIFF—APPELLANT

versus

KEDAR NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Sale of land—Vendor, duty of, to put vendee in physical possession of property sold.

A vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if in fact the subject-matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell. The obligation is upon the vendor to give the vendee possession; and not upon the latter to go and get possession for himself, specially when any difficulty arises in identifying the particular land sold. [p. 540, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Patna, dated the 20th February 1913, reversing that of the Additional Subordinate Judge, Patna, dated the 15th June 1912.

Mr. *Kulwant Sahai*, for the Appellant.

JUDGMENT.

ATKINSON, J.—This is an action brought by a lady, *Musammat* Darpan Koer, as plaintiff, against Kedar Nath defendant No. 1 and defendant No. 2, a gentleman called Munshi Jai Behari Lal, and the action claims a declaration for possession of a certain plot of land purchased by the plaintiff from the defendant No. 1, or, in the alternative, for a declaration

that the purchase-money which has been paid, stated to be Rs. 800, may be refunded with interest. The defendant No. 2 is only concerned in this case as being a *mukhtear* or agent. He negotiated the sale of this plot of land between the plaintiff and the defendant No. 1. The defendant No. 1 seems to have purchased at a revenue sale on the 6th June 1907 a plot of land marked on the Revenue Registration Roll dated 1840, which is alleged to be the plot in question. He never seems to have examined or enquired either before or after the purchase which he made, whether or not what he had bought did in fact exist and corresponded with the plot marked on the map of 1840. He procures the sale certificate of the 20th of May 1908 and re-sells to the plaintiff on the 15th of August 1908 what he had purchased by his sale certificate on the 20th of May 1908 and apparently between these two dates, in May and August, he made no attempt to ascertain the existence of the subject-matter of the property which he then was re-selling as vendor. The plaintiff paid as the purchase-money of this plot Rs. 500, the defendant No. 1 got the Rs. 500, executed a conveyance, and purports to recite in it that he is in possession of the property which he is conveying to the plaintiff and of which she is thereafter to be put in possession. The plaintiff, during the negotiations for the sale, makes no enquiry and takes no steps to ascertain whether or not the property in fact exists. Having paid her money, and having got her conveyance, she proceeds to take the necessary steps to have herself registered with the Revenue Authorities and having gone a certain distance in that procedure, she discovers then for the first time that the valuable property which she has purchased from the defendant No. 1 is not in existence and cannot be physically traced, nor can physical possession be given of the same to her. The defendant No. 1 says, "What I sold to the plaintiff was the sale certificate and whatever rights I had in the plot of land given me by that document". In my opinion a vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if, in fact, the subject-matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell.

In this case the defendant No. 1 neither knew nor cared whether the property was there or not and the District Judge so finds. The plaintiff did not herself enquire as to whether the property was such as she could acquire physical possession of: but up to the present time she has not got the property and she cannot be put in possession of it because the defendant No. 1 will take no steps to put her into possession even if the property exists. The obligation is upon the defendant No. 1 to give the plaintiff possession; and not upon the plaintiff to go and get possession for herself, especially when any difficulty arises in identifying the particular land sold. We cannot, therefore, concur in the views of the learned District Judge who decided this case on appeal, when he says that the plaintiff in the distant future may, if she is fortunate enough at some time or other, unknown and undefined, be able to trace upon some map or somewhere else particulars to enable her to identify this particular plot of land which she has purchased. Therefore the decree which we will make will operate fairly between the plaintiff and the defendant No. 1. The burden of the argument on behalf of the defendant No. 1 before us has been that the property is in existence in fact. If it is, the defendant No. 1 can physically give possession through the agency of this Court to the plaintiff. If it is not there, he can refund the money which has been paid with interest thereon. Therefore the decree will be an order declaring the plaintiff entitled to possession and to be put in possession by the defendant No. 1 within three months from this date. In default of clear possession being given within that time, the defendant No. 1 shall pay to the plaintiff Rs. 525 with interest at 12 per cent. per annum, until payment. The defendant No. 2 has not appealed from the decree against him in favour of the plaintiff for Rs. 275. This decree will stand in the form declared by the Subordinate Judge. The defendant No. 1 must pay the plaintiff's costs in the first Court and

In the matter of PAMANMAL HEMANMAL.

in the lower Appellate Court and of this appeal.

CHAPMAN, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION No. 18 OF 1915.

December 17, 1915.

Present:—Mr. Pratt, J. C.

In the matter of an APPLICATION BY PAMANMAL HEMANMAL TO BE DECLARED AN INSOLVENT.

Provincial Insolvency Act (III of 1907)— Petition for insolvency not made bona fide, *but for inequitable purpose—Inherent power of Court to dismiss · Debt proveable in insolvency—Maintenance, claim for.*

A Court has inherent power to dismiss a petition for insolvency when it is presented, not with the *bona fide* view of obtaining an adjudication, but for an inequitable and collateral purpose.

Girwardhari v. *Jai Narain*, 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835, referred to.

Obiter.—A claim for maintenance ordered to a wife by a decree of the Court is not a debt proveable in insolvency.

Linton v. *Linton*, (1885) 15 Q. B. D. 239; 54 L. J. Q. B. 529; 52 L. T. 782; 27 Morrell 179, referred to.

Mr. *Mulchand Thawardas*, for the Applicant.

Mr. *Kimatrai Bhojraj*, for the Creditor Motabai.

JUDGMENT.—This is a petition for insolvency presented by a debtor who is entitled to present the petition under section 6 (3) (*b*), as he has been arrested in execution of a decree for the payment of money. In my opinion the petition is one which should be dismissed, as it has been presented, not with the *bona fide* view of obtaining an adjudication, but for an inequitable and collateral purpose. The Court's power to dismiss such petitions has been recognized, as decided in the case of *Girwardhari* v. *Jai Narain* (1), and this has been consistently followed by this Court in the exercise of its insolvency jurisdiction.

My reasons for believing the petition to have been presented for an improper motive are two fold:—

(1) The nature of the debt. The only debt is a debt for maintenance payable under a decree of this Court to the petitioner's wife. There is no Indian decision on the subject, but I have little doubt that the Courts here would follow the English case of *Linton* v. *Linton* (2) that maintenance ordered to a wife by a decree of the Court is not a debt proveable under the Insolvency Act. The reasons being that the amount is variable and may be altered by the Court in accordance with the means of the husband and that it might be determined at any time by the husband and wife resuming cohabitation. That being so, there is no relief which the petitioner can obtain by his adjudication

(2) The conduct of the petitioner. The order made in execution proceedings shows that the maintenance decree was a consent decree. Six days after the decree the joint shop of the petitioner and his brother was divided and put in the name of the brother. This was obviously a device to represent himself as having no assets. If there was a change in his fortunes, he could have sued to have the maintenance allowance reduced. He did not do this but pleaded poverty in the execution proceedings, a plea which was disallowed. The petitioner has a second wife and this petition is merely the last step in a series of disgraceful and immoral transactions by which petitioner is endeavouring to get rid of the order for payment of maintenance.

I dismiss the petition with costs.

Petition dismissed.

(1) 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835.

(2) (1885) 15 Q. B. D. 239; 54 L. J. Q. B. 529; L. T. 782; 2 Morrell 179.

DEVI DITTA *v.* INDAR DEVI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1036 OF 1913.

December 20, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

DEVI DITTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat INDAR DEVI AND OTHERS—PLAINTIFFS—AND ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Succession—Jats of Kharar Tahsil, Ambala District—Daughter versus *collaterals—Property non-ancestral—Burden of proof*—Res judicata, *chance remark in judgment in previous case, whether operates as.*

In a dispute with regard to succession to alleged ancestral property, the onus is on those who allege the property to be ancestral and the circumstance that they happen to be defendants in the case does not shift the onus on to the plaintiff.

Where, therefore, the daughters of one *H*, a *Jat* of *Mauza* Rurki in the Kharar Tahsil of the Ambala District, sued to establish their claim to succeed to their father's estate and the suit was contested by the deceased's collaterals on the ground that the property was ancestral and that they had a preferential right of succession:

Held, (1) that the onus was on the collaterals to prove that the property was ancestral;

(2) that a mere chance remark in the judgment in a previous case brought to contest an alienation by the deceased's widow did not operate as *res judicata* when the matter was not put in issue and there was no proper finding on it;

(3) that as the collaterals had failed to establish any special custom whereby daughters were excluded by collaterals in the matter of succession to non-ancestral property, the collaterals were excluded by the daughters.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 7th March 1913.

Messrs. *Devraj Sawhny, Dhanpat Rai* and *Durga Das*, for the Appellants.

Messrs. *Broadway* and *Sewaram Singh*, for the Respondents.

JUDGMENT.

SHADI LAL, J.—In this case, the dispute is between the daughters and the collaterals with respect to succession to the estate of one Hamela, a *Jat* of *Mauza* Rurki in the Kharar Tahsil of the Ambala District. The learned Divisional Judge, who has decreed the suit of the daughters, has found that the collaterals have failed to establish their allegation as to the ancestral character of the land, and it is clear that on the record there is no evidence to prove that the land was owned by the common ancestor. It is manifest that the onus is on the persons who allege the property to be ancestral and the circumstance, that they happen to be defendants in this case, does not shift the onus on to the plaintiffs.

It is, however, contended that in a previous suit the Courts held that the land was ancestral and that the decision arrived at in that case operates as *res judicata*. Now we find that the suit alluded to above was brought by the collaterals for a declaration in respect of an alienation made by Hamela's widow, that there was no issue raising the question whether the property was or was not ancestral, and that the Courts did not record a finding thereon. A chance remark made in the judgment cannot be taken as a decision, such as would be binding in a subsequent suit. Further, we consider that in an action brought to contest an alienation by a widow it was unnecessary to decide whether the property had descended from a common ancestor.

We must, therefore, take it that the land in suit has not been proved to be ancestral, and it is undeniable that in succession to non-ancestral property the daughters exclude the collaterals, who in this case appear to be related in the seventh degree, and, according to their own admission, in the fifth degree. There is not a scintilla of evidence to establish a special custom whereby daughters are excluded by collaterals in the matter of succession to non-ancestral property. The Court of first instance framed an issue on this point and the defendants, on whom the onus rested, have failed to adduce any evidence to discharge it.

For the foregoing reasons the judgment of the learned Divisional Judge must be upheld. The appeal, therefore, fails and is hereby dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1452 OF 1915.

January 24, 1916.

Present:—Mr. Justice Shadi Lal.

GOKAL CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MILKHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Brahmans *of* Mauza *Nurpur*, Tahsil *Garhshankar*, *District Hoshiarpur—Adoptee, whether entitled to succeed collaterally in adoptive family—Decision in previous suit, whether operates as* res judicata *against nominal defendant—Civil Procedure Code* (*Act V of* 1908), *s.* 11.

A decision arrived at in a previous suit cannot operate as *res judicata* against a person who was in that suit merely a nominal defendant. [p. 543, col. 2.]

Zaman Ali v. *Manji*, 60 P. R. 1894; *Labhu* v. *Hira Singh*, 41 P. R. 1899; *Ramdass* v. *Vazirsaheb*, 25 B. 589; 3 Bom. L R. 179, referred to.

A person who has been formally adopted by a *Brahman* of *Mauza* Nurpur, Tahsil Garhshankar, District Hoshiarpur, is entitled to succeed collaterally in the adoptive family. [p. 544, col. 1.]

First appeal from the decree of the District Judge, Hoshiarpur, dated 27th February 1914.

Bakhshi *Tek Chand*, for the Appellants.

Messrs. *Duni Chand* and *Umar Bakhsh*, for the Respondents.

JUDGMENT.— The dispute in this appeal relates to the property of one Harbhaj, a Brahman of *Mauza* Nurpur, Tahsil Garhshankar of the Hoshiarpur District, the succession to whose estate opened out on the death of his widow, *Musammat* Uttam Devi. The plaintiffs contend that in the matter of succession to Harbhaj, the defendant Milkhi, the adopted son of Diwana, should be treated as a son of his natural father and is, according to custom, precluded from inheriting collaterally in the adoptive family. This contention has been rejected by the District Judge, and the appeal preferred by the plaintiffs impugns the correctness of his decision.

Before dealing with this question, it is necessary to consider the plea of *res judicata* raised by the appellants for the first time in this Court. It appears that in June 1913 the present plaintiffs brought an action for the recovery of certain houses against *Musammat* Uttam Devi's brother's sons, and in that suit Milkhi was impleaded as a defendant and his allegation, that he was entitled to succeed collaterally, was not accepted by the Courts. Now, it is clear that Milkhi was not in possession of any property then in dispute, and no relief was claimed against him. He was not a necessary party to the suit, which could have proceeded without impleading him as a defendant. In these circumstances, the principle of law is well established that a decision arrived at in a previous suit cannot operate as *res judicata* against the person who was in that suit merely a nominal defendant, *vide*, *inter alia*, *Zaman Ali* v. *Manji* (1); *Labhu* v. *Hira Singh* (2) and *Ramdas* v. *Vazirsaheb* (3).

Coming now to the merits of the issue in controversy, I consider that all the circumstances point to the conclusion that the adoption in question was a formal one, and not a mere appointment of an heir. The parties are Brahmans and Milkhi was Diwana's brother's grandson. It is beyond dispute that Diwana lived with Milkhi's father and that their holding was joint. In 1890 he executed a deed of adoption reciting therein a formal adoption many years previously, and though there may be some exaggeration in the details as to the adoption, I am inclined to think that the ceremony of giving and taking did, as a matter of fact, take place. Upon the record there is some oral evidence to that effect, and though it is not very satisfactory, it must be remembered that the transaction took place many years ago, and that oral evidence of a convincing nature can hardly be expected after the lapse of more than a quarter of a century. The probabilities of the case are entirely in favour of Milkhi's contention, and I do not think that the circumstance, that the Brahmans of this village form a compact village community and till the land with their own hands, constitutes an adequate reason for holding that the institution of adoption among them has lost all religious significance and has become a purely secular affair.

My view then is that Milkhi's adoption by Diwana was performed in accordance with the usual ceremonies observed in such cases, and upon that finding there is no

(1) 60 P. R. 1894.
(2) 41 P. R. 1899.
(3) 25 B. 589; 3 Bom. L. R. 179.

question that he is entitled to succeed collaterally in the adoptive family. The general rule is in his favour, and we have further a judicial instance, *viz.*, the judgment of the Commissioner, dated the 9th January 1883, which decides the question of collateral succession in favour of an adopted son.

For the aforesaid reasons I affirm the decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2268 OF 1914.

April 14, 1916.

Present:—Mr. Justice Mullick.

BIDYA NATH—PLAINTIFF—APPELLANT

versus

KHIKHINDA KOER—DEFENDANT—RESPONDENT.

Transfer of Property Act IV of 1882), *s.* 111(g) – *Lease —Permanent tenancy, termination of—Denial of landlord's title—Landlord and tenant—Ejectment – Inference as to status—Question of law—Appeal, second.*

A permanent tenancy under the Transfer of Property Act is determinable by the tenant's denial of the landlord's title and the latter can sue for ejectment of such tenant. [p. 545, col. 2.]

Kally Dass Ahiri v. *Monmohini Dassee*, 24 C. 440; 1 C. W. N. 321, followed.

An inference as to a question of status is always a question of law and hence liable to be rejected in second appeal. [p 544, col. 2.]

Second appeal from a decision of the District Judge, Muzafferpur, dated the 9th June 1914, reversing that of the Munsif, Muzafferpur, dated the 31st August 1912.

Mr. *Mustafa Khan* for Mr. *Laxmi Narain Sinha* (with him Mr. *Harnarain Prasad*), for the Appellant.

Mr. *Rajendra Prasad*, for the Respondent.

JUDGMENT.—The plaintiff is the landlord and the defendant is a person who was originally described by the plaintiff in a former suit as a trespasser but who, having succeeded in that suit in proving that he was a tenant, is now described in the present suit as a tenant subject to the provisions of the Transfer of Property Act. The suit is for ejectment from a plot of land measuring 1 *bigha* 3 *cottas*, on which there are a number of mango trees. The previous history of the litigation is this. The defendant having in the Record-of-Rights been entered as a tenant at fixed rates, the plaintiff in 1908 brought a suit (No. 495 of 1908, also described as No. 33 of 1908) for ejectment on the ground that the land was *zerait* land of the plaintiff and that the defendant had no tenancy therein. In that suit the defendant denied the title of the plaintiff altogether and said that a third party was her landlord. She also asserted that she was a tenant at fixed rates. The defendant succeeded in part and it was held that the plaintiff was the landlord but that the defendant was his tenant and that the plaintiff was entitled only to receive rent from the defendant. The plaintiff thereupon brought the suit out of which the present appeal arises, praying to eject the defendant on forfeiture for denial of his title as landlord. The Munsif decreed the suit but on appeal the District Judge dismissed it; hence the present second appeal by the plaintiff.

The learned District Judge states that the plaintiff has not shown that the land is not agricultural land, and he seems to be of opinion that the defendant's tenancy is a tenancy at fixed rates within the meaning of the Bengal Tenancy Act and that for that reason the plaintiff is not entitled to eject.

The *first* question, therefore, that arises is whether the tenancy is one under the Bengal Tenancy Act or not. The learned District Judge's finding as to the character of the land is, no doubt, a question of fact, but his inference as to whether the tenancy was one to which the Bengal Tenancy Act applies is assailable on two grounds, *firstly*, because it is an inference which has been drawn from no evidence whatever, and *secondly*, because it is an inference as to a question of status which is always a question of law. It appears that in the Court of first instance no oral evidence was given on either side of the purpose for which the tenancy was created and the parties proceeded to trial on the documentary evidence alone on this point. Now the Record of Rights is in favour of the defendant and throws the burden of proof upon the plaintiff. The learned District Judge says that the mere holding of a *hat* upon the land would not take the land out of the operation of the Bengal Tenancy Act, if the land was originally let out for an agricultural purpose and he relies upon the case of *Secretary of*

State for India v. *Karuna Kanta Chowdhry* (1) in support of this proposition. That is no doubt perfectly correct, but the point is whether upon the evidence the plaintiff has succeeded in showing that the land was not let out for the purpose of cultivation either of crops or of fruit.

The plaintiff's case in the previous suit of 1908 was that the land was *zerait* land, but it was found in the litigation ending with the appeal judgment, dated 8th of September 1909, that the defendant had become a tenant or was a tenant by reason of the fact that he had for at least 20 years held the *hat* partly for the sale of bullocks and partly for other purposes. The defendant never alleged in that suit that his tenancy was one for the purpose of cultivation. That was a defence which he ought to have taken and did not take. He ought to have resisted the prayer for ejectment on the ground that he was a tenant at fixed rates within the meaning of the Bengal Tenancy Act, but he did not. In my opinion he cannot, in the present suit, set up a defence which he ought to have taken in the previous suit. The question, therefore, is whether the finding of the Appellate Court in the previous suit does not rebut the entry in the Record of Rights. In my opinion it does. The Court found that the tenancy was a tenancy created by operation of law by reason of receipt of rent from persons holding a *hat* upon the land. There was no finding, and it was not anybody's case, that the land was used for the purpose of cultivation or for any other agricultural purpose. There is no suggestion in this case that the *hat* was for a purpose ancillary to cultivation and, therefore, the case of *Sheikh Hedayet Ali* v. *Kumar Kalanand Singh* (2) does not apply. In my opinion the principles enunciated in the case of the *Raniganj Coal Association, Limited* v. *Judoonath Ghose* (3) are applicable to the present case. The learned District Judge, therefore, in my opinion is wrong in stating that the plaintiff has failed to show that the land was not used for agricultural or horticultural purposes. He has overlooked the judgment of the Appellate Court in the previous litigation. If, therefore, as I hold to be the case, the Transfer of Property Act, and not the Bengal Tenancy Act, applies to the tenancy, the question arises whether the plaintiff can eject the defendant, and this part of the case is concluded by the decision of *Kally Dass Ahiri* v. *Monmohini Dassee* (4), which is clear authority for the proposition that a permanent tenancy under the Transfer of Property Act is determinable by denial of the landlord's title. The plaintiff, therefore, must succeed in the present suit. The decree of the lower Appellate Court will be set aside and that of the Munsif restored. The appeal is allowed with costs.

Appeal decreed.

(1) 35 C. 82 (F. B.); 11 C. W. N. 1053; 6 C. L. J. 342.

(2) 20 Ind. Cas. 332; 17 C. L. J. 411.

(3) 19 C. 489.

(4) 24 C. 440; 1 C. W. N. 321.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 523 OF 1914.

May 31, 1916.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

RANKU—DEFENDANT—APPELLANT

versus

Musammat HUKMI—PLAINTIFF—RESPONDENT.

Partition—Joint family property—Suit for partial partition, if maintainable.

A suit does not lie for partition of a portion of a joint family property. [p. 546, col. 1; p. 547, col. 1.]

Jag Ram v. *Hans Raj*, 17 P. R. 1893, distinguished.

Shadi v. *Sanditta*, 77 P. R. 1887; *Chint Ram* v. *Bakhtawar Rikh*, 1 P. L. R. 1902; *Sundar Singh* v. *Deva Singh*, 13 Ind. Cas. 863; 2 P. W. R. 1912; 85 P. L. R. 1912; *Parbati Churn Deb* v. *Ain-ud-Deen*, 7 C. 577; 9 C. L. R. 170; *Burugapalli Sriramulu* v. *Nandigam Subbarayadu*, 10 Ind. Cas. 57; 10 M. L. T. 313, *Musammat Bhag Bhari* v. *Wazir Khan*, 14 Ind. Cas. 45; 91 P. W. R. 1912; 124 P. L. R. 1212; 70 P. R. 1912, referred to.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 3rd February 1914, reversing that of the District Judge, Hoshiarpur, dated the 21st April 1913.

Bakhshi *Tek Chand*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.

BROADWAY, J.—The parties in this case are closely related. *Musammat* Hukmi, the plaintiff, is the widow of one Relu, whereas

the defendants are Ranku, the brother of Relu, and *Musammat* Mahanti, widow of Ghania, another brother of Ranku, and Relu. Ghania died without issue and Relu had one son, Siri Ram. Relu, Ghania and Siri Ram died during the lifetime of Nihala, who was the father of Relu and his brothers. The parties are Rajputs and belong to an agricultural tribe and their ancestors settled the village. The family has, however, been carrying on the business of money-lending in addition to agricultural pursuits. On the death of Nihala, Ranku, *Musammat* Hukmi and *Musammat* Mahanti were all three entered as co-sharers of all the property, belonging to the family, in the mutation registers. A part of this property, consisting of land, was mortgaged to Relu by defendants Nos. 1—21 for a sum of Rs. 744. The original mortgagors redeemed their property and paid the sum of Rs. 744, the redemption money, to Ranku. On this *Musammat* Hukmi apparently brought a suit against Ranku, etc., asking for a declaration to the effect that she was solely entitled to receive the redemption money inasmuch as the mortgage was to Relu alone. That suit was dismissed on the ground that a declaratory suit did not lie.

Musammat Hukmi then, on the 14th November 1912, filed the present suit in which she claimed possession of the 952 *kanals* 2 *marlas* of land mortgaged, or, in the alternative, the sum of Rs. 744 paid to Ranku. She based her claim, as in the former suit, on the allegation that Relu had advanced this money out of his separate estate and that Ranku had no right to receive the redemption money. The Courts below have held that Relu advanced the money out of joint funds and that Ranku, as the head of the family and its *karkun*, had rightly received it. The suit for possession was accordingly dismissed.

The first Court held with regard to the alternative relief claimed that, although *Musammat* Hukmi might be entitled to a share in the money, she was certainly not entitled to the whole, and that as her suit amounted to a prayer for partition of a portion of the joint property only, she could not be allowed to sue for partition without asking that the whole of the property should be divided. The lower Appellate Court held that the family was a joint Hindu family and that Relu was its *karkun*, but that both *Musammat* Hukmi and *Musammat* Mahanti had a share in the estate, and were entitled to share in the income of the family; and on the authority of *Jag Ram* v. *Hans Raj* (1), the learned Divisional Judge held that *Musammat* Hukmi could sue for one-third of the Rs. 744 without asking for the whole of the property to be partitioned, and granted a decree in her favour against Ranku for Rs. 248.

Against this decree Ranku has preferred this appeal, and on his behalf Mr. Tek Chand has argued that under section 5 of the Punjab Laws Act it was the duty of the Court to first ascertain whether there was any custom applicable to the family, and failing such a custom, to decide the case in accordance with Hindu Law, whereas the learned Divisional Judge has apparently held that neither custom nor Hindu Law applied and that, therefore, section 6 of the Punjab Laws Act empowered him to take the action that he has taken. *Firstly*, he points out that the Courts have held that the parties belong to a joint Hindu family and that, therefore, it is the Hindu Law that should be applied under which females could not be co-parceners, but are only entitled to maintenance and not to a share; *secondly*, that if Hindu Law does not apply, *Musammat* Hukmi cannot claim a share in the *corpus* unless she can prove a special custom entitling her to do so, and in this case no special custom has either been pleaded or proved; and *finally*, that assuming she is entitled to a share, she cannot ask for partition of a small portion of the joint family property without asking for partition of the whole. In support of this contention he has referred us to *Shadi* v. *Sainditta* (2), *Chint Ram* v. *Bakhtawar Rikh* (3), *Sundar Singh* v. *Deva Singh* (4), *Parbati Churn Deb* v. *Ainud-Deen* (5) and *Burugapalli Sriramulu* v. *Nandigam Subbarayadu* (6). He has also pointed out that there has been an error in

(1) 17 P. R. 1893.
(2) 77 P. R. 1887.
(3) 1 P. L. R. 1902.
(4) 13 Ind. Cas. 863; 85 P. L. R. 1912; 2 P. W. R. 1912.
(5) 7 C. 577; 9 C. L. R. 170.
(6) 10 Ind. Cas. 57; 10 M. L. T. 313.

the decree sheet with reference to the costs awarded against his client.

Dr. Gokal Chand, on behalf of *Musammat* Hukmi, pointed out that the finding of the first Court is not that the family is a joint Hindu family in the ordinary sense in which females have no share, and that as a matter of fact Ranku has admitted that both Hukmi and Mahanti have a share inasmuch as he has himself had mutations effected in their names jointly with himself. In these circumstances he claims that his client is entitled to obtain one-third of this money which, he points out, formed a part of the joint family property which is now represented by the redemption money. Further, inasmuch as the family was not a joint Hindu family within the true meaning of Hindu Law, Ranku was not the *karta* or *karkun* of this family and that, therefore, he is bound to account for whatever property comes into his hands in which his co-sharers have a share. He laid stress on the fact that in a true joint Hindu family, all the members are represented by one member who is termed the "*karta*," whereas in this case the family is not represented by Ranku alone, but by Ranku and his two sisters-in-law, each holding an equal share in the entire property. He pointed out that a widow not ordinarily having a share in the estate, Ranku's action in getting *Musammat* Hukmi recorded as a co-sharer is an admission of her right to share, and that Ranku is, therefore, estopped now from denying that right. Finally, he urged that there was no reason why Ranku should retain the whole of the redemption money, and has referred us to *Musammat Bhag Bhari* v. *Wazir Khan* (7) as authority for the proposition that a widow with only a life-estate can sue for partition. He has, however, not replied to Mr. Tek Chand's contention that a suit for partial partition is incompetent. The present suit, however, was for possession of the property mortgaged or, in the alternative, that Ranku be decreed to pay to the plaintiff the whole of the Rs. 744 realised by him.

It has been rightly held that *Musammat* Hukmi was not entitled to either of the reliefs she claimed. The property, including this sum of Rs. 744, has been held to be joint; it has also been held that *Musammat* Hukmi has a $\frac{1}{3}$rd share in the entire estate including this redemption.

In our opinion, section 6 of the Punjab Laws Act did not apply, and we do not think that *Jag Ram* v. *Hans Raj* (1) authorized the action taken by the learned Divisional Judge. *Musammat* Hukmi was not asking for partition and we consider that the conclusions arrived at by the first Court were correct. At the same time the best and most equitable course would have been to have returned the plaint for amendment, so that plaintiff-respondent may, if so advised, sue for partition of the whole estate.

We accordingly accept this appeal, and setting aside the decree of the Court below, return the case to the learned Subordinate Judge and direct him to return the plaint to *Musammat* Hukmi giving her leave to amend the plaint if she so wishes.

Costs will follow the event.

We would note that Pleader's costs as calculated in the decree-sheets are erroneous.

The claim against Ranku was for Rs. 744 only and this should have been the basis of calculation in the first Court, whereas in the lower Appellate Court the costs should have been calculated on the sum decreed, namely, Rs. 248.

The stamps in the appeals to the lower Appellate Court and to this Court will be refunded.

Appeal accepted; Case remanded.

(7) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No 4148 OF 1913.

April 10, 1916.

Present:—Mr. Justice Mullick.

RAM TAHAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUKESWAR REYAIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33—Appeal by one co-defendant—Common ground—Power of Court to pass decree in favour of all defendants.

Order XLI, rule 33, read with Order XLI, rule 4, of the Civil Procedure Code, gives the Appellate Court power to interfere with a decree if the decree is based

upon grounds common to all the defendants although only one of such defendants has appealed against that decree. There is no justification for the proposition that a defendant who suffers a decree to be passed *ex parte* against him cannot benefit by the appeal of his contesting co-defendant. The object of rules 4 and 33 of Order XLI is to prevent contradictory decisions in the matter of the same suit. [p. 546, cols. 1 & 2.]

Second appeal from the decision of the Subordinate Judge, Muzaffarpur, dated the 20th August 1913, reversing that of the Munsif, Sitamarhi, dated the 9th April 1913.

Mr. *Bankim Chandra Mukerji*, for the Appellants.

Mr. *Laxmi Narain Singh*, for the Respondent.

JUDGMENT.—The case of the plaintiffs is that two ladies, *Musammat* Sukeswar and *Musammat* Gangajal, executed in his favour, for a consideration of Rs. 300, a *patta* in perpetuity for 4 *bighas* of land. Defendant No. 2, *Musammat* Gangajal, did not appear, but *Musammat* Sukeswar contested the suit stating that she never executed the *patta*; that her intention was to execute a mortgage-bond and that the plaintiffs had manufactured the *patta* in suit in collusion with defendant No. 2, and fraudulently induced her to admit execution at the registry office; that the consideration money had never been paid and that the plaintiffs were not entitled to a declaration of their *mukarrari* right and *khas* possession. The Munsif decreed the suit and defendant No. 1 appealed. No appeal was preferred by defendant No. 2. The result of the appeal of defendant No. 1 was that the Subordinate Judge held that no consideration money had passed; that defendant No. 1 had never executed the *patta* and that registration had been obtained by fraud on the part of the plaintiffs. He also held that neither defendant No. 1 nor defendant No. 2, who were *parda-nashin* Hindu ladies, had obtained independent advice in relation to the transaction. The Subordinate Judge, therefore, dismissed the whole suit.

The only point taken in the present second appeal by the plaintiffs before me is that, inasmuch as defendant No. 2 did not appeal against the decree of the Munsif and was apparently satisfied with the decree, it was not competent to the Subordinate Judge to dismiss the whole suit. Now, Order XLI, rule 33, read with Order XLI, rule 4, would seem to give the Court power to interfere with a decree if that decree was based upon grounds common to all the defendants, although only one of such defendants had appealed against that decree. It is a question in each case to be judged upon the circumstances, whether the decree appealed against has proceeded on a ground common to all. In the present case the Court's decree is based upon the finding that there was no execution either by Sukeswar or Gangajal; that there was no independent advice to either in the matter of the transaction and that registration was obtained by the fraud of the plaintiffs against both, and that no consideration money passed. These are grounds which would have been common both to defendants Nos. 1 and 2, if defendant No. 2 had chosen to put in an appearance; and I have to see whether her absence in the Court of the Munsif makes any difference. In my opinion, it does not. If the Court's decree is based upon a common ground which she might have taken, it is sufficient to give her the benefit of the decree passed in favour of her co-defendant. The case of *Sreenath Chowdhry* v. *John James Grey* (1) is authority in support of this proposition. In that case the decree was passed *ex parte* against certain defendants, but on appeal by one of the contesting defendants, the whole decree was set aside on the ground that the decree had proceeded on a ground common to all. There is no justification, therefore, for the proposition that a defendant who suffers a decree to be passed *ex parte* against him cannot benefit by the appeal of his contesting co-defendant. It is true that the case above cited was under a former Civil Procedure Code, but the provisions of the section, namely, section 119 of Act VIII of 1859, do not materially differ from the provisions of our corresponding rule, *viz.*, Order XLI, rule 4, of the present Code. I think, therefore, that I am bound by the authority of the Weekly Reporter case. On general principles also the learned Subordinate Judge's decision would seem to be right. The object of rules 4 and 33 of Order XLI is to prevent contradictory decisions in the matter of the same suit, and in the present case it would be somewhat absurd if we were to hold that the *patta* was as against defendant No. 1 a fraudulent

(1) 13 W. R. 114.

transaction but as against defendant No. 2 perfectly genuine and valid.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 653 OF 1912.

December 23, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

GANGA SINGH AND ANOTHER—DEFENDANTS —APPELLANTS

versus

Musammat BEGAM AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Hindu Law - Apostacy—Hindu's conversion to Islam, effect of—Suit by convert for his share in family property—Limitation Act (IX of 1908), Sch. I, Arts. 127, 142.

The effect of a Hindu's conversion to Muhammadanism is *ipso facto* to separate him from the coparcenary. [p. 550, col. 1.]

Gobind Krishna Narain v. *Abdul Qayyum*, 25 A. 546, A. W. N. (1903) 137, followed.

The plaintiff, a Hindu convert to Islam, sued to recover possession of the property left by his uncle, as a member of a joint Hindu family still existing at the time of the uncle's death. Part of this property was ancestral. It appeared that on the uncle's death in 1909 his daughters had taken possession of the whole property, that the suit was brought in 1911 and that the plaintiff had embraced Islam 10 or 11 years before suit:

Held, (1) that as by reason of his conversion to Islam, plaintiff was not a member of the joint Hindu family at the time when the suit was instituted, it was for him to prove that the separation of the family had not taken place more than 12 years before suit; [p. 550, cols. 1 & 2]

Ram Ghulam Singh v. *Ram Behari Singh*, 18 A. 90; A. W. N. (1895) 234, followed.

(2) that as he had failed to prove that he remained a member of a joint Hindu family as late as within 12 years of the date of the institution of the suit, his suit was, under Article 142 of the Limitation Act, barred by time; [p. 550, col 2.]

(3) that in that portion of the property which was ancestral the plaintiff was entitled to the share which was his at the time of his conversion. [p. 551, col. 1.]

First appeal from the decree of the District Judge, Gujrat, dated the 9th March 1912.

Bhagat *Govind Das*, for the Appellants.

Mr. *Badr-ud-Din*, for the Respondents.

JUDGMENT.

LESLIE JONES, J.—Owing no doubt in some degree to the plaintiff's own uncertainty as to his position in this case, the judgment of the District Judge betrays considerable confusion; and we think that the best plan in dealing with this appeal is to treat the case as presented to us in this Court.

Ganda Mal, a *Khatri*, had three sons, Ghasita Mal, who died in 1888, Bhagwan Das, who died in 1893, and Kahn Chand, who died in 1909. Ghasita Mal again had two sons, one of whom, Ralla Ram, died sonless in 1908; his second son, Mela Ram, the present plaintiff, is a convert to Islam. Kahn Chand left two daughters, *Musammat* Har Devi and *Musammat* Gur Devi, the former of whom is now represented by her son Ganga Singh. Bhagwan Das died sonless.

When Kahn Chand died he had in his possession a considerable property. A small part of the property is admittedly ancestral, having been held either by Ganda Mal or by some more remote ancestor; the remaining property, moveable and immoveable, was acquired after Ganda Mal's death. When Kahn Chand died, the whole of the property was taken by *Musammat* Gur Devi and Ganga Singh against whom Mela Ram (now called Din Muhammad) instituted the present suit in 1911 for possession of the whole. He has obtained a decree for half of the immoveable property, and the defendants have now appealed to this Court.

The only ground on which the plaintiff could claim to take the whole property is by survivorship as a member of a joint Hindu family still existing at the time of the death of Kahn Chand, and it would seem that this was his original intention, for although in the plaint he spoke of himself as Kahn Chand's heir he afterwards stated more explicitly that the family was joint until the time of Kahn Chand's death and produced evidence to that effect. At a later stage, however, he admitted through his Counsel that Kahn Chand's daughters were entitled to keep half of the property, and on this admission the District Judge, though finding that the family was joint till Kahn Chand's death, gave the plaintiff a decree for half of his claim.

It is sufficiently obvious that if the family continued joint the plaintiff was entitled to take the whole property by survivorship but there is an excellent reason why any claim on the part of the plaintiff to take by survivorship must fail.

On his own showing the plaintiff embraced Islam ten or eleven years before the institution of this suit. (The date of his conversion has been disputed by Counsel for the appellants but we see no reason to doubt that he gave it correctly. Two of his witnesses have given evidence to the same effect and there is no rebuttal on behalf of the defence). The effect of the plaintiff's conversion to Muhammadanism was *ipso facto* to separate him from the co-parcenary, *vide Gobind Krishna Narain* v. *Abdul Qayyum* (1).

Counsel for the respondent has endeavoured to show that the plaintiff continued to be accepted by the family as one of its joint members and went on to argue, as we understand him, that if that was so it must be taken that Kahn Chand accepted the proposition that conversion to Islam does not operate to break up the co-parcenary. We are unable, however, to find any substantial evidence that Kahn Chand regarded the matter in this light or even that the plaintiff, after his conversion, continued to be treated as a member of a joint Hindu family and accordingly we do not propose to discuss this argument further.

Although Counsel for the respondent has continued to insist on the jointness of the family up till the time of Kahn Chand's death, we have, nevertheless, considered whether it ought not to be held that the plaintiff was entitled to claim one-fourth of the property, on the ground that that was his share at the time when he was converted to Islam. (He could not possibly claim one-half because having ceased to be a member of the joint Hindu family the share of Ralla Ram, his brother, would go by survivorship to Kahn Chand.) There is here, however, another and an insuperable difficulty in the plaintiff's way. As by reason of his conversion to Islam he was not a member of the joint Hindu family at the time when the suit was instituted, it was for him to prove [*vide* amongst other rulings *Ram Ghulam Singh* v. *Ram Behari Singh* (2)] that the separation of the family had not taken place more than 12 years before the suit was instituted. It is true that his conversion to Islam was within that period, but that fact does not settle the matter. He is still faced with Article 142 of the Limitation Act. There is, of course, the oral evidence to that effect, but we are unable to regard it as at all trustworthy, and the only other point upon which the Counsel for respondent is able to rely is the fact that some of the landed property acquired after the death of Ganda Mal was standing in the names of Kahn Chand and Ralla Ram as co sharers in 1907. No copy, however, of the mutation order by which these entries were effected has been produced and the probability is that when Bhagwan Das, who had acquired property in his own name, died, the Revenue Officer treated the question of succession as if it were one falling under Customary Law, and that when on enquiry as to the heirs of Bhagwan Das he discovered that Bhagwan Das had left a brother and a brother's son, he ordered mutation accordingly.

On the other hand, we know that when Bhagwan Das died Kahn Chand took out a succession certificate and in a Will of 1894 expressly disclaimed jointness with Ralla Ram. None of the property acquired since the death of Ganda Mal was acquired in the name of Ghasita Mal or either of his sons, and there is no likelihood that the acquisitions were in any way due to a nucleus of ancestral property, which consisted only of a small share in a residential house and a shop of trifling value. We know, moreover, that the plaintiff had left his home for a number of years before his conversion to Islam, and this is an additional reason which makes it very unlikely that he should have remained a member of a joint Hindu family as late as within 12 years of the date of the institution of the suit. We must hold, therefore, that he has been unable to show that a suit by him for a share of coparcenary property on separation is within time.

The case as regards ancestral property stands on a different footing. As regards such property the plaintiff was a co-sharer and the presumption is that his title continued "until it was extinguished by some overt act of adverse possession." Consequently Counsel for the appellants was obliged

(1) 25 A. 546; A. W. N. (1903) 137.
(2) 18 A. 90; A. W. N. (1895) 234.

to concede that in that property the plaintiff is entitled to the share which was his at the time of his conversion. There has been a dispute as to how much of the property is ancestral in character, but Counsel for the appellants has been successful in showing that only a part of one house and a part of one shop can be so described. The plaintiff was entitled to one-sixteenth of the house in plan No. 1 and one-eighth of the shop in plan No. 2. We must accordingly accept the appeal and modify the decree of the first Court so as to give the plaintiff a decree only for one-sixteenth of the said house and one-eighth of the said shop.

As the defendants-appellants originally elected to deny that the plaintiff was the son of Ghasita Mal, a plea which they totally failed to substantiate and have since abandoned, and also contested the plaintiffs' claim even to a share in the ancestral property, we direct the parties to bear their own costs throughout.

The plaintiff-respondent has died during the pendency of the appeal, leaving a penniless widow and a child. We cannot but express the hope that the appellants will make some suitable provision for the unfortunate widow.

Appeal accepted; Decree modified.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 26 AND 27 OF 1914.

December 22, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

GEHIMAL DYALMAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KARMOOMAL SIROOMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Birth register kept by tapadar, entry in, relevancy of—Civil Procedure Code (Act V of 1908), s. 100—Appeal, second—Right to dispute finding not challenged before lower Appellate Court—Limitation Act (IX of 1908), s. 22, Sch. I, Art. 44—Joinder of parties after institution of suit, how far involves bar of limitation—Hindu Law—Alienation by mother of her minor son's property in excess of her authority—Limitation.

An entry in a birth register kept by a *tapadar* in the discharge of his official duty is relevant under section 35, Evidence Act. [p. 552 col. 1.]

Where the appellant did not challenge in the lower Appellate Court the finding by the first Court that certain sales by the guardian of a Hindu minor were not for legal necessity, he cannot be permitted to challenge it again in second appeal. [p. 552, col. 1.]

Gavadappa v. *Girimallappa*, 19 B. 331, referred to.

The joinder of parties subsequent to the institution of a suit does not necessarily involve a bar of limitation under section 22 of the Limitation Act. Such a result depends upon the fact whether the joinder was necessary to enable the Court to award such relief as may be given on the suit as framed. [p. 552, col. 2; p. 554, col. 2.]

Guruvayya v. *Dattatraya*, 28 B. 11; 5 Bom. L. R. 618, referred to.

Per *Pratt, J. C.*—Under Hindu Law the sale by a Hindu widow or guardian mother, in excess of her authority, is void and not voidable and Article 44 of the Limitation Act does not apply to such an alienation. [p. 552, col. 1.]

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 (P. C.); 18 W. R. 81*n.*; Sevestre 253*n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147; *Mata Din* v. *Sheikh Ahmad Ali*, 13 Ind. Cas. 976; 14 Bom. L. R. 192 (P. C.); 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49, referred to.

Per *Crouch, A. J. C.* (contra).—Under Hindu Law, when a mother, as the natural guardian, sells a portion of her minor son's property for good consideration but in excess of her powers, *e. g.*, without legal necessity, the purchaser is entitled to the benefit of Article 44 of the Limitation Act. [p. 554, col 1.]

Satish Chandra Guha v. *Chander Kant Pyne*, 3 C. W. N. 278; *Sham Chandra Dafadar* v. *Godadhar Mandal*, 9 Ind. Cas. 377; 13 C. L. J. 227, referred to.

Appeals against the decision of the Joint Judge, Larkana.

Mr. *Lalchand Hassomal*, for the Appellants.

Mr. *Kimatrai Bhojraj*, for Respondents Nos. 1 and 2.

Mr. *Partabrai Dhanrajmal*, for Respondent No. 6.

JUDGMENT.

PRATT, J. C.—The plaintiff sued to recover three houses from the defendant Dyalmal, who is represented in this appeal by his sons the four appellants.

The first house had been sold during his minority by his mother, after his father's death, to one Manghamal and by him through various other intermediate purchasers finally to Dyalmal. The second and third houses had similarly been sold by his mother directly to Dyalmal.

The lower Appellate Court decreed possession as the sales by the mother were not justified by necessity.

The *first* point raised in appeal is that the suit is time-barred, not having been filed within three years of the plaintiff's

attaining majority. This is a pure question of fact, which is concluded by the finding of the lower Appellate Court. It is argued that the birth register on which the finding as to plaintiff's age is based is not admissible in evidence. There is no substance in this objection, for the birth register is an official register kept by the *tapadar*, who is a public servant, in the discharge of his official duty. It is, therefore, relevant under section 35, Indian Evidence Act.

It is *next* urged that the sales were justified by necessity. The first Court had found they were not and this finding was not challenged in the lower Appellate Court, whose judgment is silent upon the point. We cannot allow this point which involves a mixed question of fact and law to be raised again in second appeal. See *Gavdappa* v. *Girimallappa* (1).

As regards the first two houses, it is further contended that the suit was time-barred because the intermediate purchasers were joined as parties after the period of limitation for filing the suit had expired. The argument is that the sale by the widow was voidable and, therefore, it was necessary for the plaintiff to show that he had repudiated the sale to the 1st intermediate purchaser Manghamal and that Manghamal and his purchasers were, therefore, necessary parties. The flaw in this argument is that a sale by a widow or guardian mother in excess of her authority is void, not voidable. *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (2) was the case of an alienation by a mother and the law there declared has been enacted in section 38 of the Transfer of Property Act. Where the authority, actual or presumed, is wanting the sale is void. The Privy Council have recently pointed out that an alienation by a *de facto* guardian without authority is void and that to such an alienation Article 44 of the Limitation Act does not apply, *Mata Din* v. *Sheikh Ahmad Ali* (3).

(1) 19 B. 331.

(2) 6 M. I. A. 393 (P. C.); 18 W. R. 81*n*; Sevestre 258*n*; 19 E. R. 147; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552.

(3) 13 Ind. Cas. 976; 14 Bom. L. R. 152; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 15 C. L. J. 270; 9 A. L. J. 215; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6; 39 I. A. 49.

If the mother's alienation was void, it seems clear that the intermediate purchasers are not necessary parties; who is a necessary party appears from Order I, rule 3, and Order I, rule 10. There are, as stated in *Durga Charan Sarkar* v. *Jotindra Mohan Tagore* (4), two conditions to be satisfied, "*first*, there must be a right to some relief against him in respect of the matter involved in the suit, and *second*, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." It is clear that neither condition makes any of the intermediate purchasers a necessary party, for the plaintiff claimed no relief against any of them and the question of the title and right of possession to the land could be decided without their presence. As pointed out in *Guruvayya* v. *Dattatraya* (5), "section 22 of the Limitation Act does not of itself purport to determine whether the joinder of parties after the institution of the suit shall in all cases necessarily involve a bar of limitation. Such a result must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given on the suit as framed". Here the relief sought was against Dyalmal and could be awarded in the suit as originally framed.

I would accordingly confirm the decree of the lower Appellate Court and dismiss these appeals with costs.

CROUCH A. J. C.—On the 18th January 1892, there died one Sirumal leaving him surviving a son Karmumal, then a few months old, and a widow Vinjhibai, a young woman about 18 years of age. At the time of his death Sirumal possessed four houses, of which three form the subject of Suit No. 466 of 1912 in the Sub-Court of Sehwan out of which these appeals arise. The 4th was dealt with in Suit No. 647 of 1912. On the 26th April 1912, Vinjhibai sold one of the houses to Manghamal (respondent No. 4); the property was re-sold several times until it was finally purchased by Dyalmal, now deceased. Dyalmal's legal representatives were defendants Nos. 2 to 5 and are appellants in this appeal. Respondents Nos. 4 to 9 defendants (Nos. 6 to 11) are the intermediate purchasers.

(4) 27 C. 493.

(5) 28 B. 11; 5 Bom. L. R. 618.

GEHIMAL DYALMAL *v.* KARMOOMAL SIROOMAL.

On the 10th June 1893, Vinjhibai sold the other two houses to Dyalmal. Thus, all three houses were at date of suit in the hands of appellants.

In the suit out of which this appeal arises Karmumal with Rijhumal, who has purchased a six-anna's share, seeks to recover possession of the three houses on the ground that Vinjhibai was minor when she sold the properties and that she was under no legal necessity to sell them. It is alleged that Karmumal was born on the 30th June 1891, and came of age on the 30th June 1909, and that the suit having been filed on the 28th June 1912 is within time.

As the defendants Nos. 6 to 11 were joined as defendants after the institution of suit at a date when any suit against them was time-barred, the original Court, finding that they were necessary parties, dismissed the suit as time-barred as against all the defendants as regards the first house.

The same Court held that Karmumal was born on the 30th June 1891 and that the suit was in time so far it concerned the other two houses, and that no legal necessity for the sale by Vinjhibai had been established. The learned Judge also expressed the opinion that Vinjhibai was under the age of 18 at the time of the sale of the first house. There was a decree for possession in respect of the two houses as against defendants Nos. 2 to 5 and the suit was dismissed as regards the first house.

Both plaintiffs and defendants Nos. 2 to 5 appealed. In plaintiffs' appeal (No. 109 of 1914) the lower Appellate Court held that defendants Nos. 7 to 11, the intermediate purchasers of the first house, were not necessary parties and reversed the decree of the lower Court so far as it related to the first house. It also held that no legal necessity for the sale to Dyalmal had been established.

In the defendants' appeal, the Court, after stating that the only issue which arose was whether Karmumal was born on the 30th June 1891, found in the affirmative and dismissed the appeal.

The representatives of Dyalmal, defendants Nos. 2 to 5, now appeal against both judgments. Mr. Lalchand who appears for appellants asks the Court to consider the following points:

1. Was the suit time-barred as regards the first house?

2. Was it time-barred as regards the two houses?

3. Was the finding as to the age of Karmumal correct?

4. Should not compensation be allowed to appellants?

No claim to compensation was made in the original Court, or in the lower Appellate Court, nor has any reference been made to it in the memorandum of appeal; therefore, the claim cannot now be entertained.

If the age of Karmumal as found by both the lower Courts was correct, then the suit as regards the two houses was within time. We have concurrent findings of fact as to the age of Karmumal and cannot re-open the question. The only point, therefore, which calls for serious discussion in this appeal is the first one.

Mr. Lalchand contends that Vinjhibai sold the house as guardian of Karmumal; that there is no clear finding by the lower Courts that there was no legal necessity; that even if there were no legal necessity the transaction was voidable and not void; that no suit for possession could lie until the sale by Vinjhibai had been set aside; that in a suit to set aside the sale the original purchaser, Manghamal, was a necessary party, and that as he had not been joined until after the period of limitation had passed the suit was time-barred. He also contends that as the evidence in Suit No. 647 of 1912 was by agreement evidence in the suit out of which this appeal arose, and that as that suit had been remanded for further evidence, the present suit should also have been remanded.

In the judgment of the original Court it is stated: "The defendants have made no serious attempt to prove that there was no legal necessity for the sale to Dyalmal". Though these words had special reference to the sale of the two houses, they applied also to the first house. In the judgment of the lower Appellate Court this finding seems to be clearly confirmed. Mr. Lalchand has not attempted to show that there was any evidence whatever of legal necessity or that there was any ground for referring it back for a finding of the point.

The contention that this case should be remanded because the other case, of which the depositions were by agreement to be evidence in this case, also was referred back for further evidence, cannot be seriously entertain-

ed. It was open to the parties at the hearing to call any further evidence they chose; they were not restricted by the conduct of the other case.

If Vinjhibai was a minor at the time when she purported to sell her son's property, as alleged by plaintiff, then the sale would have been by some one who was in no legal sense the guardian, and Article 44 would have no application. But, under Hindu Law, Vinjhibai, if of age, was the natural guardian of her son's property and, if she sold any portion of it for good consideration, but in excess of her powers, inasmuch as there was no legal necessity, then the defendant was, in my opinion, entitled to the benefit of Article 44. [See *Satish Chandra Guha* v. *Chander Kant Pyne* (6) and *Sham Chandra Dafadar* v. *Godadhar Mandal* (7).] The use of the words "void" and "voidable" in connection with Article 44 is misleading, for suits lie to set aside void sales, and where a sale is voidable a plaintiff can sue for possession, exercising his right to avoid the sale by an overt act of election implied by such suit. See *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (8). But in determining the scope of Article 44 the High Courts of India have found the division of sales into void and voidable a convenient one.

The question, however, whether the sale was void or merely voidable is one that we need not consider; for even if it be conceded that it was voidable only, and that Article 44, had application, the suit would be barred only if the intermediate purchasers were necessary parties. But they were not necessary parties. Plaintiffs asked for and desired no relief against them. They were not in possession of the property or of the deed of sale, there was no outstanding estate vested in them, they claimed no interest in the property. They were joined merely to enable the Court to finally decide the question whether the sale was void or voidable, not merely as between the plaintiff and the representatives of Dyalmal, but as between the latter and other intermediate parties.

I would dismiss both appeals with costs.

Appeals dismissed.

(6) 3 C. W. N. 278.
(7) 9 Ind. Cas. 377; 13 C. L. J. 277.
(8) 34 C. 329 (P. C.); 9 Bom. L. R. 602; 11 C. W. N. 424; 5 C. L. J. 334; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 339; 34 I. A. 87.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1685 OF 1914.
April 11, 1916.
Present:—Mr. Justice Mullick.

FAKIRA LAL SAHU—PLAINTIFF—APPELLANT
versus
Munshi RAM CHARAN LAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 142—Presumption of possession from title—Both sides' evidence unworthy of credit—Arable land—Suit for possession—Limitation—Burden of proof.

The presumption of possession from title arises only in cases where the evidence of possession is equally strong on both sides. This principle does not apply to cases in which the evidence is equally unworthy of credit on both sides except in respect of land of a special character, such as waste, jungle or land under water. In case of arable land, in the absence of evidence on either side as to possession, the presumption arising from title does not save limitation under section 142 of the Limitation Act. [p. 555, col. 1.]

Second appeal from a decision of the District Judge, Saran, dated 23rd March 1914, confirming that of the Munsif, Chapra, dated the 18th September 1913.

Mr. *Sailendra Nath Palit* for Mr. *S. N. Guha*, for the Appellant.

Mr. *Kulwant Sahay* for Mr. *Harihar Prasad Sinha*, for the Respondent.

JUDGMENT.—It is admitted that the plaintiffs have proved their title to the land. The only question is whether the plaintiffs have proved possession within 12 years of the suit. The land is arable land and capable of the ordinary modes of possession. Both parties adduced evidence of cultivation and the Munsif found the plaintiffs' evidence worthless and that of the defendant good, and held that the plaintiffs had not proved possession within 12 years. On appeal the District Judge finds that the evidence for the defendant is "very poor", by which I presume he means that it cannot be believed, and then he says that "the plaintiff has the misfortune of not having anything better on his own side and his oral evidence of possession is not good enough to support a decree." By this he means, I presume, that the plaintiffs' evidence is equally unworthy of credit. Therefore, the position which the learned Vakil for the appellant maintains before me is that the evidence of possession being equally balanced on both sides, the presumption of possession following title

should prevail. But that presumption arises only in cases where the evidence is equally strong on both sides, that is to say, when there is some evidence on both sides which the Court believes and where, by reason of that evidence being equally balanced on both sides, it is extremely difficult to decide the dispute satisfactorily. But the principle does not apply to cases in which the evidence is equally unworthy of credit on both sides except in respect of land of a special character, such as waste, jungle or land under water. The case of *Thakur Singh* v. *Bhogeraj Singh* (1) following the Full Bench ruling in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (2), is authority for this proposition. So also is the judgment of the Privy Council in *Babu Kasturi Singh* v. *Rajkumar Babu Bissun Pragas Narain Singh* (3), but there is no case which goes so far as to lay down that when there is an absence of evidence on both sides in respect of arable lands, the presumption from title is to operate to save limitation under Article 142 of the Limitation Act. It may be said that in principle there is no difference between ordinary lands and waste and jungle lands, but we are bound by the decisions of the Court, and although there are some expressions in *Babu Kasturi Singh* v. *Rajkumar Babu Bissun Pragas Narain Singh* (3) which might support the argument of the learned Vakil for the appellant before me, I do not think that the case goes as far as the learned Vakil maintains.

Appeal dismissed.

(1) 27 C. 25.
(2) 9 C. 744 (F. B.); 12 C. L. R. 257.
(3) 8 C. W. N. 876.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 2087 OF 1913.
January 21, 1916.
Present:—Mr. Justice Rattigan and Mr. Justice Leslie Jones.
Musammat SARDAR BEGAM—DEFENDANT—APPELLANT
versus
MUHAMMAD SHARIF AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Whether plaintiff's father's consent was bona fide, if question of fact—Consent, whether sufficient cause of action—Denial of plaintiff's right in written statement, effect of.

On the death of one of three brothers holding an estate in equal shares, his widow succeeded to a life-interest in her husband's share. A part of the estate having been acquired by Government, the widow's share of the purchase-money was paid to her with the consent of her brothers-in-law. Their minor sons then sued for declarations that the widow was only entitled to use by way of maintenance the income of the sum which she received as compensation, and that after her death the plaintiffs should be entitled to the capital and for an injunction restraining the defendant from using the capital during her lifetime. Both the lower Courts having decreed the plaintiffs' claim, the defendant preferred a second appeal to the Chief Court:

Held, (1) that the question whether the consent of the plaintiffs' fathers was given *bona fide* was one of fact and could not be argued in second appeal: [p. 556, col. 1.]

(2) that although the mere fact that their fathers consented to allow the widow to receive the compensation in cash, gave the plaintiffs no cause of action, provided that the welfare of the estate was not threatened, yet in view of the plaintiffs' allegation that the defendant set herself up as full owner and her reply that the plaintiffs had no right in the property, it could not be said that the plaintiffs had no cause of action. [p. 556, cols. 1 & 2.]

Bindoo Bassinee Dossee v. *Bolie Chand Sett*, 1 W. R. 125; *Musammat Prab Devi* v. *Harkishn Das*, 47 P. R. 1884; *Subba Reddi* v. *Chengalamma*, 22 M. 126; 9 M. L. J. 19, distinguished.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 10th June 1913.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

Messrs. *Oertel* and *Nabi Bakhsh*, for the Respondents.

JUDGMENT.—Muhammad Shafi, Muhammad Hafiz and Muhammad Hanif were three brothers holding an estate in equal shares. On the death of Muhammad Hanif his widow *Musammat* Sardar Begam succeeded to a life-interest in her husband's share of the estate. In 1910 a part of the estate was acquired by Government under the Land Acquisition Act, the widow's share amounting to Rs. 6,115-2-3.

In spite of the provisions of section 32 of the Land Acquisition Act this sum was paid to the widow in cash by the Land Acquisition Officer with the consent of her brothers-in-law.

The present suit was instituted by the minor sons of Muhammad Shafi and Muhammad Hafiz for declarations that the widow

is only entitled to use by way of maintenance the income of the sum which she received as compensation and that after her death plaintiffs shall be entitled to the capital, and for injunctions restraining the defendant from using the capital during her life and requiring her to deposit the amount in some Bank to be selected by the Court, or to so invest it that there will be no danger of its being used or squandered during defendant's lifetime. The plaintiffs obtained a declaration that the defendant was only entitled to deal with the property in question in the same way as she was entitled to deal with the land, an injunction prohibiting her from dealing with it otherwise, and a further injunction directing her to deposit or invest the amount as prayed by the plaintiffs.

The defendant preferred an appeal to the Divisional Judge who maintained the decision of the first Court, and the defendant has now lodged a second appeal in this Court.

The learned Advocate for the defendant-appellant has argued two points only. The *first* is that the plaintiffs-respondents were bound by the consent of their fathers.

Both Courts have found as a fact that the consent of the plaintiffs' fathers was not given *bona fide*. But Mr. Shafi contends that a wrong inference has been drawn from the facts in evidence and that, therefore, he is able to argue this question on second appeal as a point of law. With that contention we do not agree, but even if the case could be so argued, we have no hesitation in saying that in our opinion the decision of the lower Courts on the question of fact was perfectly correct. It is no doubt true that the fathers of the plaintiffs were not actuated by any desire to injure their sons, but at the same time their action in consenting to allow this large sum to be made over to their brother's widow in direct contravention of the provisions of the Act was so wholly unreasonable that it is impossible to regard their consent as being of *bona fide* character. We agree, therefore, with the lower Courts that the plaintiffs are not estopped from suing by their fathers' consent.

Mr. Shafi's *second* point is that, even if it be granted that the plaintiffs are not so bound, the mere fact that their fathers consented to allow the widow to receive the compensation in cash, provides the plaintiffs with no cause of action provided that the welfare of the estate has not been threatened by the widow, and in support of this proposition he has cited *Bindoo Bassinee Dossee* v. *Bolie Chand Sett* (1); *Musammat Prab Devi* v. *Harkishn Das* (2) and *Subba Reddi* v. *Chengalamma* (3). In the abstract, no doubt, this proposition is quite correct. The plaintiffs have no more right to bring a suit regarding this money than they would have had if the property had remained in the shape of land. The argument, however, fails when we come to look at the facts. It was stated in paragraph 9 of the plaint that the defendant denies that the plaintiffs have any right, present or reversionary, in the property and that she sets herself up as the full owner and threatens to use the capital. It is true that no evidence to this effect was tendered in Court, but it was unnecessary in view of the terms of paragraph 9 of the pleas. The defendant there asserted that the plaintiffs had no right in the property and that she herself had every right to spend properly the compensation money which she had been awarded. Having regard to the text we are unable to hold that by the word 'property' she meant merely that she was entitled to spend the capital for necessity of the kind which would justify her in alienating land; and we think that it is clear from her own pleas that she had in fact set up an absolute title and threatened to use the capital in a manner which would not be warranted by custom, and in view of the attitude which she has taken, we are of the opinion that the decree granted by the District Judge is no more than is required to safeguard the property in the interest of the reversioners.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 1 W. R. 125.
(2) 47 P. R. 1884.
(3) 22 M. 126; 9 M. L. J. 19.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3612 OF 1913.

April 12, 1916.

Present:—Mr. Justice Chitty and Mr. Justice Walmsley.

KHIRODE CHANDRA ROY—DEFENDANT No. 1—APPELLANT

versus

Srimati ASHTULLA BEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *ss.* 13, 108, 311—Res judicata—*Suit to set aside* ex parte *decree on ground of fraud, if barred, when application under s.* 108, *Civil Procedure Code, on same ground rejected.*

Where a question of fraud has been properly raised and determined in an application under section 108 of the Civil Procedure Code, 1882, to set aside an *ex parte* decree, the same question cannot be re-opened by the applicant in a suit subsequently brought by him to set aside the *ex parte* decree on precisely the same ground. [p. 561, col. 1.]

Bal Kishan Lal v. *Topeswar Singh*, 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219, not followed.

Appeal against the decree of the Officiating Additional District Judge, Hughly, dated the 7th June 1913, reversing that of the Munsif, 2nd Court, Howrah, dated the 20th February 1912.

FACTS material to the report will appear from the judgment of the High Court and from the following extracts from the judgment of the first Appellate Court:—

"The suit out of which this appeal arises is to set aside a rent-decree passed on 20th June 1899, and the execution proceedings which followed culminating in the sale of the property in question on 18th November 1899, on the ground of fraud. The plaintiffs allege that they became aware of the fraud on 17th September 1907. The present suit was brought on the 17th July 1909.

Defendant No. 1 brought the suit for rent, the decree passed in which is now sought to be set aside. The defendant No. 2 is his brother and is also a Pleader of the Court in which that suit was brought. Defendant No. 3 is a relation of theirs and a Mukhtear of the same Court. The three were members of a joint Hindu family up to 1309.

The case, set forth in that Court, is that no summons was served in the required names but one was sent to the plaintiffs' house by defendant No. 3, whereupon the present plaintiff No. 3 came to Court and saw defendant No. 2 and paid him Rs. 50 in full satisfaction of the claim upon his promising to see that the suit would be withdrawn; that the defendant No. 2, besides being defendant No. 1's brother and interested in the property with defendants Nos. 1 and 3, was also defendant No. 1's Pleader in that suit and was entrusted with its conduct; that subsequently another co-sharer landlord named Erfan-ud-din Mallick obtained a decree for rent against the plaintiffs which he put into execution, whereupon defendant No. 1 preferred a claim to the property in question as auction-purchaser thereof; that it was thereupon that they first became aware of this fraudulent decree and auction-purchase; that they then applied to set aside the *ex parte* decree and the sale but were unsuccessful and that they, therefore, bring this regular suit for the purpose of obtaining the necessary declarations, possession being still with them.

The defence material to this appeal is that there was no fraud and everything was *bona fide*; that there was no promise to withdraw from the suit and there was no payment of Rs. 50 as alleged; that Rs. 50 was indeed paid to defendant No. 2 but not for the purpose alleged, but on account of the rent suit brought by Erfan-ud-din Mallik and that the suit is *res judicata* and time-barred.

The learned Munsif has dismissed the plaintiffs' suit.

Hence the plaintiffs' appeal.

[After discussing the evidence and the circumstances of the case, the learned Officiating Additional District Judge came to the findings of fact that fraud as alleged by the plaintiffs was established and that the suit was within time, as they were kept out of knowledge of the fraud by the defendants. As regards the question of *res judicata*, he observed:]

"The third point for consideration is whether the present suit is barred by *res judicata* or not maintainable by reason of the plaintiffs' applications under sections 108 and 311, Civil Procedure Code, having been rejected.

The learned Munsif has held it is not.

I think so too.

The cases of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and *Ram Gopal Majumdar* v. *Prasanna Kumar Samad* (2) have been cited

(1) 8 C. 51; 11 C.L.R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249.

(2) 2 C. L. J. 508; 10 C. W. N. 529.

for the defendants and those of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (3); *Radha Raman Shaha* v. *Pran Nath Roy* (4); *Khagendra Nath Mahata* v. *Pran Nath Roy* (5); *Golab Koer* v. *Badshah Bahadur* (6) and *Bal Kishan Lal* v. *Topeswar Singh* (7) for the plaintiffs. I think the cases quoted for the defendants have no application. The question for consideration upon the application under section 108, Civil Procedure Code, was a very limited one, namely, whether there had been served no summons or the applicants had been prevented from appearing at the hearing by any sufficient cause. It is quite conceivable that even if fraud like that alleged in this suit be alleged in an application under section 108, Civil Procedure Code, the application may be dismissed on the finding that the remedy by such application is time-barred or that though there might be an understanding of the kind alleged, yet it was the duty of the applicant to appear in the suit on the date fixed and see that the understanding was duly carried out. But the rejection of an application of this kind on such ground ought not to bar the trial of the question, whether the violation of the understanding and the obtaining of an *ex parte* decree by means of such violation are not fraud which vitiates the decree and renders it liable to be set aside on that ground. Furthermore, the view that a regular suit is the preferable, though not the exclusive, remedy in a case in which an *ex parte* decree and a sale on the basis of it are assailed on the ground of fraud, is well-founded on principle and is supported by weighty authorities, as pointed out in the cases quoted for the plaintiffs. The enquiry required upon an application under section 311, Civil Procedure Code, is also limited in its scope. I, therefore, think that the present suit is not barred by reason of the plaintiffs' unsuccesful applications under sections 108 and 311, Civil Procedure Code, the scope of both of which was so limited. * * * * * * * * * * * * * * * * * *"

(3) 24 C. 546.
(4) 28 C. 475; 5 C. W. N. 757.
(5) 29 C. 395; 6 C. W. N. 473; 4 Bom. L. R. 363; 29 I. A. 99; 8 Sar. P. C. J. 266.
(6) 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197.
(7) 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219.

The appeal was decreed and the decision of the Munsif reversed. The defendant then appealed to the High Court and the first two grounds taken in the memorandum of appeal were that the Court of Appeal below ought to have held that the suit was barred by *res judicata* and that it was not maintainable by reason of the plaintiffs' applications under sections 108 and 311, Civil Procedure Code, 1882, having been rejected.

Babu *Manmatha Roy*, for the Appellant.—The suit to set aside the *ex parte* rent-decree and the execution proceedings is barred by *res judicata*. There having been previous applications by the plaintiffs' predecessor in 1908 to set aside the rent-decree and the execution proceedings under sections 108, 244 and 311, Civil Procedure Code, 1882, on identical grounds which have been dismissed, the plaintiffs cannot re-agitate the same question in the present suit. See *Niadar Mal* v. *Raunak Husain* (8), *Puran Chand* v. *Sheodat Rai* (9) and the observation of the Judicial Committee in *Rajwant Prasad Pande* v. *Mahant Ram Ratan Gir* (10). The question of fraud on which this suit is based was properly within the scope of the previous application and was, as a matter of fact, enquired into and found against the plaintiffs' predecessor.

The cases referred to by the learned District Judge in support of his view are clearly distinguishable. In the Privy Council case of *Khagendra Nath Mahata* v. *Pran Nath Roy* (5) the suit itself was attacked as fraudulent and there was no allegation of fraud made in the application to set aside the *ex parte* decree. In the case of *Radha Raman Shaha* v. *Pran Nath Roy* (4) Lord Hobhouse distinctly observed that it was impossible to say that the matter alleged to be fraudulent in the suit came in any way before the Court in the application under section 108, Civil Procedure Code, 1882.

In the case reported as *Pran Nath Roy* v. *Mohesh Chandra Moitra* (3) it appears from the judgment that the plaintiff's case was that the defendant's suit was a fraud in its inception, see page 549.*

(8) 29 A. 608; A. W. N. (1907) 191; 4 A. L. J. 668.
(9) 29 A. 212; A. W. N. (1907) 31; 4 A. L. J. 51.
(10) 30 Ind. Cas. 849; 13 A. L. J. 937; 29 M. L. J. 165; 2 L. W. 671; 18 M. L. T. 173; 17 Bom. L. R. 754; 37 A. 485; 20 C. W. N. 35; (1915) M. W. N. 736; 23 C. L. J. 55; 42 I. A. 171 (P. C.).

*Page of 24 C.—*Ed.*

In the recent case of *Bal Kishan Lal* v. *Topeswar Singh* (7) Mr. Justice Mookerjee stated the proposition somewhat too broadly; the Privy Council cases to which he referred do not seem to justify such a general proposition. Besides that case is no authority for the present case as the facts are not similar. The decision in *Ram Gopal Majumdar* v. *Prasanna Kumar* (2) is still good law, although it goes too far and brings such cases within the purview of constructive *res judicata*.

Babu *Dwarkanath Chakraburty* (with him Babu *Nagendra Nath Ghosh*), for the Respondents.—There could be no *res judicata* if the scope of the previous infructuous proceedings under sections 108, 244 and 311, Civil Procedure Code, was such that the question raised in this suit could not be decided.

Referred to *Khagendra Nath Mahata* v. *Pran Nath Roy* (5). The fraud in the present case consisted of the circumstance that although the then plaintiff took the money promising to make a settlement with the then defendant (the present plaintiff), he did not do so but managed to secure an *ex parte* decree. The only question in the application to set aside the *ex parte* decree was whether appearance of the defendant was prevented by fraud. But the present suit is based on a different ground of fraud.

[CHITTY, J.—The fraud consisted in keeping the defendant away from the suit—that is quite within the scope of section 108. The test is whether the fraud could be enquired into and was in fact gone into.]

The case in *Bal Kishan Lal* v. *Topeswar Singh* (7) supports my contention.

[CHITTY, J.—There was no adjudication, the application was dismissed for default.]

There are two distinct frauds, one was practised upon me and the other upon the Court. The fraud in the suit is not the same which was alleged and inquired into in the application.

JUDGMENT.—In this case the original plaintiff Kasimji Adamji, whose heirs are now the plaintiffs on the record, sued for a declaration that the decree in Suit No. 188 of 1899 in the Court of the fourth Munsif of Howrah and the execution proceedings resulting on that decree should be set aside as fraudulent, and the plaintiff confirmed in possession of the land described in the schedule to the plaint. The sole question arising in this second appeal is whether the present suit is barred by reason of an order under section 108 of the Civil Procedure Code of 1882 dismissing an application of the present plaintiff to set aside the *ex parte* decree in Suit No. 188 of 1899. The Court of first instance found that there was no fraud on the part of defendant No. 1 in obtaining the *ex parte* decree, and that no payment was made to the defendant No. 2, as alleged, for the purpose of getting the suit withdrawn. As to the execution proceedings, that Court was of opinion that no fraud had been established. It also found that the plaintiffs' predecessor-in-title knew of the auction-sale and of the possession being delivered to the defendants before the date when it was alleged that that fraud had become known to him, and it accordingly found that the suit was barred by limitation. On appeal by the plaintiff, the lower Appellate Court found that the fraud relied upon by the plaintiff was satisfactorily established, and that the suit was within time, having been brought within three years of the date when the fraud was discovered. On the third point, which is the point before us, the learned Additional District Judge found that the suit was not barred by reason of the plaintiffs' unsuccessful applications under sections 108 and 311 of the Civil Procedure Code of 1882. He accordingly allowed the appeal and gave the plaintiff a decree. Against that the defendant No. 1, Khirode Chandra Roy, has appealed to this Court. His interests are the same as those of defendants Nos. 2 and 3.

A number of cases have been cited before us. It was held by this Court in the case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (3) that the fact of the plaintiff having applied unsuccessfully under sections 108 and 311 of the Civil Procedure Code of 1882, did not bar the suit then before the Court, which was for setting aside a decree as fraudulent. That case and a cognate case went upon appeal to Her Majesty in Council. The case just referred to is reported as *Radha Raman Shaha* v. *Pran Nath Roy* (4). There their Lordships of the Judicial Committee said that they had nothing before them but the bare fact that the plaintiff had endeavoured to get an *ex parte* decree set aside under section 108, Civil Procedure Code, under which the Court might try who-

ther the summons had been served or whether the plaintiff had been prevented by any sufficient cause from appearing. It was, therefore, impossible for them to say that the matter now alleged as fraudulent came in any way before the Court under the application which was made by virtue of section 108. In the cognate case of *Khagendra Nath Mahata* v. *Pran Nath Roy* (5) more particulars were laid before their Lordships. Lord Robertson, who delivered the judgment of the Court, said: "It is, therefore, necessary to ascertain what are the true grounds and scope of the present suit, in order to see whether the refusal of the applications under the sections specified had already determined the questions now raised." After setting out the allegations made by the plaintiff he said: "These allegations are plainly an attack, not on the regularity or sufficiency of the service or the proceedings, but on the whole suit as a fraud from beginning to end." The Privy Council accordingly held that the limited orders under sections 108 and 311 would not bind the plaintiff in that suit, where the whole suit itself was attacked as a fraud. In the case of *Bal Kishan Lal* v. *Topeswar Singh* (7) the learned Judge remarked: "It is now well settled by the decision of the Judicial Committee" (in the cases to which we have just referred) "that it is open to a plaintiff, whose application to set aside an *ex parte* decree under section 108 and the sale consequent thereon under sections 244 and 311 of the Code of 1882 have been infructuous, to maintain a suit to set aside the decree on the ground of fraud or for any other valid reason." If the judgment of the Judicial Committee to which we have just referred be carefully read, it will be seen that that proposition is too broadly stated. In that case, however, it was obvious that the order under section 108 could not bind the plaintiff. The plaintiff was a minor at the date of the original decree and was not represented by any guardian. Some person, it does not appear who, made an application on behalf of the plaintiff while he was still a minor to have the *ex parte* decree set aside. That application, however, was dismissed for default, and a later application to restore it was subsequently rejected. Obviously the plaintiff in that case could not be said to be bound by the order, which had been made nominally against him when he was a minor and unrepresented. The case of *Golab Koer* v. *Badshah Bahadur* (6), to which reference was made, has really no application to the present case as the point there was whether an order made under section 623 declining to review a decision would bar a subsequent suit. The two cases do not rest upon precisely the same footing. The true test seems to be whether the fraud, in respect of which it is sought to set aside the decree, was a question which was properly in issue in the application under section 108. It seems unnecessary to consider the question of the application under section 311. If the decree can be set aside in this suit, the execution proceedings consequent upon it would likewise be set aside. If the decree stands, then the decision of the application under section 311 would rest upon its own facts and upon its own merits. It seems, therefore, necessary to see what the fraud actually alleged by the plaintiff was. A perusal of the first 7 paragraphs of the plaint shows that the fraud alleged in this case was not in the rent suit itself but was the deceit practised upon the plaintiff, or rather upon his son, by which the then plaintiffs secured the absence of the present plaintiff Kasimji Adamji on the date that the suit came on for hearing. The allegation was that Salebhoy Kasimji had gone to the Pleader and had paid him Rs. 50 on account of the claim which was just under that sum and the Pleader, who was the brother of defendant No. 1, had promised that he would get the suit withdrawn. Instead of doing that the defendant No. 1, aided by defendant No. 2, his brother the Pleader, and defendant No. 3, applied for and obtained an *ex parte* decree. There was in this case no doubt that the money was due as claimed by the plaintiff. The Court which tried the application under section 108 found that the plaintiff had failed to prove the arrangement made by Salebhoy Kasimji with the Pleader for the withdrawal of the suit or that the Rs. 50 was paid. The application under section 108 was accordingly rejected, as it appeared that the plaintiff Kasimji Adamji was well aware of the suit and of the date when it would come on for hearing. That appears to be the precise fraud, on which it is now sought to set aside

that decree. An attempt was made by the learned Pleader for the plaintiff to argue that the fraud in obtaining the decree was not that, but was the false swearing that money was due when, as a fact, it was not due. That, however, is not correct. The fraud alleged was the deceit which was practised upon the plaintiff's son, and which, no doubt, facilitated the passing of the *ex parte* decree. We have not been referred to any case in this Court precisely in point, but there are two cases decided by the Allahabad High Court in which this distinction has been drawn. In the case of *Puran Chand* v. *Sheodat Rai* (9) it was pointed out that the only real fraud alleged was connected with the non-service of summons. That was a fraud which could be and was decided in the application under section 108. It was, therefore, held that the plaintiff could not be allowed to again litigate that question in a subsequent suit. The Privy Council cases above referred to were distinguished on that ground. In *Nixdar Mal* v. *Raunak Husain* (8) the same view was taken. There the suit was brought by the plaintiff to set aside a decree on the ground of fraud, the fraud alleged being that the suit had been improperly instituted against the plaintiff as of full age when he was, in fact, a minor. In the application under section 108, that question was gone into and was found against the plaintiff. It was held that he could not be allowed to re-open that question in a subsequent suit. If the remarks of Lord Robertson to which we have above referred, be read carefully, it will be seen that their Lordships clearly anticipated that the refusal of applications under sections 108 and 311 might determine the question of fraud on which the subsequent suit was based. The point in every case must be whether such questions have been properly raised and determined on such applications. In the case before us, the fraud alleged and sought to be proved, was clearly the prevention of Kasimji Adamji, the original plaintiff, from appearing as defendant in the previous suit. That was found against him in his application under section 108 after a full trial, and we are of opinion that he cannot be allowed to re-open it in the present suit in which he seeks relief on precisely the same grounds.

We accordingly allow the appeal and order that the plaintiff's suit do stand dismissed with costs in all the Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 634 OF 1913.

January 17, 1916.

Present:—Mr. Justice Shah Din.

SHIB DIAL—PLAINTIFF—APPELLANT

versus

MATHRA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom or personal law—Bhandari Khatris *of Jalalabad, Amritsar District—Custom, proof of—Presumption in case of high caste Hindus.*

Each case of alleged custom has to be decided primarily upon the proof actually adduced in that case and not upon *a priori* grounds. [p. 563, col. 1.]

Where the parties concerned are high caste Hindus not depending for their subsistence on agriculture, the presumption in the first instance is in favour of the applicability of Hindu Law to the exclusion of custom. [p. 563, col. 1.]

Bhandari Khatris of *Mauza* Jalalabad, Amritsar District, are, in matters of succession, governed by ordinary agricultural custom, and not by their personal law. [p. 562, col. 1.]

Mussammat Pal Devi v. *Fakir Chand*, 60 P. R. 1895; *Harnam Singh* v. *Devi Chand*, 107 P. R. 1901; 117 P. L. R. 1901, distinguished.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 21st January 1913.

Bakhshi *Tek Chand*, for the Appellant.

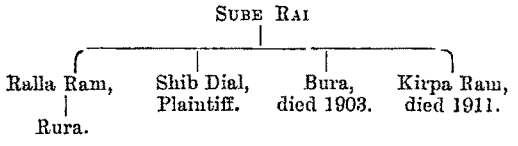
Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—A return has now been received to this Court's order of remand dated the 22nd December, 1914. Both the Munsif, who conducted the enquiry, and the District Judge, through whom the record has been re-submitted to this Court, have concurred in holding that in the matter of succession the parties are governed by ordinary agricultural custom and not by their personal law, and that, therefore, the plaintiff Shib Dial, though a nearer reversionary collateral of Chamman Mal, vendor, would not exclude the remote reversioner Mathra Das, vendee, from succession to the land in suit.

The District Judge has discussed in his return five instances of succession among the *Bhandari Khatris* of Jalalabad as dis-

closed by mutation entries in the revenue records of the village; and he has shown that in each of these instances the collaterals of the male proprietor concerned succeeded to the landed property according to the rule of representation recognised by custom and that the nearer collateral did not exclude the more remote.

Two of the instances relate to the family of the parties. The following pedigree-table is material:--



Bura died in 1903, leaving two brothers, Shib Dial, who is plaintiff in the present case, and Kirpa Ram, and a nephew Rura. The land left by Bura was mutated in the names of all three in equal shares. This is the first instance of succession in the family. The second instance is that of succession to the land left by Kirpa Ram who died in 1911. His estate was mutated in the names of Shib Dial, plaintiff, and his nephew Rura in equal shares. The remaining three instances relate to the village in which the parties reside, and the facts as stated by the District Judge by reference to the several pedigree-tables given in his return have not been disputed before me.

We may, therefore, take it as proved that there are no less than five authenticated instances of succession to landed property among the *Bhandari Khatris* of Jalalabad, which show that in the matter of inheritance relating to land they are governed by custom and not by Hindu Law. The plaintiff has been unable to cite one single instance to show that the Hindu law of succession has ever been followed either in his own family or among other families of *Bhandari Khatris* in Jalalabad so far as succession to landed estate is concerned. The only criticism of the above-mentioned instances that has been made by the plaintiff's learned Pleader is that the collaterals, who are said to have succeeded together to the landed estate of the male proprietor concerned in each of those instances, might have been members of a joint Hindu family, and that as such they would succeed equally irrespective of the nearness or remoteness of their relationship to the male proprietor. No such suggestion appears to have been made in the Courts below even as regards the two instances in his own family in which the plaintiff Shib Dial was directly concerned, and I cannot give any weight to his learned Pleader's argument relating to this part of the case.

It is next contended by him, on the authority of *Musammat Pal Devi* v. *Fakir Chand* (1) and *Harnam Singh* v. *Devi Chand* (2), that *Bhandari Khatris* follow Hindu Law and not agricultural custom, and that the few instances proved and relied upon by the opposite party in this case are insufficient to establish the applicability of custom regarding succession to landed property among members of this tribe. Now, *Musammat Pal Devi* v. *Fakir Chand* (1) was a case in which the parties were *Bhandari Khatris* of Batala in the Gurdaspur District, and it was held by this Court that they followed Hindu Law, under which the widow of the last male proprietor was entitled for her life to a share equal to that of a son of the proprietor upon the estate being divided among the sons. The actual decision has, therefore, no bearing upon the present case. But it was observed that in a case in which the parties are by caste Hindus of good position and residents of a town, and, though holding land, non-agriculturists, depending for their livelihood on avocations other than cultivation of land, while the Courts should see in the first instance whether there is any custom bearing on the question in issue relating to inheritance, alienation, etc., no presumption should be made in favour of the existence of such custom, which will have to be established by the evidence of the parties. This principle was followed in *Harnam Singh* v. *Devi Chand* (2), which was a case of an alienation among the *Bhandari Khatris* of Verowal, a town in Tarn Tarn *Tahsil*; and it was there held that upon the evidence adduced in that case the plaintiff had failed

(1) 60 P. R. 1895.
(2) 107 P. R. 1901; 117 P. L. R. 1901.

to establish that a sonless *Bhandari Khatri* of Verowal was governed by custom prohibiting alienation by him of ancestral land without the consent of the collaterals.

The principle underlying the above-mentioned decisions is now well-established, namely, that each case of alleged custom has to be decided primarily upon the proof actually adduced in that case and not upon *a priori* grounds; and that where the parties concerned are high caste Hindus not depending for their subsistence on agriculture, the presumption in the first instance is in favour of the applicability of Hindu Law to the exclusion of custom.

In the present case the initial burden lay on the defendant-vendee of proving that the parties were governed by custom and not by Hindu Law; but I agree with the Courts below that he has discharged that *onus*, and it must be held that in matters of succession to landed estate custom applies to the parties and not their personal law.

It follows from the above finding that the plaintiff's right of pre-emption in respect of the land sold is not superior to that of Mathra Das, the second vendee; and I accordingly maintain the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 144 AND 143 OF 1914.

RULES NOS. 385 AND 386 OF 1914.

June 23, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

SHAIK SAHED—DEFENDANT NO. 1—APPELLANT

versus

KRISHNA MOHAN BASAK—PLAINTIFF—RESPONDENT.

Landlord and tenant—Suit for rent against all heirs of deceased tenant, if could be decreed against one of them—Contract Act (IX of 1872), s. 43, application of.

In a suit for rent brought against all the heirs of a deceased tenant, a money-decree for the entire claim cannot be made against one of them on the ground that he alone used to pay the rent as the representative of the old tenant. The defendants must be taken as one body of registered tenants holding one single holding. [p. 563, col. 2; p. 564, col. 1.]

Section 43 of the Contract Act can have no application where parties become jointly interested by operation of law in a contract made by a single person. [p. 564, col. 1.]

Rameswar Singh v. *Jaideb Jha*, 6 Ind. Cas. 387; 12 C. L. J. 591; *Jogendra Nath Roy* v. *Nayendra Narain Nandi*, 11 C. W. N. 1026, distinguished.

Kashi Kinkar v. *Satyendra Nath Bhadro*, 7 Ind. Cas. 840; 15 C. W. N. 191; 12 C. L. J. 642, followed.

Appeals against the decrees of the Officiating Sub-Judge, Dacca, dated 12th August 1913, reversing and affirming, respectively, those of the Additional Munsif of that place, dated the 27th September 1912.

Babu *Surendra Nath Das Gupta*, for the Appellant.

Dr. *Sarat Chandra Basak* (with him Babu *Chandra Sekhar Sen*), for the Respondent.

JUDGMENT.

S. A. No. 144 OF 1916.

The plaintiff, a co-sharer landlord, brought a suit for arrears of rent against defendants Nos. 1, 2 and 3, the heirs of his original tenant. Defendant No. 1 did not appear, but defendants Nos. 2 and 3 appeared and filed a written statement denying the rate of rent alleged by the plaintiff and pleading want of parties and dispossession of a part of the holding. The Court of first instance dismissed the suit for want of parties and dispossession of a part of the holding and expressed an opinion that the plaintiff had failed to prove the rate alleged by him. On appeal by the plaintiff the learned Subordinate Judge has given a money-decree against defendant No. 1 only for the entire claim. The defendant No. 1 appeals and it is contended on his behalf that the learned Subordinate Judge is wrong. The learned Subordinate Judge has held that defendant No. 1 used to pay the rent as the representative of the old tenant and is, therefore, liable to pay the whole rent, although there is no evidence that defendant No. 2 or No. 3 ever authorised him to pay rent. Now the defendant No. 1 was the eldest son of his father, defendant No. 2 being a minor and defendant No. 3 a female, and he might be taken as representing the family in their relations with the landlord and if the landlord had brought a suit against him alone as his recorded tenant, there would perhaps have been no difficulty in his obtaining a decree for the rent claimed against him alone but the landlord has chosen to sue him as

one of three tenants who stand in the place of one deceased tenant. Having brought his suit against all the heirs, he has recognised them all as his tenants and they must all be taken as one body of registered tenants holding one single holding. There is no case of a joint contract which might be enforced against any of the joint contractors, because the defendants have not made any joint contract. Section 43 of the Contract Act speaks of two or more persons making a joint promise and can have no application where parties become jointly interested by operation of law in a contract made by a single person. Reliance has been placed on the case of *Sir Rameswar Singh* v. *Jaideb Jha* (1). That was not a case in which the contract of one person was inherited by more than one; at least the report does not show that it was such a case. The observation there that "it was competent to the plaintiff to bring his suit against any number of several joint tenants" must be read as applying to the facts of that case and for all that we know, that case may have been one in which the contract of tenancy was entered into jointly by the several tenants. The same remarks may also be made as to the case of *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2). The later case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (3) is more in point, as the case was one of an inherited contract and supports the contention of the appellant. We think it was not open to the learned Judge to make for the plaintiff a case that he did not make for himself. The decree of the lower Appellate Court must, therefore, be set aside and the case sent back for a decision in accordance with law as a case against all the defendants. Costs to abide the result.

This judgment will govern Second Appeal No. 143 of 1914.

The Rules will stand discharged.

Appeals allowed; *Cases remanded*; *Rules discharged.*

(1) 6 Ind. Cas. 387; 12 C. L. J. 591.
(2) 11 C. W. N. 1026.
(3) 7 Ind. Cas. 840; 15 C. W. N. 19; 12 C. L. J. 642.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2540 OF 1914.

January 19, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

KANHAYA LAL—DEFENDANT—APPELLANT

versus

ALLIANCE BANK OF SIMLA, LTD.—PLAINTIFF—RESPONDENT.

Mortgage—Debt payable by instalments—Provision in deed enabling mortgagee to call up whole amount—Failure of mortgagor to pay first instalment—Mortgagee, whether can claim re-payment of whole debt.

On the 14th November 1912 defendant mortgaged a house to plaintiff for Rs. 15,000, which amount was to be re-paid in 5 annual instalments of Rs. 3,000 each beginning on the 1st January 1914. The deed contained a provision that the mortgagor will, 90 days after demand, pay to the mortgagee Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account current to be made up with interest and all other lawful charges. Defendant having failed to pay the first instalment, the plaintiff Bank sued to recover the whole sum then due on the footing of the mortgage with interest at the same rate until realisation:

Held, (1) that the Bank was fully entitled to sue for the amount of each unpaid instalment as soon as it fell due, and that the provision in the deed conferred on the Bank the further right to call up the whole amount of the debt whenever it thought fit and whether or no there had been any default on the part of the mortgagor 90 days after demand; [p. 565, col. 1.]

(2) that as no final demand had been made for the payment of the whole debt 90 days before the institution of the suit, the terms of the deed had not been complied with and the plaintiff Bank was only entitled to claim the amount of the first instalment *plus* the interest due on the whole debt up to the date of the institution of the suit. [p. 565. col. 2; p. 566, col. 2.]

Venkatarao Krishnappa v. *Mahableshwar*, 26 B. 241, 3 Bom. L. R. 876, distinguished.

First appeal from the decree of the District Judge, Delhi, dated the 22nd July 1914.

Messrs. *Balwant Rai* and *Sardha Ram*, for the Appellant.

Messrs. *B. Bevan Petman* and *Wazir Singh*, for the Respondent.

JUDGMENT.

LESLIE JONES.—On the 14th November 1912 the defendant Kanhaya Lal of Delhi mortgaged a house with outbuildings to the Alliance Bank of Simla, Limited, in lieu of a sum of Rs. 15,000 bearing interest at 7 per cent. per annum with six-monthly rests. According to the terms of the deed the principal was to be re-paid in five annual instalments of Rs. 3,000 each, beginning

on the 1st of January 1914. Before the first instalment fell due the defendant had begun to ask for an extension of time. This request was refused by the Bank, which instituted the present suit on the 16th of April 1914 for the whole sum then due on the footing of the mortgage with interest at the same rate until realization of the decree.

The District Judge of Delhi has granted the plaintiff a decree for the sum of Rs. 17,671 principal and interest at Rs. 7 per cent., calculated up to the 22nd of October 1914, with further interest at the rate of Rs. 6 per cent. per annum after that date until realization, with full costs.

The defendant has now appealed to this Court.

The deed which is in the form of an English mortgage, contains a provision that the mortgagor will, 90 days after demand, pay to the Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account current to be made up with interest and all other lawful charges.

It has been contended on behalf of the defendant that according to this provision the Bank was not entitled to claim even the amount of the first instalment until 90 days after demand. We have, however, no difficulty in finding that the Bank was fully entitled to sue for the amount of each unpaid instalment as soon as it fell due, and that the provision in question is one which confers on the Bank the further right to call up the whole amount of the debt whenever it thought fit and whether or no there had been any default on the part of the mortgagor 90 days after demand.

We are equally clear that there was no subsequent oral agreement extending the time for the payment of the first instalment and also that there has been no waiver on the part of the defendant-appellant of any right which he may have possessed under the deed.

The first question of importance is whether the Bank had demanded the whole sum due on the footing of his mortgage 90 days before the institution of the suit. For the plaintiff-respondent it is contended that such demand was made in two letters dated the 25th of November 1913 and the 7th of January 1914, respectively. The first of these letters was in reply to a request by the defendant for an extension of time. It refers particularly to the instalment of Rs. 3,000 due on the 1st of January 1914 and closes with the following sentences:— "We insist upon your instalment, &c., being paid as per your bond, and unless you pay the same on due dates (*sic*) your loan account will at once be called up. Please acknowledge receipt of this letter." The second letter dated the 7th of January 1914 runs as follows:—

"*Re* instalment P Rs. 3,000 due on your loan account on the 1st current and interest Rs. 763 5-3 accrued to 31st December last.

"As you have failed to pay the above, we write to say that unless you pay the amount due by the 15th current a suit will be filed against you without further notice.

"Kindly own receipt of this notification."

We are unable to read these letters as containing a demand for the whole amount of the debt. What they contain rather is a threat that if the first instalment was not paid the whole debt would then be called up, and it is admitted by Counsel for the plaintiff-respondent that if the first instalment had been satisfied, the whole amount of the debt would not have been claimed.

That the view which we take regarding the contents of these letters is correct, is indicated by a letter dated 19th of March 1914 despatched by the Pleader for the Bank to the defendant, in which the defendant was given what is described as a final notice that unless the first instalment *plus* interest is paid within a week the plaintiff Bank would file a suit for the recovery of the whole debt.

In our opinion, then, no final demand was made for the payment of the whole debt 90 days before the institution of the suit. There was merely a conditional notice and although we have asked Counsel for the plaintiff-respondent to supply us with some authority for holding that such conditional notice is tantamount to an absolute demand, he has failed to do so. We hold, therefore, that the terms of the deed as regards the making of a demand 90 days before the institution of the suit have not been complied with.

Counsel for the plaintiff-respondent has two further arguments with which it is necessary to deal. According to the terms of the deed the Bank is entitled to bring the whole property to sale without notice, if the whole or part of any instalment has fallen into arrears for one calendar month. It is contended that this provision enables the Bank to neglect the earlier provision regarding 90 days' demand. Counsel for the appellant urges, on the other hand, that by reason of the provisions of section 69 of the Transfer of Property Act this condition in the mortgage is invalid. That contention, however, we do not propose to discuss for this reason that even if it be granted that the full terms of that English mortgage in dispute are enforcible in the Punjab, we are still of the opinion that the condition in question is not one on which the plaintiff-respondent is able to rely for the purposes of the present suit, as the right which this condition gives to the plaintiff is merely a right of private sale. The plaintiff has not even asked the Court to enforce that right but has elected rather to sue for the amount of the mortgage debt and having done so, we consider that he is bound by the provisions of the deed which relate to such recovery.

The last argument of Counsel for the plaintiff-respondent is that as the defendant-mortgagor has failed to carry out the terms of the mortgage contract, the Bank is entitled to put an end to the contract and to call up the whole amount of the debt although the remaining instalments have not fallen due. In support of this argument he has cited *Venkatarao Krishnappa* v. *Mahableshwar* (1), but an examination of that ruling shews that the Bombay High Court were dealing with very different facts. The defendant in that case had mortgaged ten fields to secure payment of certain debts payable after 15 years, but subsequently it turned out that he had no title to six of the fields. He not only failed to pay the stipulated interest as agreed upon but also he had failed to furnish the plaintiff with the whole of his security. In those circumstances the Bombay High Court held that the plaintiff was entitled to bring the mortgaged property to sale notwithstanding that the term of 15 years had not expired. We do not think that this case is one which can have any bearing on the appeal now before us.

We hold then that in the present suit the plaintiff Bank was only entitled to claim the amount of the first instalment *plus* the interst due on the whole debt up to the date of the institution of the suit. The plaintiff-respondent has not appealed against the decision to allow interest at the rate of only Rs. 6 per cent. per annum after that date until realization.

Accordingly we accept the appeal to this extent that the plaintiff will get a decree for the sum of Rs. 3,000 principal, with interest calculated with six monthly rests at the rate of Rs. 7 per cent. per annum from the 14th of November 1912 up to the date of the institution of the suit, *plus* interest on the total at the rate of Rs. 6 per cent. per annum after that date until realization.

Having regard to the whole circumstances of the case we further order that the parties do bear their own costs throughout.

Appeal accepted in part.

(1) 26 B. 241; 3 Bom. L. R. 876.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1553 OF 1913.

March 17, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Newbould.

KANTA MOHINI DASI, MINOR, BY HER NEXT FRIEND KAMINI DASI—PLAINTIFF —APPELLANT

versus

NANICHORA SOBA AND, ON HIS DEATH HIS HEIRESS AND LEGAL REPRESENTATIVE, HIS WIDOW BRAJA SUNDARI DASI—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Maintenance, right &c—Alienation by husband for his maintenance during illness—Family necessity—Widow's lien or charge.

The right of a Hindu widow to maintenance by her husband in his lifetime or to a charge upon his property must be dependent on his right to alienate the property for a family necessity. [p. 568, col. 2.]

A gift by a diseased Hindu of his property to another, who has been maintaining and nursing him, in consideration of services rendered in the past and to be rendered in the future, is an alienation for good consideration and for a family necessity and

so his widow cannot claim to charge that property for her maintenance. [p. 567, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 8th of October 1912, reversing that of the Munsif, 1st Court, at Katwa, dated the 22nd March 1912.

Babu *Satish Chandra Ghose* for Babu *Hemendra Nath Sen*, for the Appellant.

Babu *Shib Prasanna Bhattacharjee*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—In my judgment this appeal must be dismissed.

The facts of the case were these: —They are concisely set out in the judgment of the lower Appellate Court at page 10 of the paper-book. The action was brought by the plaintiff, a minor who was the widow of one Bhusan and who was represented in the action by her mother. The defendant was the maternal uncle of the deceased Bhusan. The action was brought for a declaration, *first* of all, that a certain deed of gift executed by the plaintiff's husband in favour of his maternal uncle was fraudulent and invalid and the same should be set aside; and *secondly*, for a a declaration or for that which was equivalent to a declaration that the property was liable for the plaintiff's maintenance if it were found that she was not entitled to have the deed of gift set aside, and to obtain possession of the property.

Now, Bhusan, apparently, was paralyzed and he had this young wife, the plaintiff who was of tender years. I think I am right in saying that she was living in the house of her mother and never went to live with her husband. This property which belonged to Bhusan was a very small piece of property, which was barely sufficient to provide for the maintenance of one individual. When Bhusan became paralyzed he proposed that he should go and live in the house of his wife's mother, and his wife and her mother should look after him and that they should take possession of the property, and out of that property maintain Bhusan, the paralysed man. The learned Subordinate Judge in giving his judgment at page 10 says: "The defendant's witnesses have proved that plaintiff's mother was called in and was asked to take charge of her invalid son-in-law and his properties, but very likely considering that the property was very small (only about 4 *bighas* of land) and the income was not sufficient even to support one man, she refused to take charge, and if under such circumstances the defendant took charge of him (Bhusan) and the latter made a gift of his little property, either out of gratitude or love, to the former, it cannot be called a *mala fide* transaction." The learned Judge has found that it was a *bona fide* transaction and that there was no ground for setting aside the deed of gift. The learned Vakil for the appellant agrees that inasmuch as that is a finding of fact it cannot be disputed in this Court. Therefore, the only question is whether the learned Judge in the Court below, when he said that this property in the hands of the defendant was not subject to the charge for the maintenance of the deceased man's widow, was right or wrong.

Now I do not intend to decide any question relating to the Hindu Law except the particular one that arises in this case: and, if I were to find it in favour of the plaintiff, it certainly would have an astounding result. It would come to this, that although the plaintiff, the widow who was really acting through her mother, was offered the property in order that she might maintain her husband during his lifetime and look after the property, and upon such offer being made to her, she refused through her mother to have anything to do with her husband, and then the husband was taken compassion upon by his maternal uncle, who himself was a poor man and was not able out of his own income to support the paralytic man, then when the husband, the paralytic man, for good consideration, both for services rendered in the past and for services to be rendered in future, executed a deed of gift in favour of the maternal uncle, it is to be said that inspite of this the maternal uncle is not to have this bit of property, but it is to be subject to the charge of maintenance of the widow. I should be very sorry if I were forced to come to such a conclusion. But it is not necessary to come to this conclusion for I think the appeal upon the second point ought to be dismissed, and the reason is this: The deed of gift, to my mind, shows from the terms of it that it was made by Bhusan for good consideration. It refers first of all to the beginning of his illness; then it says, "so in a distressed condi-

tion I (Bhusan) sought for your (*i. e.*, the maternal uncle's) help and support and you agreed to it. Since that time you have kept me in your house and although your circumstances are very bad yet moved by affection you have incurred debts from others on account of my medical treatment and nursing. Till now my illness has not abated. It cannot be said how long I shall have to live in this diseased condition. As your circumstances are bad you have become embarrassed on account of my medical treatment, &c. Besides, so long as I shall continue in this condition I have no other means but to remain in your house and to be nursed under your care and medically treated at your expense. I also know this for certain that you cannot help keeping me in your own house and getting me treated during my diseased condition. *For the said reasons*"—this, as I understand it, means that he is paralysed, that he has received assistance from the maternal uncle in the past and in consideration of services to be rendered by him in future, because he was a paralysed man, and he had no other means but to remain in the house of his maternal uncle and to be medically treated at his expense and the maternal uncle could not get rid of him—"I do hereby give you this property". It simply amounts to this that in consideration of what was done in the past and in consideration of what is to be done in future I give you this bit of property. This is, to my mind, a deed for which there is good consideration.

Now the question is whether the property, having passed by the deceased man to the defendant, is subject to a charge in favour of the plaintiff for maintenance. I do not think it is. I accept what was stated by the learned Vakil in the argument when he read from a passage in Mr. Mayne's Book (Hindu Law and Usage, 8th Edition) at page 646. It begins: "It has, no doubt, been decided that a father in Bengal may by Will deprive his son of any right to maintenance. But that is because an adult son has no right whatever to maintenance. His only right is as an heir expectant, and that right may be wholly defeated by sale, gift or devise. But the right of a widow to her maintenance arises by marriage, and that of a daughter by birth; it exists during the life of the father, and continues after his death. It is a legal obligation attaching upon himself personally, and upon his property. He cannot free himself from it during his lifetime, and it attaches upon the inheritance immediately after his death. It seems, therefore, contrary to principle to hold that, by devising the property to another, he could authorise that other to hold it free from claims which neither he himself nor his heir could have resisted." I accept that in its entirety. The whole question is what is the right of a widow to maintenance. The right of a widow to maintenance has been dealt with in the same book at page 638, to which the learned Vakil has referred in his argument, where Mr. Mayne after dealing with the right of the widow to maintenance says, "upon these passages, however, it is to be observed: *first*, that they all refer to cases of gift or dissipation, where no consideration exists for transfer" and in this case I think there is consideration, it is not a case of gift or dissipation. "The same prohibition" (*i. e.*, prohibition against alienation) "would not apply to a sale, either for a family necessity or for value, where the purchase-money would take the place of that which was disposed of." As I read this, I understand it to mean that the right of the widow to maintenance by her husband in his lifetime or to a charge upon his property must be dependent on his right to alienate the property for a family necessity, and the question is whether it can be said that the alienation which took place during the husband's lifetime by the deed of gift, we should now properly describe it as a deed of alienation for good consideration, was an alienation for a family necessity. I cannot imagine a better instance of a family necessity. In this case there was a man paralysed without any means of supporting himself except this little bit of property and the only way of preserving his life or, as the learned Vakil for the respondent has described it in a graphic way, the only way of eking out his miserable existence, was to sell this property. If this was not a family necessity, I do not know what can be called family necessity. If he had not sold the property he would have starved and would have been dead within a few days and in order to avoid that and to live a little bit longer, his wife's mother having refused to take him into her house or support him,

he did the only thing he could do, namely, he got his maternal uncle to take him into his house and look after him, and in consideration of that he alienated the disputed property. I think he alienated it for family necessity and for these reasons I think the appeal should be dismissed with costs.

NEWBOULD, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 939 OF 1914.

January 3, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

RAHIMAN BEEBI AND OTHERS—DEFENDANTS NOS. 2 TO 7—APPELLANTS

versus

KHATOON BEE AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Trusts Act (II of 1882), s. 82—Purchase of property in name of third party—Presumption of ownership—Advancement, doctrine of—Law in India.

The presumption of advancement as prevailing in England does not arise in India, the source from which the purchase-money was paid shifting the onus. That was the law prior to the Trusts Act. [p. 570, col. 1.]

Stock v. *McAvoy*, (1872) 15 Eq. 55; 42 L. J. Ch. 230; 27 L. T. 411; 21 W. R. 521; *Bai Motivahoo* v. *Purshotam Dayal*, 29 B. 336; 6 Bom. L. R. 975; *Suleiman Kadr Bahadur* v. *Mehndi Begum*, 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254; *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima*, 3 M. I. A. 232; 13 W. R. (P. C.) 1; 4 B. L. R. (P. C.) 1; 2 Sar. P. C. J. 522; 15 E. R. 87; *Naginbhai* v. *Abdulla*, 6 B. 717, followed.

The question is now governed by section 82 of the Indian Trusts Act, and the Court must, in each case where property is transferred to one person for a consideration paid or provided by another, address itself to the question whether it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee. In doing so, the particular circumstances of the case must be first considered, and the Court should determine whether or not there was any intention to benefit the person in whose name the purchase was made. [p. 570, cols. 1 & 2.]

Dhurm Das Pandey v. *Musammat Shama Soondri Dibiah*, 3 M. I. A. 229; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 13 E. R. 97; *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M. I. A. 53; 4 W. R. 46 (P. C.); 1 Sar. P. C. J. 493; 13 E. R. 603; *Ram Narain* v. *Muhammad Hadi*, 26 I. A. 38; 26 C. 227; 3 C. W. N. 113; 7 Sar. P. C. J. 425; *Suleiman Kadr Bahadur* v. *Mehndi Begum*, 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254, referred to.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 129 of 1913, preferred against that of the Principal District Munsif, Chingleput, in Original Suit No. 142 of 1912.

Mr. *K. S. Krishnaswami Aiyangar*, for the Appellants.

Mr. *V. Visvanatha Sastri*, for the Respondents.

This second appeal coming on for hearing on the 3rd, 4th and 5th August 1915 and having stood over for consideration till the 19th August 1915, the Court (Ayling and Tyabji, JJ.), delivered the following

JUDGMENT.—The plaintiff sues her husband (the 1st defendant) and her husband's mother and sisters and brothers for recovery of a certain property, alleging that it was transferred to her by the 1st defendant in part payment of her *mahr*. The alleged transfer is by Exhibit A.

It is admitted before us that Exhibit A was executed by the 1st defendant, and that *mahr* was due from him when he executed it. The real contest in this Court is on the question whether it was the 1st defendant or his father who was entitled to the property, at the time when Exhibit A was executed.

The property was purchased on 27th March 1903 by the father of the 1st defendant, in the name of the 1st defendant (Exhibit I). On 9th July 1909 it was mortgaged by the two jointly for Rs. 300 (Exhibit II). On 22nd June 1910 Exhibit A was executed by the 1st defendant purporting to transfer the property to the plaintiff. On 1st September 1910, the 1st defendant executed a deed [Exhibit III (*a*)] purporting to cancel Exhibit A, and another deed (Exhibit III) purporting to re-transfer the property to his father.

The District Judge, reversing the District Munsif's finding, has held that the property passed to the 1st defendant under Exhibit I, because there was nothing to negative the presumption that it was intended to make the 1st defendant the owner of the property.

He considers this conclusion supported by the fact that the property was subsequently mortgaged (by the 1st defendant and his

father) for the expenses of the 1st defendant's marriage. "So it may equally well be argued," he says, "that the property was ear-marked as belonging to the 1st defendant." This observation is not in accordance with the prevailing custom amongst Musalmans, which requires the father to bear the expenses of his son's marriage.

On the broad question involved in the 2nd issue the authorities do not seem to have been brought to the notice of the learned District Judge; and he seems to have had in mind the presumption of advancement as prevailing in England. See, *e. g.*, *Stock* v. *McAvoy* (1). That presumption, to use the words of Batty, J., in *Bai Motivahoo* v. *Purshotam Dayal* (2), "does not arise in India, the source from which the purchase-money was paid shifting the onus; *Suleiman Kadr Bahadur* v. *Mehndi Begum*" (3).

The presumption has been stated to be the other way by the Privy Council in *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima* (4) and in very clear terms in *Naginbhai* v. *Abdulla* (5).

These two lastly mentioned pronouncements were made before the Indian Trusts Act was enacted, and the law must be now taken from section 82 of that Act, which does not create any presumption of law. Our attention was drawn in this connection to what Batty, J., said in *Bai Motivahoo* v. *Purshotam Dayal* (2) at the original trial, his exposition of the law having been approved in appeal on page 314.

The Indian Trusts Act has not been extended to Bombay, and in that respect the law prevailing in Madras is, it was contended, different from that obtained in *Bai Motivahoo* v. *Purshotam Dayal* (2).

In our opinion, under the Indian Trusts Act, the Court must, in each instance where property is transferred to one person for a consideration paid or provided by another person, address itself to the question whether it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee. In doing so the particular circumstances of the case must, of course, be first considered; and so far as the circumstances and considerations referred to in the cases mentioned above, and in *Dhurm Das Pandey* v. *Musammat Shama Soondri Dibiah* (6), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (7), *Ram Narain* v. *Muhammad Hadi* (8) and *Suleiman Kadr Bahadur* v. *Mehndi Begum* (3) are not special to those cases, but such as would fall under the terms of section 114 of the Indian Evidence Act, they should also be given due weight.

It is for the Court that has to find on the facts to weigh the importance of such of these and other circumstances as may exist in any particular case and to determine whether or not there was any intention to benefit the person in whose name the purchase is made. As the learned District Judge approached the decision of this question from a wrong point of view, we shall call for a revised finding on the 2nd issue.

It was contended before us, however, that no such finding is necessary as under section 41 of the Transfer of Property Act, the first defendant's father allowed the 1st defendant to be the ostensible owner of the property, and to transfer it for consideration to the plaintiff. In order that this contention may be available to the plaintiff, it must also appear that the plaintiff, (1) after taking reasonable care to ascertain that the 1st defendant had power to make the transfer, (2) has acted in good faith. In the circumstances of this case, considering the relation between the parties, the answer to these two questions must depend upon the finding on issue No. 2. If the plaintiff intended to rely on section 41 as a separate ground of claim, apart from the finding on issue No. 2, she should have pleaded the necessary facts, and an issue should have been raised on it. We do not consider that it would be proper now to

(1) (1872) 15 Eq. 55; 42 L. J. Ch. 230; 27 L. T. 411; 21 W. R. 521.
(2) 29 B. 306 at p. 312; 6 Bom. L. R. 975.
(3) 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254
(4) 13 M. I. A. 232; 13 W. R. (P. C.) 1; 4 B. L. R. (P. C.) 1. 2 Sar. P. C. J. 522; 15 E. R. 87.
(5) 6 B. 717.
(6) 3 M. I. A. 229 at p. 240; 6 W. R. (P. C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 13 E. R. 97.
(7) 6 M. I. A. 53 at p. 74; 4 W. R. 46 P. C.; 1 Sar. P. C. J. 493; 13 E. R. 603.
(8) 26 I. A. 38; 26 C. 227; 3 C. W. N. 113; 7 Sar. P. C. J. 425.

frame new issues based on section 41 of the Transfer of Property Act and to allow fresh evidence to be adduced on them. We, therefore, reject the plaintiff's contention based on section 41 of the Transfer of Property Act.

In case the finding on the 2nd issue is in favour of the plaintiff it may be necessary to determine "whether the 2nd defendant is entitled to any lien on the property" (issue No. 3).

The contention of the 2nd defendant is that she paid off the mortgage on the property executed by her son (the 1st defendant) and his father, her deceased husband; and that in any event she ought to have a right to be paid off that mortgage. On this question, the learned District Judge was under the wrong impression that the endorsement of discharge on Exhibit II (the mortgage-deed) was not proved. It was proved by the 3rd witness for the defence, and the learned Pleader for the plaintiff-respondent had to concede that the payment had been made by the 2nd defendant out of her husband's estate. Under the circumstances, considering that the mortgage was executed by the 1st defendant jointly with his father, and that at the time when the 2nd defendant paid the mortgage-debt there was a re-conveyance of the property from the 1st defendant to his father, the learned District Judge erred in holding that the presumption was that the mortgage was extinguished. It is not alleged that there was any intention to discharge the mortgage for the benefit of the plaintiff. The 2nd defendant is entitled to be subrogated to the mortgagee's rights in the event of issue No. 2 being decided against her.

It was argued, however, that though the 2nd defendant may be entitled to have such a claim she ought not to be given the declaration in the present litigation, and that the parties should be referred to a fresh suit for determining their rights on these facts. This course would, it appears to us, result in mere multiplicity of suits.

We shall, therefore, call for a fresh finding on the 2nd issue. The finding will be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following

FINDING.—The High Court has called for a fresh finding on issue No. 2: "Whether the 1st defendant has had full rights in the property to alienate the same to the plaintiff?"

* * * * *

I hold that the 1st defendant acquired no interest in the property and accordingly find issue No. 2 in the negative.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—We accept the finding and must hold that 1st defendant at the time of Exhibit I had no right in the property which he purported to convey thereby. He subsequently succeeded to a fractional interest (7/48) on the death of his father. Under section 43 of the Transfer of Property Act, plaintiff is entitled to recover this fractional share subject to payment of a similar share of the mortgage amount (Rs. 300) discharged by 2nd defendant, *i. e.*, Rs. 43-12-0.

She will be given a decree accordingly with proportionate costs to each side throughout, the decree of the District Judge being set aside.

Appeal allowed in part:
Decree modified.

V. R. P.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 395 OF 1914.

May 23, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

CHUNNILAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HABIB ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XLI, r. 23—Remand for decision on merits - Fresh preliminary point, whether can be raised before trial Court after remand - Pleadings - Res judicata.

Plaintiffs sued on a mortgage, but their suit was dismissed on the ground that no consideration for the mortgage had passed. Plaintiffs appealed to the High Court, which held that the

passing of consideration was proved and remanded the case to the lower Court under Order XLI, rule 23 for decision on the merits. The defendants did not try before the High Court to support the judgment of the lower Court on any other ground. On the case being remanded to the lower Court they raised for the first time the objection that the mortgage-deed had not been properly attested within the meaning of section 59 of the Transfer of Property Act. The lower Court again dismissed the suit, on that ground:

Held, that the effect of the order of remand was to send back the case to the first Court to have the remaining issues tried, and that the latter Court was not competent to frame and try a fresh preliminary issue. [p. 574, col. 2.]

Held, further, that the technical plea of want of due attestation, in the form in which it was put forward, was a new one and ought to be treated as a plea put forward for the first time in appeal. The defendants not having raised the point when the case came up before the High Court for the first time, should be held to be precluded from taking it at a subsequent stage of the same litigation, either on the principles of *res judicata* as laid down in *Ram Kirpal* v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; A. W. N. (1886) 286 (P. C.), or on the general discretion of an Appellate Court in dealing with a substantially new pleading, taken for the first time in appeal, and not admitting of satisfactory disposal without the recording of fresh evidence. [p. 574, col. 2; p. 575, col. 1.]

First appeal from the decision of the Additional Subordinate Judge, Aligarh, dated the 11th March 1914.

FACTS.—The plaintiffs brought a suit on the footing of a mortgage, dated the 10th December 1883, executed by one Shaukat Ali. One of the pleas of the contesting defendants was that they did not admit "the execution and completion of the bond and the receipt of consideration". The Court framed the following issue:—

"Did Shaukat Ali execute the bond in suit for consideration?" On this issue it found that the bond was executed by Shaukat Ali, but no consideration had passed. The plaintiffs appealed to the High Court, which decided that the passing of consideration was proved. The case was then remanded for trial under Order XLI, rule 23, Civil Procedure Code. The defendants-respondents did not raise any objection as to the due execution of the bond. Thereupon the Additional Subordinate Judge proceeded to try the question, whether the bond was duly attested within the meaning of the ruling of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (1). He held that the plaintiffs had failed to prove t mortgage-deed had been duly execut dismissed the suit. The plaintiffs a to the High Court.

The Hon'ble Mr. *Moti Lal Nehru* (w Mr. *Gulzarilal*), for the Appellant Court below is wrong in deciding th tion of execution. That question wa decided by the predecessor of the Subordinate Judge. No objectio taken to his finding by the responden the matter came up in appeal to thi The Privy Council ruling had co existence by that time. The def could have supported the decree Court of first instance by showing th deed in suit had not been duly a No such plea was in fact ever raised defendants in their written statement. chief defence in fact was that they c hold any portion of the property be to the mortgagor. Under these circum the pleadings of the parties should be construed. He relied on the provis Order VI, rule 8, Civil Procedure Cod

The Hon'ble Dr. *Tej Bahadur Sapru* (w Messrs. *G W. Dillon*, *Pearey Lal Ban Lakshmi Narayan*) for the Respondent Court below was perfectly justified i into the question of proper attestation. question had not been decided by th Court, which simply confined its the question as to the passing of co tion. The question is a question of la it can be raised at any stage of the p ings. As the High Court did not any opinion on the point, there was to prevent the Court below from o it. He relied on *Shamu Patter* v. *Kadir Rowthan* (1) and *Radhe Shi Chunni* (2).

In any event this Bench can consid question as the whole case is before is not bound by the previous of remand. *Mubarak Husain* v *Bihar Amir Kazim* v. *Zainab Begam* (4).

The Hon'ble Mr. *Moti Lal Nehru* re

JUDGMENT.—This is an appeal plaintiffs in a suit on a mortgage of th

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1002; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 2; 9; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220 (P. C.).

(2) 35 Ind. Cas. 192; 14 A. L J. 361.
(3) 16 A. 306; A. W. N. (1894) 97.
(4 A. W. N. (1897) 152.

December 1883. The defendants originally impleaded were the mortgagor, Shaukat Ali, and a number of other persons alleged to be transferees of the mortgaged property, or at any rate persons in actual possession of the same. Shaukat Ali has died during the pendency of the litigation and his heirs have been brought on the record in his place; but no appearance has been entered or defence set up by, or on behalf of the original mortgagor. The suit was contested by the other defendants. They formally put the plaintiffs to proof of the execution of the mortgage-deed and of the passing of consideration. Their substantial defence on the merits was that Shaukat Ali, on the date of the mortgage, either possessed no interest at all in property purporting to be dealt with under the said deed, or at most possessed an interest in a fraction only of the said property, and this interest encumbered by some prior charge or charges in favour of the contesting defendants. There was also a plea as to the alleged insanity of one of the defendants. This was finally disposed of by the decision of the first Court on the seventh issue framed by it. Of the remaining six issues the learned Subordinate Judge tried only the first. He found that the deed in suit had been duly executed by Shaukat Ali, but that the payment of consideration was not satisfactorily proved. His judgment is dated July 10th, 1911. The plaintiffs appealed, and their appeal was determined by a Bench of this Court on January 15th, 1913. In the interval the famous ruling of their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir Rowthan* (1) "had enlightened the Courts in this part of India as to the true force of the provisions of section 59 of the Transfer of Property Act (IV of 1882) regarding the "attestation" of instruments of mortgage. It is to be noted that the appeal before this Court (First Appeal No. 315 of 1911) was by the plaintiffs; they simply asked for a reversal of the finding of the first Court as to the passing of consideration. It was, however, open to the successful defendants to support the decision of the first Court on the ground which had been decided against them. They could have asked this Court to re-consider the whole of the evidence on the question of execution; and they could undoubtedly have raised the point that, even if the said evidence were held sufficient to prove that the signature on the deed in suit was that of Shaukat Ali, it was not proved that this signature had been affixed in the presence of two attesting witnesses. The record shows that no such plea was taken on behalf of the defendants-respondents; the learned Judges of this Court disposed of the appeal by determining the one and only question raised before them, that of the passing of consideration. They reversed the finding of the first Court on this point, held that the payment of consideration was proved, and remanded the case to the first Court under the provisions of Order XLI, rule 23, of the Civil Procedure Code, to "be re-admitted to its original number in the register, and disposed of according to law."

The effect of this order is the principal point which we have to consider and determine in order to dispose of the appeal now before us. It seems worth while to say at once that we do not consider it part of our functions to criticise this order, as for instance by discussing the question whether an order under rule 25 of Order XLI of the Civil Procedure Code might not have been passed by our learned predecessors, instead of one under rule 23. What we are concerned with is the meaning and effect of the order actually passed, and we conceive that we are bound to put a broad and reasonable interpretation on the said order, and to insist upon due effect being given to the same as governing the subsequent course of the litigation. Looking at the matter from this point of view, we find no difficulty in appreciating the position taken up by our learned predecessors. They regarded the pleas taken as to proof of execution and passing of consideration as merely formal and the decision on these points as "preliminary" to the trial of the substantial questions involved in the remaining issues dealing with the extent of the mortgagor's interest in the property dealt with by him. They saw no reason to distrust the direct and positive evidence by which the plaintiffs proved that Shaukat Ali had not merely executed the bond in suit, but had received the consideration in cash at registration. These "preliminary points" being determined in the plaintiffs' favour, there remained for disposal a number of issues bearing on the extent of Shaukat Ali's

interest in the property which he purported to mortgage. We have no doubt that the true effect of this Court's order of January 15th, 1913, was simply to send back the case to the first Court to have these issues tried.

If we are right in this opinion, it follows beyond question that this order has not been complied with according to its spirit and intention. The case came before a successor of the learned Subordinate Judge who had first decided it. He asked the parties if they desired to produce any further evidence, and they replied that they did not. The case was then set down for arguments and for disposal on the evidence as it stood. At the hearing which followed the defendants for the first time raised the point that the plaintiffs' evidence, while sufficient to prove the signature on the deed in suit to be Shaukat Ali's, fell short of proving that he had affixed this signature in the presence of two attesting witnesses. The learned Subordinate Judge felt grave doubts as to whether he ought to entertain this plea: but decided to do so. He then considered the evidence. The plaintiffs had fully complied with the provisions of the Indian Evidence Act: they had put in the witness-box the sole survivor of the attesting witnesses. His evidence, on any reasonable interpretation of the same, does prove that Shaukat Ali signed the deed in his presence; but he does not say that any of the other attesting witnesses was also present at that moment. He was not asked any question on this point; the plain fact is that no one thought of putting questions, of this sort to an attesting witness before the strict meaning of the word "attestation" was expounded by their Lordships of the Privy. Council. The other witness for the plaintiffs was present at the registration of the document, but not at its execution. On this evidence the Court below has found that the plaintiffs have failed to prove due "attestation" of this document: that it has consequently no effect as a legal mortgage, and that the suit must fail on this ground alone, the limitation period for enforcing the personal liability of the executant having long since expired.

The plaintiffs having again appealed to this Court, we hold, for reasons which we have already made sufficiently clear, that it was not open to the Court below to dismis the suit a second time on such grounds as the above. To do so was in effect to re-open one of the "preliminary points" which this Court had held to be concluded in favour of the plaintiffs. The learned Subordinate Judge should have been content to comply with this Court's order of January 15th, 1913, and we can only repeat that, in our opinion, he has not done so.

This makes it unnecessary for us to discuss the further question whether, under the circumstances stated, the Court below ought not to have offered the plaintiffs a definite opportunity of further examining the surviving attesting witness, or of producing other evidence on this specific point. It may perhaps be contended that even the conclusions hitherto reached by us do not dispose of the present appeal. Our own position is not quite the same as that of the Subordinate Judge; we are seized of the whole case, and responsible for its correct decision at this stage. We have not been asked to re-consider the finding of our predecessors on the question of the payment of consideration, and need not, therefore, discuss the question whether we could have done so. The real question is whether we could or ought, at this present stage of the litigation, to treat the question of the legal attestation of this document as an issue not yet disposed of, and to proceed to deal with it on that basis. We are of opinion that we ought not to do so. The practical inconvenience of an order calling for fresh evidence on this specific point, after all that has occurred, is obvious and need not be enlarged upon. The technical plea of want of due attestation, in the form in which it is now put forward, is a new one, and we think it ought to be treated as a plea put forward for the first time in appeal. Indeed it is overstating the case in favour of the defendants to put it in this way. There might have been something to be said in favour of remitting an issue on this specific point if the question had been raised before the Bench which passed the order of January 15th, 1913. The defendants not having raised the point then, we think, they should be held to be precluded from taking it at a subsequent stage of the same litigation. This opinion may be based upon a constructive

application of the principles of *res judicata* on lines analogous to those laid down by the highest authority in the case of *Ram Kirpal* v. *Rup Kuari* (5), or it may be rested simply on the general discretion of an Appellate Court in dealing with a substantially new pleading taken for the first time in appeal and not admitting of satisfactory disposal without the recording of fresh evidence. From either point of view the question must, in our opinion, be decided against the respondents.

For these reasons, we set aside the decree of the Court below. We again remand the case to that Court in order that our predecessors' order of January 15th, 1913, may be given effect to according to its true purport and intention. The suit must be tried out on the merits; that is to say, on the remaining issues raised by the pleadings, the questions of the valid execution of the deed in suit, of its effect as an instrument of mortgage and of the payment of consideration being treated as preliminary points finally decided in favour of the plaintiffs. We think the appellants are entitled to the costs of this appeal, and we order accordingly, such costs to include fees on the higher scale.

Decree set aside; Case remanded.

(5) 6 A. 269; 11 I. A. 37; A. W. N. (1886) 286 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 585 OF 1915.

April 28, 1916.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

BOLLAPRAGADA RAMAMURTHY

TRADING UNDER THE NAME AND STYLE OF

BOLLAPRAGADA RAMAMURTHY & Co.—PLAINTIFF—APPELLANT

versus

THAMMANNA GOPAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *ss.* 9, 19—*Conditional acknowledgment of liability, when operative—Agreement to refer to arbitration, effect of—Promise not to plead limitation—Contract Act* (*IX of* 1872), *s.* 23.

In cases of conditional acknowledgment of liability, where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled. [p. 576, cols. 1 & 2.]

Maniram Seth v. *Seth Rupchand*, 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165; *Arunachella Row* v. *Rangiah Appa Row*, 29 M. 519; 16 M. L. J. 563; 1 M. L. T. 318; *River Steamer Co., In re, Mitchell, Ex parte*, 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130, followed.

To operate as an acknowledgment a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration, which *prima facie* is only a mode of settling disputes and not an admission of any liability by the parties, does not import any such relationship. [p. 576, col. 2.]

A promise by the defendant not to raise the plea of limitation, should a suit have to be filed, is in effect a covenant to defeat the provisions of the Limitation Act and consequently void under section 23 of the Contract Act. [p. 577, col. 1.]

Parties to a suit cannot estop themselves from pleading the provisions of a Statute. [p. 577, col. 1.]

Sitarama Chetty v. *Cotta Krishnasami Chetty*, 21 Ind. Cas. 24; 38 M. 374; (1913) M. W. N. 676; 25 M. L. J. 264, followed.

Where in a suit brought in 1912 for damages for breach of a contract, of which the performance was due before the 20th September 1906, the plaintiff relied upon a letter dated 20th September 1909 written by the defendant, saying that as a suit was threatened he (the defendant) agreed to refer matters to arbitration and to pay whatever was found due from him, and further agreed that he would not raise the bar of limitation to any suit brought by the plaintiff:

Held, (1) that inasmuch as the letter was a mere submission to arbitration containing a promise to pay whatever amount the arbitrators awarded against the defendant, it was not available as an acknowledgment within the meaning of section 19 of the Limitation Act in the event of the arbitration proving abortive; [p. 576, col. 2.]

(2) that inasmuch as the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run, it could not be stopped by anything that happened subsequently. [p. 577, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Appeal Suit No. 130 of 1914, (Referred Appeal No. 32 of 1914, on the file of the Court of the Subordinate Judge, Cocanada), presented against that of the District Munsif, Cocanada, in Original Suit No. 589 of 1912.

Mr. *G. Venkataramayya*, for the Appellant.

Mr. *P. Venkataramana Row*, for the Respondents.

JUDGMENT.—Plaintiff is the appellant. He sued in 1912 to recover damages for breach of a contract of which performance was due before the 20th September 1906;

and relied upon a letter dated 20th September 1909 to save the bar of limitation. Both the lower Courts dismissed the plaintiff's suit, on the ground that the letter does not contain an acknowledgment of liability sufficient to bring the case within section 19 of the Limitation Act.

The letter Exhibit B signed by the defendants states that as disputes about the contract were not settled and a suit threatened, both parties agreed to refer matters to the arbitration of the persons mentioned therein. The material part of the document runs as follows:—"I shall agree to the decision made by them (arbitrators). Without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If perhaps, for any reason, the said three mediators do not give their decision it is settled that, on this letter, suit, etc., proper steps may be taken and conducted in the Court without having anything to do with the time-bar".

It is argued for the appellant that the letter contains a promise to pay whatever may be found due on arbitration and that there is an acknowledgment of liability. It is also argued that the agreement to refer to arbitration and not to plead limitation as a bar, if the arbitration fell through, is valid and binding on the parties, amounting as it does to a covenant by one party not to sue till the arbitration was over and by the other not to plead limitation should it be necessary to file a suit.

We do not think that the terms of Exhibit B amount to an unconditional undertaking by the defendants to pay the debt. The plaintiff was setting up a claim for damages and the defendants were denying that they were liable to the plaintiff. When a suit was threatened, the parties agreed to refer the disputes to arbitration. Exhibit B is a conditional promise to pay whatever the arbitrators may find to be due What the defendants in effect state is: "We deny that anything is due to you. But as you threaten a suit, we shall agree to refer matters to arbitration and if the arbitrators give an award holding us liable to pay any sum, we shall pay it to you."

In cases of conditional acknowledgment of liability the law is clear that where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled.

In *River Steamer Co., In re, Mitchell, Ex parte* (1), which has been approved of by their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (2), Lord Justice Mellish observed that in order to take the case out of the Statute of Limitation, there must either be an acknowledgment of the debt from which a promise to pay may be implied, or an unconditional promise to pay the debt or a conditional promise to pay the debt and evidence that the condition has been performed. This case was referred to and followed in *Arunachella Row* v. *Rangiah Appa Row* (3), where Justices Subramania Ayyar and Benson were of opinion that the English and Indian Law are the same as regards conditional promises and that an acknowledgment of a conditional liability would not give a fresh start so long as the condition remained unfulfilled.

It is well-settled law that to operate as an acknowledgment, a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration, which *prima facie* is only a mode of settling disputes and not an admission of any liability by the parties, does not import any such relationship. No authority has been cited for the proposition that the mere fact that parties agree in writing to refer matters to arbitration amounts to an acknowledgment. The result of the English authorities seems to be that a mere submission to arbitration containing a promise to pay whatever the arbitrators decide, is not available as an acknowledgment if the arbitration proves abortive, unless the submission contains an unqualified acknowledgment of the debt (Halsbury's Laws of England, Volume 19, page 66; Banning on Limitation, page 45). There is nothing in section 19 of the Limitation Act to suggest that the law in India is different.

(1) 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130.

(2) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 30; 2 N. L. R. 130; 33 I. A. 165.

(3) 29 M. 319; 16 M. L. J. 563; 1 M. L. T. 318.

We do not think that the promise of the defendants not to raise the plea of limitation, should a suit have to be filed, is valid. It is argued that the effect of the clause is not to restrict the time but to extend it and that section 28 of the Contract Act, which only applies to cases where time is limited, has no application. Reference has been made to the observations of Sir Frederick Pollock in his Commentaries of the Contract Act at page 179.

Whatever doubts my exist as to the applicability of section 28, we think that the case falls under section 23. The effect of the covenant is, in our opinion, to defeat the provisions of the Limitation Act and it falls under section 23 of the Contract Act, as being an agreement which defeats the provisions of the Limitation Act.

It has been argued that the period between the date of the agreement to refer and the date when the plaintiff knew that the proceedings became abortive should be excluded.

It is difficult to see how a reference to arbitration, though it may imply a covenant not to sue, would prevent the operation of the law of limitation when once the period commenced to run. Though parties to a contract may agree to postpone the accrual of any rights under it, they cannot postpone the period of limitation, in case a suit should have to be filed for its breach. In the present case the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run and section 9 of the Limitation Act is clear, as it enacts that once limitation begins to run it cannot be stopped by anything that happened subsequently. The case does not fall within the provisions relating to stay of suits by injunction.

As regards the argument that the defendants are estopped from pleading limitation, there can be no question of estoppel as the parties cannot estop themselves from pleading the provisions of the Statute [*Sitarama Chetty* v. *Cotta Krishnasami Chetty* (4)].

We are of opinion that the decrees of the lower Courts are right and dismiss this second appeal with costs.

Appeal dismissed.

V.R.P.

(4) 21 Ind. Cas. 24; 38 M. 374; (1913) M. W. N. 676; 25 M. L. J. 264.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2057 OF 1913.

June 1, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

ISHAR DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HARKISHAN DAS AND ANOTHER—PLAINTIFFS, BHAGWAN DAS—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 57, 64, 85—Punjab Loans Limitation Act (I of 1904), Sch. I, S. Nos. 3, 7—Account stated—Closed account—Open and current account—Balance—Interest, rate of—Presumption.

An account is said to be stated only when there have been cross-demands between the parties and the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract and is a substantive cause of action. [p. 578, col. 1.]

Laycock v. *Pickles*, 33 L. J. Q. B. 43; 4 B. & S. 497; 10 Jur. (N. S.) 336; 9 L. T. (N. S.) 378; 12 W. R. 76; 12 E. R. 546; 129 R. R. 827, referred to.

When in striking the balance of an account interest at a certain rate is charged, it must be presumed that the same rate is to be chargeable till payment. [p 578, col. 2]

Plaintiff advanced loans to defendant from time to time, and in re-payment defendant occasionally passed grain to plaintiff, which the latter sold and credited to the former's account. After some months the accounts were examined and a balance struck in plaintiff's favour. Subsequently defendant borrowed more money from plaintiff and overpaid him in this latter account. Plaintiff, after giving credit in the previous account of this overpayment in the subsequent open account, claimed the balance under the former account averring an oral agreement for re-payment of balance with interest:

Held, that plaintiff's suit was on a closed account and not on an open account and that it was governed by Article 64 or by Article 57 of the Limitation Act as amended by the Punjab Loans Limitation Act and not by Article 85 of the Limitation Act. [p. 578, cols. 1 & 2.]

Jas Ram v. *Attar Chand*, 30 Ind. Cas. 491; 178 P. L. R. 1915; 118 P.W.R. 1915; 16 P.R. 1916, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Lyallpur, dated the 14th July 1913, varying that of the Subordinate Judge, Lyallpur, dated the 30th July 1912, dismissing the suit.

The Hon'ble Pandit *Shea Narain*, R. B., for the Appellants.

Rai Sahib Lala *Moti Sagar*, for the Respondents

JUDGMENT.

LEROSSIGNOL, J.—The only question in this appeal is one of limitation.

ISHAR DAS *v.* HARKISHAN DAS.

The suit was for money due on accounts and was dismissed by the first Court on the ground of the time-bar; it held that Article 85 applied and not Article 64 of the Limitation Act.

The period for the latter Article has been extended by the Punjab Loans Limitation Act to six years, whilst that for the former remains at three.

The Additional Divisional Judge held that Article 64 applied and decreed the claim less interest against Ishar Das personally, and against the other defendants to the extent of the property received from Devi Das. Defendants-appellants now urge that the suit was time-barred, that it fell under Article 85 and that *Jas Ram* v. *Attar Chand* (1) is a parallel case.

For plaintiff-respondent it is argued that *Jas Ram* v. *Attar Chand* (1) is not parallel, for in that case several kinds of transactions were embodied in the accounts, whilst in this case the account consisted solely of loans by the plaintiff to defendants who made re-payments in the shape of grain, which was sold by plaintiff and credited to defendants' account. The transactions lasted from 21st January 1905 to 16th September 1905, when the accounts were examined and a balance of Rs. 2,530-14-3 in plaintiff's favour was established, which plaintiff alleges defendants agreed to pay with interest.

Subsequently up to 13th April 1906 defendants borrowed Rs. 1,033-3-3 and re-paid Rs. 1,453-3-9, so that plaintiff deducts Rs. 420-0-6 from the balance of Rs. 2,530-14-3 and sues for Rs. 2,110-13-9 plus interest.

It will be observed that plaintiffs sue not on an open but on a closed account, although they allow a credit due on another open account and this circumstance alone would appear to exclude Article 85 and distinguish this case from *Jas Ram* v. *Attar Chand* (1).

A suit under Article 64 is a suit on an account stated and signed by defendant, but an account is said to be stated only when there have been cross-demands between the parties and the balance struck then becomes the consideration for the discharge on either side.

Such an account stated amounts to a new contract and is a substantive cause of action. *Cf. Laycock* v. *Pickles* (2).

Moreover in this case a definite oral agreement to pay is alleged and we see no reason why the allegation should not be accepted.

The exact nature of the agreement between the parties it is not possible for us to say on the material on record, but on the facts disclosed, there was no reason why the account should not have oscillated from one side to the other, for plaintiffs at any time might have sold on defendants' account grain supplied by defendants for a much higher price than that advanced to defendants by plaintiffs.

But even if Article 64 of the Limitation Act does not furnish the proper limitation for the suit and the account stated of 1905 is to be regarded as a mere acknowledgment, then the suit is one for money payable for money lent, and falls under Article 57, the period for which under the Punjab Loans Limitation Act of 1904 has been extended to six years.

Under either Article, the suit is within time.

There is also a cross-appeal by plaintiffs, in which they ask for the interest denied by the lower Court and also pray the decree should be made personal against all the defendants.

They charged six per cent. when balancing the account and it must be presumed that the same rate was to be chargeable till payment.

The debt was incurred by Ishar Das father and Devi Das his eldest son, so there is every presumption that they were acting as *kartas* of the family.

In accordance with these findings, we dismiss this appeal and accepting the cross-appeal we enhance the lower Court's decree from Rs. 2,110-13-9 by Rs. 694-9-0 to Rs. 2,805-6-9, recoverable from Ishar Das personally and also from the co-parcenary interest in the joint family property of all the other principal defendants, with proportionate costs throughout.

Appeal dismissed.

(1) 30 Ind. Cas. 491; 16 P. R. 1916; 178 P. L. R. 1915; 118 P. W. R. 1915.

(2) 33 L. J. Q. B. 43; 4 B. & S. 497; 10 Jur. (N. S.) 336; 9 L. T. (N. S.) 378; 12 W. R. 76; 122 E. R. 546; 129 R. R. 827.

MAHADEO PRASAD SAHU *v.* RAM CHANDAR NARAIN SINGH.

PATNA HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 396 OF 1914.

July 4, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

MAHADEO PRASAD SAHU—DECREE-HOLDER—APPELLANT

versus

Pandey RAM CHANDAR NARAIN SINGH —JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182—Execution application presented more than three years after dismissal of last application, whether barred—Application in continuation of former application.

Where the execution of a decree has not been stayed by injunction or order, and the decree-holder has not been prevented by force or fraud from executing it, an application for execution presented more than three years after the dismissal of the last application is barred by time. [p. 579, col. 2; p. 580, col. 1.]

The principle that the Court may treat an application *prima facie* barred by limitation as an application made in continuation of an application which has been dismissed, can be applied only to those cases where the decree-holder has not been remiss. [p. 580, col. 2.]

Rameshwar Singh Bahadur v. *Rateshwar Singh*, 18 Ind. Cas. 841; 17 C. L. J. 125, distinguished.

Kartic Chandra Mondal v. *Nilmani Mondal*, 32 Ind. Cas. 931; 20 C. W. N. 686, referred to.

Appeal from the decision of the Sub-Judge, Muzaffarpur, dated the 16th July 1914.

Messrs. *Hasan Imam*, *Jayaswal* and *Saroshi Charan Mittra*, for the Appellant.

Messrs. *S. Sinha* and *Kulwant Sahay*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This is an appeal against an order of the Subordinate Judge, first Court, Muzaffarpur, dismissing an application made by the appellant for execution of a decree, passed on December 14th, 1903. The first application for execution was presented in 1906 and was struck off on November 15th, 1906. Meanwhile on November 14th, 1906, a suit had been brought by the judgment-debtor to have the decree set aside on the ground of fraud. On June 8th, 1908, that suit was dismissed. On July 6th, 1908, an application was made to the Court to restore that case to the pending file. That application was dismissed on August 29th, 1908. On September 23rd, 1908, another application was made for execution and on January 16th, 1909, an order was made with reference to that application bringing on to the record the names of the representatives of a deceased party. On February 8th, 1909, that application for execution was struck off for default. Meanwhile on November 26th, 1908, the judgment-debtor had appealed to the High Court against the order of August 29th, 1908, dismissing the application for restoration of the case. On July 8th, 1910, the appeal was allowed and the case was remanded by the High Court to the Subordinate Judge and on May 8th, 1912, the Subordinate Judge again dismissed the suit. The application for execution out of which this appeal arises was presented on March 5th, 1914. The decree-holder claims to be entitled to deduct the period that elapsed between April 8th, 1909, and May 8th, 1912. The former was the date on which the decree-holder received notice that the judgment-debtor had filed an appeal to the High Court against the order of August 29th, 1908.

If the decree-holder is allowed to deduct the time that elapsed between the date on which he received notices of the appeal to the High Court and the date on which the Subordinate Judge dismissed the judgment-debtor's suit after the remand by the High Court, the present application for execution is within time, otherwise it is barred by limitation. The decree-holder suggests that it was reasonable for him to await the decision in the judgment-debtor's suit before proceeding further with the execution of the decree. This, even if true, would not justify the Court in disregarding the law of limitation. Section 15 of the present Limitation Act applies to applications for the execution of a decree and it provides that "in computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn, shall be excluded." In the present case the execution of the decree was not stayed by injunction or order. It is conceded that when the judgment-debtor appealed to the High Court in November 1908 he did not obtain an order from the High Court staying further execution of the decree. Nor is it suggested that the decree-holder was prevented

either by force or by fraud from executing his decree between February 1909 and March 1914, when the present application was made. A little over 5 years elapsed between the dismissal of the previous application and the filing of the present application. It is contended by learned Counsel on behalf of the decree-holder that although the case is not covered by section 15 of the Limitation Act and although there is no question of force or fraud on the part of the judgment-debtor, yet he is entitled to a deduction of the time that elapsed between the filing of the judgment-debtor's appeal and the dismissal of his suit by the Subordinate Judge, in accordance with the principle applied in the case of *Rameshwar Singh Bahadur* v. *Rateshwar Singh* (1). In that case Sir Lawrence Jenkins said: "From the narrative of these long and tedious proceedings, it is, I think, apparent that the decree-holder has not been remiss; the delay has been occasioned by obstacles for which he cannot be held responsible. And so the decree-holder can claim with some show of reason that the case, viewed as a whole, presents those features which are regarded by the Court as a justification for holding that an application otherwise time-barred may be treated as one for the revival and continuation of earlier proceedings in execution. The decree-holder's application of the 24th of March 1908 was apt for this purpose, for it contained a prayer directed to obtaining such an order in case the Court thought fraud not established." The present application for execution did not contain a prayer that it should be treated as one made in continuation of the previous application, but subsequently a petition was presented to the Court praying for permission to amend the application by inserting in it a prayer to that effect. That petition was rejected, but for the purpose of this appeal we may assume that the petition should have been allowed and we may treat the application for execution as if it contained a prayer that it should be treated as one made in continuation of the previous application. Even so, it appears to me that the decree-holder is not entitled to a deduction of the time claimed by him. The case on which he relies can easily be distinguished from the present case. That case arose out of an application made for execution of a decree passed in December 1893. Shortly before the expiry of 12 years from that date an application regular in all respects was made for execution of the decree. Thereupon a claim was made on which the Court ordered that the property placed under attachment should be released and soon afterwards it dismissed the application for execution in consequence of the claim case. Immediately after that, further claims were made. Within a year of the dismissal of the application the decree-holder came into Court with an application which, he prayed, might be treated as a continuation of the previous application. From the extract from the judgment given above, it will be seen that the Court was of opinion that the decree-holder had not been remiss in any way. I do not think that that remark applies to the decree-holder in the present case. I can discover no reason whatever why he took no action to execute his decree during the five years after February 8th, 1909, and assuming that there is a principle in accordance with which the Court may treat an application *prima facie* barred by limitation as an application made in continuation of a previous application which has been dismissed, it is obvious that the principle can be applied only to those cases where the decree-holder has not been remiss. The present case is not unlike that of *Kartic Chandra Mondal* v. *Nilmani Mondal* (2). In that case their Lordships, dealing with the contention that the subsequent application should be regarded as a continuation of the previous application, said: "We need only point out that the previous application was finally disposed of on November 5th, 1908, so that that branch of the contention has no substance in it." So in the present case, the previous application for execution was definitely dismissed in February 1909, not in consequence of any proceedings which had been taken by the judgment-debtor or any other person but because of the default of the decree-holder. In these circumstances it appears to me impossible to treat the present application as one made in continuation of the previous application. I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

Appeal rejected

(1) 18 Ind. Cas. 841 17 C. L. J. 125 at p. 130.

(2) 32 Ind. Cas. 931; 20 C. W. N. 686.

MADRAS HIGH COURT.

REFERRED CASE No. 5 OF 1915.

March 29, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

MR. J. KRISHNA ROW—PLAINTIFF—APPELLANT

versus

THE PRESIDENT OF THE CORPORATION OF MADRAS—DEFENDANT—RESPONDENT.

Madras City Municipal Act (III of 1904), ss. 150, 151 (f)—Vehicle kept under repair—Liability for being taxed—'Kept,' 'let out for hire,' 'used,' meaning of.

The possession of a vehicle without use brings the possessor within the scope of section 150 of the Madras City Municipal Act. Therefore a motor car kept under repair is liable to taxation.

Under section 150, the car need not be in the possession of the owner.

The three phrases "kept," "let out for hire", and "used" in section 150 of the Madras City Municipal Act are employed distinctively and the word 'kept' is not qualified by the words "for hire."

Case stated under section 176 of Act III of 1904 by the Chief Presidency Magistrate, Egmore, Madras, in Calendar Case No. 9747 of 1915.

FACTS.—The facts appear clearly from the following extracts from the letter of reference by the Chief Presidency Magistrate to the High Court:—

"A gentleman, Mr. Krishna Row, bought a motor car in August 1914. Immediately after purchase it was handed over to a firm of motor car repairers, as it was not then in running order. It was returned to him after repair only on the 9th September 1914; on these facts, the Corporation assessed Mr. Krishna Row on his motor car for the half year ending 30th September 1914, *viz.*, Rs. 25. This assessment was based on section 152 (2) of the said Act which lays down that the tax shall be payable 'so soon as a vehicle has been for thirty days kept or let out for hire or used within the city.' The Corporation contends that the car, having been purchased in August 1914, was kept for more than thirty days.

"On appeal, this Court held that to keep a car was something more than to own a car and that though Mr. Krishna Row owned the car from August 1914, he kept a car only from the 9th September 1914, when the car was handed over to him by the epairers.

"If the interpretation placed by this Court on the expression 'to keep a vehicle or animal' is not upheld, a further question raised by the appellant will have to be considered, *i. e.*, whether it is the keeping of a car or the keeping for hire that is referred to in section 150 as a condition necessary for rendering a person liable to the tax."

Mr. *R. N. Ayyangar*, for the Appellant.

Mr. *P. Doraiswami Ayyangar*, for the Respondent.

JUDGMENT.

AYLING, J.—In my opinion the three phrases "kept", "let out for hire" and "used" in section 150 of the Madras City Municipal Act are employed distinctively; and the word "kept" is not qualified by the words "for hire". If the mere possession of a car which is never used does not bring the possessor within the scope of section 150, it is difficult to imagine what is the object of the exemption clause, section 151 (*f*).

I can see no ground for holding that a car ceases to be "kept," within the meaning of section 150, because it is under repair and for that reason unfit for immediate use.

I would set aside the order of the Magistrate, cancelling the tax and ordering refund.

NAPIER, J.—I agree.

Three points are argued. *First*, that a car under repair is not a vehicle. I cannot take this argument seriously. *Second*, that the word "kept" must be read with the words "for hire" and private persons who do not use for 30 days are not taxable. Section 151 (*f*) clearly negatives this argument. *Thirdly*, that as the owner had not the car in his possession, he was not "keeping it." The section does not require the car to be in the possession of the owner. Any vehicle that is under some one's control is undoubtedly kept.

It has not been argued that if it was kept the owner need not pay and the argument would be impossible as long as the owner had control. *Vide* Section 150 (2) of the Madras Municipal Act. The assessment by the Corporation is correct.

Reference answered in the negative.

DANPATI MAHTO v. MIDNAPUR ZAMINDARY CO., LTD.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 790 OF 1915.

June 16, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

DANPATI MAHTO AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE MIDNAPUR ZAMINDARY CO., LTD., —PLAINTIFFS—RESPONDENTS.

Minor—Guardian's agreement to pay enhanced rent, if binding upon minor.

The mere fact that infants tenants would avoid litigation with the landlord is not sufficient by itself to entitle their guardian to enter into a fresh lease agreeing, on behalf of the infants, to pay enhanced rent. [p. 583, col. 1.]

Appeal against the decree of the District Judge, Midnapore, dated the 26th December 1914, affirming that of the Officiating Subordinate Judge, 1st Court at that place, dated the 9th July 1913.

FACTS of the case will appear from the judgment.

Babu *Mohini Mohan Chatterji*, for the Appellants.—The appeal is by the defendants Nos. 4 to 8. Defendant No. 3 was himself a minor when he executed a *kabuliyat*, in favour of the Midnapur Zemindary Co., on behalf of defendants Nos. 4 to 8. The defendant No. 3 had no authority whatsoever to execute the aforesaid *kabuliyat* on behalf of defendants Nos. 4 to 8. The *kabuliyat* was for the payment of enhanced rent. The onus, in the present case, is clearly on the plaintiffs to show that the *kabuliyat* was legally executed by one who had authority to do so, and the plaintiffs have not discharged that onus. It is for the plaintiffs to show that the minors were properly represented. There is no finding as to how the minors will be benefited. In order that a minor might be bound by an agreement, it must be clearly established that he was going to obtain some benefit by it. No evidence has been given in the present case to justify the enhancement of rent. Unless the plaintiffs have fully discharged the onus which lies heavily on them, they cannot succeed.

Mr. *U. N. Sen Gupta*, Counsel (with him Mr. *S. M. Bose* and Babu *Probodh Kumar Das*), for the Respondents.—It is a general principle of law that when adult members are parties to a *kabuliyat*, the minors therein too are bound by the terms of the said *kabuliyat*. *Vide Rameswar Pershad Singh* v. *Rum Bahadur Singh* (1).

The very fact that the adult members joined in the execution of the *kabuliyat* is proof positive of the fact that the minors too had beneficial interest. The ordinary presumption of fact is that the minors entered into the contract with the adults for their own benefit, and this presumption has not in any way been rebutted by the minor defendants. So the plaintiffs are entitled to succeed as against defendants Nos. 4 to 8, who cannot be said to be not bound by the terms of the *kabuliyat* executed on their behalf by defendant No. 3.

Babu *Mohini Mohan Chatterji* was not called upon to reply.

JUDGMENT.—This is an appeal from the decision of the learned District Judge of Midnapur, dated the 26th December, 1914, affirming the decision of the Subordinate Judge of that place, dated the 9th July, 1913. The suit was brought by the plaintiff, the Midnapur Zamindary Company, Limited, to recover the arrears of rent due under a *kabuliyat*. There are two classes of defendants in this case, the adult defendants and the infant defendants. The appeal in so far as the adult defendants are concerned is, it is conceded, barred by limitation and is accordingly dismissed. We shall now deal with the appeal of the infant defendants, namely, the defendants Nos. 4 to 8.

Two questions are raised in this appeal with reference to the infant defendants. *First* of all, it is urged that the defendant No. 3, who entered into this *kabuliyat* on the 14th March, 1909, on behalf of himself and as guardian of the infant defendants, was himself a minor at that time. The learned Judge has found that he was of full age. If the case remained there, we should have to accept the finding of the learned Judge that the defendant No. 3, at the time he entered into the *kabuliyat* on behalf of the defendants Nos. 4 to 8, was of full age, although there is a considerable body of documentary evidence which would suggest that the defendant No. 3 was not at that time of full age. The *second* question is, was the *kabuliyat* properly

(1) 34 C. 70; 11 C. W. N. 178; 5 C. L. J. 175; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.).

entered into on behalf of and is binding on the infants? The learned Judge of the lower Appellate Court has made only one finding with reference to that, namely, that the *kabuliyat* was entered into in order to avoid a litigation. Before the *kabuliyat* was entered into, the defendants had a right of occupancy in the land; and it is obvious that the mere fact that the infants avoided litigation with the plaintiff Company was not sufficient by itself to entitle a guardian to enter into a fresh lease in which the rent was doubled. That seems to us quite clear. Moreover on the record there appears evidence of former proceedings brought by the Midnapur Zemindary Company as plaintiff against the defendants. What exactly were the reasons that led to the conclusion of the Court in that case does not appear on the record. But what does appear is that the Court by its decree found that the Company was not entitled to increase the rent. That being the case, it is quite clear that we cannot accept the statement made by the learned Judge of the lower Appellate Court, that the *kabuliyat* was entered into on behalf of the infant defendants by their guardian in order to avoid a litigation, as a sufficient fact on which we can hold that the infants are bound by the terms of the *kabuliyat*. The matter does not seem to have been fully or satisfactorily determined by the learned Judge of the lower Appellate Court and we think that the appeal ought to go back to him in order that we may come to a proper finding as to whether or not the *kabuliyat* is binding on the infant defendants Nos. 4 to 8.

We understand that the decree in the former litigation states that the suit for enhancement is dismissed. Whether that is so or not, obviously the conclusion of the Court was, as the matter then stood, that the plaintiff was not entitled to the enhancement of rent as claimed.

The result, therefore, is that the appeal of the adult defendants is dismissed with costs, and, in so far as the infant defendants are concerned, the appeal is sent back to the lower Appellate Court to be dealt with as directed above. The costs as between these infant defendants and the respondents will abide the result.

Case remanded.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 326 OF 1911.
Civil Miscellaneous Petition No. 484 of 1915.
January 21, 1916.
Present:—Mr. Justice Rattigan and Mr. Justice Leslie Jones.

VIR SINGH AND OTHERS—PLAINTIFFS—PETITIONERS
versus
TIRATH RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 110, O. XLV, r. 3—Privy Council Appeal—Petition for leave to appeal—Substantial question of law.

Where the decree of the Chief Court affirmed the decision of the Court immediately below, the decisions of both Courts being based solely on the facts which were held to be established, and the petitioner applied for a certificate on the ground that his claim to a small portion of the property in dispute was not barred by time:

Held, that as no substantial question of law was involved in the appeal and the case was not "otherwise" a fit one for appeal to His Majesty in Council, the certificate prayed for could not be granted. [p. 584, col. 1.]

Banke Lal v. *Jagat Narain*, 23 A. 94; A. W. N. (1900) 8, *Banarsi Prasad* v. *Kashi Krishna Narain*, 23 A. 227; 28 I. A. 11 (P. C.), 5 C. W. N. 193, followed.

Petition, under Order XLV, rules 2 and 5, of the Civil Procedure Code, for grant of a certificate to prefer an appeal to His Majesty in Council against the judgment and decree of the Chief Court, dated the 4th June 1915.

Mr. *Ralli*, for the Petitioners.
Mr. *Beechey*, for the Respondents.

JUDGMENT.—The petitioners apply under Order XLV, rule 3, of the Civil Procedure Code, for a certificate that this case fulfils the requirements of section 110 of the Code, or that it is otherwise a fit one for appeal to His Majesty in Council; and Mr. Beechey, on behalf of respondents, contests the right of petitioners to any such certificate.

In our opinion, the respondents' contention must prevail. The value of the property (which plaintiffs-petitioners themselves in the first instance estimated at Rs. 1,100) has, no doubt, been found to be Rs. 20,660, but the decree of this Court affirmed the decision of the Court immediately below and the appeal to His Majesty in Council involves no "substantial question of law," the decision of both Courts being based solely on the facts which were held to be

established. The "grounds of appeal", as set forth in the petition for grant of a certificate, do not disclose any such substantial question of law, except possibly that part of ground No. (6) which alleges that "their title to plot No. 4 was not barred by time." Apart from the objection that this plot, which is merely one of several in dispute, is of value far short of Rs. 10,000, we find that the decision of this Court as regards plaintiffs' claim to it proceeded on the ground that petitioners (who were plaintiffs in the suit) had failed to prove their allegations that their possession dated from 1887 and continued to 1898, and that they were not entitled at a late stage of the case to shift their ground by asserting that, though they were not (as they originally asserted) themselves in possession up to 1898, Charan Singh was in possession as manager or trustee on their behalf. But the decision of this Court went further, it being held that even if plaintiffs had not lost their rights by defendants' adverse possession, their title had been lost by acquiescence, inasmuch as (1) they must have known of the defendant's possession and had nevertheless stood by and allowed him without objection to erect buildings which had enormously increased the value of the property, and (2) they had, after the institution of the present suit, instituted another suit (which has also been dismissed) for pre-emption of the property sold by Charan Singh to defendant in 1899.

In these circumstances, following the decision of the Allahabad High Court in *Banke Lal* v. *Jagat Narain* (1), we hold that no substantial question of law is involved in the appeal and as the case is not, in our opinion, regard being had to the *dicta* of their Lordships of the Privy Council in *Banarsi Prasad* v. *Kashi Krishna Narain* (2), "otherwise" a fit one for appeal to His Majesty in Council, we decline to grant the certificate prayed for. It is, of course, open to the petitioners, if so advised, to apply direct to His Majesty in Council for leave to appeal from the judgment of this Court.

The application is dismissed with costs.

Petition dismissed.

(1) 23 A. 94; A. W. N. (1900) 8.
(2) 23 A. 227; 28 I. A. 11 (P. C.); 5 C. W. N. 193.

*CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 69 OF 1913.

May 19, 1916.

Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice Choudhuri.

HARISH CHANDRA BOSE—PLAINTIFF—APPELLANT

versus

RAM GOBINDA NANDY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), s. 171 -Unregistered co-sharer in occupancy holding, if entitled to benefit of s. 171.

An unregistered co-sharer in an occupancy holding cannot obtain the benefit of section 171, Bengal Tenancy Act, against the registered holder of which the decree for rent was obtained, by reason of his paying into Court the amount requisite to prevent the sale of the holding in execution of a decree. (p. 588 col. 1.)

Radhika Nath Sarkar v. *Rakhal Raj Gayen*, 3 Ind. Cas. 855; 13 C. W. N. 1175; 10 C. L. J. 473 and *Jagat Mohini Dasi* v. *Sri Nath Chatterjee*, 7 Ind. Cas. 477; 12 C. L. J. 669, distinguished.

Ashok Bhuiyan v. *Karim Bepari*, 9 C. W. N. 843 and *Behary Lal Pan* v. *Fakir Chandra Roy*, 12 C. W. N. ccxxxi, referred to.

Appeal against the decree of Mr. Justice Newbould, one of the Judges of this Court, dated the 15th of April 1913, in Appeal from Appellate Decree No. 4164 of 1910.

FACTS material to the report will appear from the following extract from the appellate judgment of the Subordinate Judge and from the High Court judgments:—

"The Maharaja of Tippera brought against the defendants Nos. 1 and 2 a suit for arrears of rent for 1311 to 1314 in respect of a *raiyati jama* of Rs. 10-5-9 and got a decree. In execution of the decree, the holding was advertised for sale. The plaintiff, who was in possession of one of the plots of the holding as mortgagee, deposited in Court Rs. 65-20 9, the decretal money, on the 14th November 1905 and thus saved the holding from being sold. The Munsif has decreed the plaintiff's claim for the Rs. 65-10-9 and also for Rs. 3 8-6, the costs for depositing, and ordered the plaintiff to get possession of those lands of the holding which are not in his possession and to remain in possession until the amounts and the costs of the suit have been realised. * * * * * The plaintiff is admittedly the owner of some of the plots of the holding, the plots Nos. 2, 3, 4, by right of purchase. In the plaint he states that he has been in

possession of the plots Nos. 2, 3, 4 after 1314 by right of purchase. But from his evidence it appears that he was in possession of the plots in 1304 by right of purchase. Now it is evident that he was a co-sharer of the defendants Nos. 1 and 2, the judgment-debtors, in the holding in 1314. The rent-decree was for the arrears of rent for 1311 to 1314. As the plaintiff is a co-sharer of the judgment-debtors in the holding, he cannot get the benefit of section 171 of the Bengal Tenancy Act, for he was jointly liable with them to pay the decretal money, *vide* ruling reported as *Behari Lal Pan* v. *Fakir Chandra Roy* (1). It is argued on behalf of the plaintiff-respondent that he deposited the decretal money as mortgagee of the plot No. 1 and consequently he is entitled to get the benefit of section 171. This argument is not valid for as co-sharer in the holding he was bound to satisfy the decree." * * * *

On appeal to the High Court, the following judgment was delivered by

NEWBOULD, J.—This appeal arises out of a suit for contribution and possession under section 171 of the Bengal Tenancy Act. The suit was decreed in part by the Court. of first instance and dismissed on appeal on the ground that the plaintiff was not entitled to get the benefit of section 171. The *first* question which arises in this appeal, is whether the plaintiff as an unrecorded co-sharer in an occupancy holding had an interest which would be voidable on the sale of the holding in execution of a rent decree to which he was not a party. For the appellant reliance has been placed on the cases of *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (2) and *Jugal Mohini Dasi* v. *Sri Nath Chatterjee* (3). Both these cases are distinguishable, *firstly*, on the ground that they are cases relating to tenures and not occupancy holdings, and *secondly*, on the ground that it was distinctly held in these cases that the interest of the person claiming right under section 170 or 171 was an interest which was voidable on sale of the tenure. It appears to me on the authority of *Ashok Bhuiyan* v. *Karim Bepari* (4) that the sale of this *jote* in execution of the decree obtained against the appellant's co-sharers cannot pass his interest. The learned Subordinate Judge had referred to the case of *Behary Lal Pan* v. *Fakir Chandra Roy* (1). I have referred to the Full Bench judgment of this case, as the note in the report is not quite clear. In that case the learned Judge held that the expression "interest" under section 171 refers to an incumbrance as defined in section 161 and any person having in a tenure or holding an interest which would be voidable on the sale means any person who has in a tenure or holding an incumbrance as defined in section 161. So far as we are concerned on the point under consideration the plaintiff is not certainly a person who had an incumbrance on the holding as defined in section 161. I agree with the view taken by my learned brother in a similar case that a person cannot obtain the benefit of section 171, on the ground of being an unregistered co-sharer in the occupancy holding, against the registered holder of which the decree for rent was obtained.

It is *next* contended that the plaintiff was not only the purchaser of shares of the holding but he was also the mortgagee. It is not quite clear whether he is a mortgagee or not. In his plaint he has not claimed to hold the land as mortgagee. He claimed that he was the purchaser of a mortgage-decree. But, however that may be, in his application for depositing the money he did not describe himself as mortgagee. He described himself as the *malik* in the *raiyati* holding. As he did not deposit the money as mortgagee he cannot now claim the benefit of section 171 as mortgagee.

The *next* point taken is that as only defendants Nos. 7 and 8 appealed against the decree of the lower Court it should have been upheld as against the other defendants who had not appealed. But in rule 4, Order XLI, of the Code of Civil Procedure it is laid down that where there are more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any of the defendants may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree in favour of all the defendants. In this case, the decree of the first Court proceeded on grounds common to all the defendants and so also the decree

(1) 12 C. W. N. ccxxxi.
(2) 3 Ind. Cas. 835; 13 C. W. N. 1175; 10 C.L.J. 473.
(3) 7 Ind. Cas. 477; 12 C. L. J. 609.
(4) 9 C. W. N. 843.

of the lower Appellate Court. The Appellate Court had full power, therefore, to reverse the decree in favour of all the defendants including those who did not appeal.

Lastly, it was contended that under section 69 of the Contract Act the plaintiff was entitled to a decree for the money which he had claimed against the other defendants. The difficulty about granting this claim is that the plaintiff has not proved the facts necessary to obtain a decree for contribution. It is contended that the lower Appellate Court should have remanded the case in order that evidence might be taken on this point. In my opinion the lower Appellate Court exercised a wise discretion in holding that the plaintiff could have given evidence in the lower Court to prove what amount as rent was due by each of the defendants, and in refusing to remand the case at that stage.

The appeal fails on all the points raised, and is, therefore, dismissed with costs

Babu *Birendra Chandra Das*, for the Appellant,—The whole question is about the declaration of a mortgage lien, *vide* section 171 of the Bengal Tenancy Act. Plaintiff has an interest which is voidable on sale, he is entitled to come under section 171 of the Bengal Tenancy Act as an unregistered co-sharer. Mr. Justice Newbould has relied on the case of *Ashok Bhuiya* v. *Karim Bepari* (4).

A decree against a registered tenant is also binding on the unregistered co-sharer, *vide Azgar Ali* v. *Asabuddin Kazi* (5). If the decree was binding on the plaintiff also, his interest then also should pass, so he has an interest which is voidable on sale.

The case of *Tarak Das Pal Chowdhry* v. *Harish Chandra Banerjee* (6) is to the point. The deposit was made under section 170, Bengal Tenancy Act. I am entitled to deposit as a part *malik*, as purchaser of a portion of a hold.ng whose name is not recorded. If enefit could not be derived as an unrecorded transferee under section 171, it could be derived as a mortgagee. Section 161 says a mortgage is an encumbrance, therefore, if the sale had taken place, the purchaser would have taken this with power to annul the sale, so he is a person who has an interest voidable on sale under section 171. It is immaterial in what capacity the deposit was made.

[CHOUDHURI, J.—The interest of a co-tenant is not voidable on sale but void.]

Your Lordship will kindly refer to Mookerjee, J.'s judgment in *Tarak Das Pal Chowdhry* v. *Harish Chandra Banerjee* (6).

[CHOUDHURI, J.—Recent decisions say that they are void.

Vide Bhagraj Singh v. *Methur Singh* (7) and in *Ahmadullah Chowdhury* v. *Harkaru Saha* (8) where these interests are said to be void.]

As regards the point whether he could come under section 171 as a mortgagee—

CHOUDHURI, J.—There is no clear finding. The deposit was made as a *malik* and not as a mortgagee.

The Appellate Court says he was in possession as a mortgagee. He was either a mortgagee or assignee of the mortgage-decree as regards plot 1. Even then he would be entitled to claim the benefit of section 171. Even after the mortgage-decree it would be an encumbrance. The difference between 'void' and 'voidable' is clearly set out in *Tarak Das Pal Chowdhry* v. *Harish Chandra Banerjee* (6). The auctionpurchaser has got to avoid the encumbrance which is voidable and not void, *vide* section 159, Bengal Tenancy Act. He has got the power to annul the encumbrance. Section 167 directs how a purchaser can annul an encumbrance *Beni Prosad Sinha* v. *Rewat Lall* (9) has held that a sale does not *ipso facto* cancel an encumbrance, so it is clear that it is voidable at the option of the purchaser.

[CHOUDHURI, J.—A mortgage-decree is not an encumbrance.]

Yes, it is so, *vide Banbihari Kapur* v. *Khetra Pal Singh Roy* (10). The case of *Radhika Nath*

(5) 9 C. W. N. 134.
(6) 16 Ind. Cas 977; 17 C. W. N. 163; 16 C. L. J. 548.
(7) 27 Ind. Cas. 424.
(8) 27 Ind. Cas. 176; 20 C.W.N. 39; 22 C. L. J. 106.
(9) 24 C. 746.
(10) 13 Ind. Cas 785; 16 C. W. N. 259; 38 C. 923.

Sarkar v. *Rakhal Raj Gayen* (2) says that the interest of an unrecorded purchaser of a share in a *darpatni* is voidable and it is unintelligible, how Newbould, J., distinguishes this case from the present one. *Vide Sahdeo Singh* v. *Kuldip Singh* (11). If he is a person whose interest is voidable on sale he can claim the benefit of section 171.

[CHOUDHURI, J.—Do you mean to suggest that the effect of the rulings you have quoted is to make the words 'void' and 'voidable' interchangeable ?]

Yes, my Lord.

[WOODROFFE, J.—Can a co-sharer who is to pay rent take advantage of section 171 ?]

No, he cannot.

[WOODROFFE, J.—You say he is not a sharer and cannot be so unless recognised by the landlord.]

Yes, he is an unrecorded purchaser and his interest is voidable on sale, *Jugal Mohini Dasi* v. *Sri Nath Chatterjee* (3). The weight of authority is that the interest of an unrecorded transferee is extinguished on sale.

[CHOUDHURI, J.—Is extinction equal to voidability ?]

Here it means so, the word 'voidable' is not to be interpreted in its strict sense.

[CHOUDHURI, J.—When the right is extinguished, then how is it voidable ?]

Vide section 170, Rampini's Bengal Tenancy Act. The case of *Ashutosh Ghose* v. *Abinash Chandra Chowdhuri* (12), which says that the interest of a co-tenant is not voidable but void, is the solitary exception. But this case does not apply here as the plaintiff here is not a co-tenant.

Babu *Dhirendra Lal Kastagir*, for the Respondent.—As regards, section 171, it refers to execution sales. For 'what interests are voidable on sale,' *vide* sections 158 (*b*) and 159. In this case it is not an encumbrance which is defined in section 161, *vide Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (13). The interest of the present plaintiff is not a protected interest, see section 160, and it does not come under section 161 too. The case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (13) was a case where a person had purchased a portion of a *patni*. Here the plaintiff's interest is that of a co-sharer tenant, and the deposit was made as a co-sharer. As it is not an encumbrance, his interest as purchaser of the holding is cancelled on sale. In this case the mortgagee obtained a decree against the mortgagor, there was only the right to execute the mortgage-decree by sale or foreclosure and nothing else. He is the purchaser of a mortgage-decree, who can apply to enforce the mortgage-decree only. The case of *Azgar Ali* v. *Asaboddin Kazi* (5) says that the purchaser of a portion of a holding would be bound by the sale. Plaintiff cannot come in under section 171. The rulings quoted by the Vakil on the other side refer to section 170. As regards the case of *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (2), it is in conflict with the case of *Abdul Rahman Chowdhuri* v. *Ahmadar Rahman* (13) which is a later decision.

Section 171 refers to a case where interest is voidable, in this case the interest passed by the sale.

Babu *Birendra Chandra Das*, in reply.—The learned Vakil for the respondent takes it for granted that an interest voidable on sale is an encumbrance, but as a matter of fact 'interest voidable on sale' has a wide meaning. Mookerjee, J., has held in *Tarak Pal Das Chowdhuri* v. *Harish Chandra Banerjee* (6) that an interest voidable on sale does not mean only an encumbrance which is voidable on sale. The ruling quoted by Mr. Kastagir has no reference to section 160 or section 161. *Bhagraj Singh* v. *Methur Singh* (7) is a distinct authority in favour of the plaintiff.

The assignee of a mortgage-decree can claim subsistence of mortgage. If the encumbrance subsists even after the mortgage-decree and if the mortgagee can take advantage of it, his representative can also take advantage. The holder of a mortgage-decree stands in the position of the mortgagee.

It does not matter in what capacity I made the deposit. The point is whether, when I made the deposit, I had an interest which would be voidable on sale. I made the deposit as assignee of the mortgage-decree. From the very beginning I wanted to take advantage of section 171.

(11) 18 C. W. N. ccxix.
(12) 11 Ind. Cas. 501; 15 C. W. N. 782.
(13) 31 Ind. Cas. 554; 19 C. W. N. 1217; 22 C. L. J. 356; 43 C. 558.

HARBANS PRASAD TEWARI *v.* RAMA KANT TEWARI.

JUDGMENT.

WOODROFFE, J.—I agree with Mr. Justice Newbould in holding that a person cannot obtain the benefit of section 171 of the Bengal Tenancy Act on the ground of being an unregistered co-sharer in the occupancy holding against the registered holder of which the decree for rent was obtained. In making his application for depositing the money, the appellant described himself as the *malik* in the *raiyati* holding. Mr. Justice Newbould says that it is not quite clear whether he is a mortgagee or not. The position of the appellant, however, is this, that he is not the mortgagee or an assignee of the mortgagee, but he is a purchaser of the mortgage-decree, that is to say, he purchased the right to execute the decree against the mortgagor. Apart from this Mr. Justice Newbould has pointed out that the plaintiff did not claim in his plaint to hold the land as mortgagee and the deposit was not made under that title but under that of *malik*.

The appeal, therefore, fails and is dismissed with costs.

CHOUDHURI, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2824 AND 3297 OF 1914.

July 25, 1916.

Present:—Mr. Justice Kingsford.

HARBANS PRASAD TEWARI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

RAMA KANT TEWARI AND OTHERS— DEFENDANTS—RESPONDENTS.

Settlement Record—"Lagan ab tak nahin dia," *meaning of*

The description "*lagan ab tak nahin dia*" used in a Settlement Record, is equally consistent with the possibility that the lands may be "*belagan*," that is rent-free, or "*kabil lagan*", that is capable of assessment.

Messrs. *Roy* and *Audh Bihari Choudhry*, for the Appellants.

JUDGMENT.—In this case the plaintiffs brought a suit before the Munsif to recover arrears of rent from 1316 to 1319 *Faslis* in respect of two holdings from the defendants-respondents. The plaintiffs stated the amount of rent and asked in the alternative that if it was held that those were not the actual rents which the defendants were liable to pay, then the rents might be assessed by the Court. The Munsif accordingly assessed the rents and passed a decree in favour of the plaintiffs.

On appeal by the defendants the learned Subordinate Judge reversed the decree and dismissed the suit. The plaintiffs appealed.

The learned Judge observes that the entry in the Settlement Record is "*lagan ub tak nahi dia*". He then goes on to discuss the meaning of the word "*kabil lagan*", and he then notes that the holdings in suit are described as *belagan* in the Settlement Record, and he holds that by virtue of this description of "*belagan*" and from other facts in the case it may be presumed that the lands are held rent-free. The Judge is mistaken in supposing that the word '*belagan*' occurs in the Settlement Record with reference to these holdings. The description is merely *lagan ab tak nahin dia*, that is to say, that no rent has been paid up to now. This description is equally consistent with the possibility that the lands may be '*belagan*", that is rent-free, or *kabil lagan*, that is capable of assessment.

It is clear, therefore, that the conclusion at which the learned Judge has arrived is based upon a misapprehension of the facts.

I, therefore, set aside the order of the lower Appellate Court and remand the appeal for re-hearing.

There is no appearance for the respondents. No order as to costs.

Order set aside; Case remanded.

MADRAS HIGH COURT.

REFERRED CASE No. 6 OF 1915.

July 24, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

VEERABHADRAH IYER—APPELLANT

versus

PRESIDENT, CORPORATION OF MADRAS—RESPONDENT.

Madras City Municipal Act (III of 1904), s. 130 (1)—"Gross value," meaning of—Stipulation by tenant to pay enhanced rent in case of failure to water garden, effect of.

"Gross rent" is the annual rent which a tenant might reasonably be expected to pay for an hereditament if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent.

Where according to the terms of a lease, the tenant was to pay Rs. 20 per mensem and keep the garden properly watered, and if he did not want to water the garden or failed to do so, the landlord was to arrange for the watering and the tenant was to pay Rs. 50, and where the tenant chose the latter course:

Held, that the gross value of the garden was the annual rent at Rs 50 per mensem, the amount received by the landlord for maintaining the garden in a proper state.

Case stated under section 176 of the Madras City Municipal Act (III of 1904), by the Presidency Magistrate, Egmore, Madras, in Municipal Appeal No. 9204 of 1915, on the file of his Court.

Mr. *C. Veeraraghava Aiyar*, for the Appellant.

Mr. *K. C. Desikachariar*, for Mr. *P. Doraisami Aiyangar*, for the Respondent.

JUDGMENT.—Petitioner in this case owns a cocoanut garden, which he has leased to a tenant. Under the lease, the tenant is to pay Rs. 20 per mensem as rent, and to keep the garden properly watered. If he does not want to water the garden, or fails to do so properly, the landlord is to arrange for the watering and the tenant is to pay Rs. 50 per mensem. The tenant has chosen the latter alternative. It is now contended that the gross rent of the land is only Rs. 20 per mensem, as the balance of Rs. 30 is paid to meet watering charges and cannot be treated as rent. It is, however, perfectly clear that the watering does not benefit the tenant alone, but it is also beneficial to the landlord for it preserves his property in good condition. If the land were not leased out, the landlord would have to water the garden, and would himself get the usufruct. Under the lease, he continues to water the garden, but instead of getting the usufruct he gets Rs. 50 per mensem, and this amount is clearly the gross rent, being the amount paid to the landlord for the occupation of the land and enjoyment of the usufruct. "Gross rent" is not defined in the Madras Municipal Act but in the Valuation of Property (Metropolis) Act (1869), 32 & 33 Victoria (Ch. 67). We find "gross value" defined as follows, *i.e.*, "the annual rent which a tenant might reasonably be expected to pay for an hereditament if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent." Applying this definition we find the gross value of the garden to be Rs. 600. *i.e.*, the annual rent at Rs. 50 per mensem, the amount received by the landlord for the land maintained in a proper state. The Presidency Magistrates are right in their conclusion and we dismiss the reference with costs.

Reference dismissed.

V.R.P.

PATNA HIGH COURT.

CIVIL REVISION PETITION No. 117 OF 1916.

July 18, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

Rani DEBENDRA BALA DASI—PLAINTIFF—PETITIONER

versus

Babu CHANDRA SEKHAR PRASAD SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Receiver, money in hands of—Disputes relating to such money, which Court can decide—Jurisdiction.

A Receiver is an officer of the Court and money in his hands is regarded as being in the custody of the Court. Therefore, the only Court which has jurisdiction to decide disputes relating to such money is the Court in whose custody the money is, and not any other Court. [p. 591, col. 1.]

Gopee Nath Acharje v. *Achha Bibee*, 7 C. 553; 9 C. L. R. 395, not followed.

Application for revision of the order of the Sub-Judge, 2nd Court, Chapra.

Messrs. *Grija Prosanno Roy Chowdhry* and *Bamkim Chandra Dey*, for the Petitioner.

Messrs. *Baldeo Narain Singh* and *Kulwant Sahay*, for the Receiver-Respondent.

Messrs. *Lakshmi Narain Singh* and *Baidyanath Narain Singh*, for the Decree-holder-Respondent.

DEBENDRA BALA DASI v. CHANDRA SEKHAR PRASAD SINGH.

JUDGMENT.

CHAMIER, C. J.—This is an application for revision of certain orders passed by the Subordinate Judge (2nd Court), Chapra. The applicant Rani Debendra Bala Dasi, who is described as executrix of the estate of Suresh Chandra Singh of Paikpara, is the holder for the time being of the Paikpara Estate. It appears that in August 1902, Mr. R. Mitter, who was then Receiver of the Paikpara Estate, lent a considerable sum of money to the uncle of the 2nd respondent and that the mortgage-deed contained a provision that it would be lawful for the mortgagee at any time after the commencement of a suit on the mortgage to apply for and obtain the appointment of a Receiver of the mortgaged premises. Consequently in a suit brought by the Receiver of the Paikpara Estate in 1907 on the mortgage an application was made to the Subordinate Judge (first Court) Chapra for appointment of a Receiver of the mortgaged property. The Subordinate Judge (first Court) disallowed the application. The plaintiff appealed, with the result that the Calcutta High Court set aside the order of the Subordinate Judge and appointed the first respondent to this application Receiver of the mortgaged property "to collect the rents and profits thereon until final disposal of the suit either by payment of the mortgage-debt or by confirmation of any sale which might take place." That order is dated June 5th, 1908, and since that date the 1st respondent has been in possession of the estate and the mortgaged property and has been receiving the rents and profits thereof. It is stated that for a considerable time the first respondent made payments to the applicant but discontinued these payments in June 1912, when the mortgaged property was sold in execution of the decree. In consequence of an application presented by the judgment-debtor that sale was set aside on May 31st, 1916. In the meantime a considerable sum seems to have accumulated in the hands of the Receiver. Respondent No. 3 Mulka Rani Kuar has obtained a money-decree for Rs. 22,070, which is declared to be recoverable out of the estate of the original mortgagor. Last year she made an application to the Calcutta High Court praying for permission to attach money in the hands of the Receiver in execution of her decree. By order of the Calcutta High Court that application stood over till after the disposal of the proceedings taken to have the sale set aside. It ultimately came up for hearing in this Court and was disposed of by this very Bench. On that occasion we said: "the only question which we have to decide is whether the applicant Mulka Rani Kuar should be allowed to execute her decree by attaching money in the hands of the Receiver, Babu Chandra Sekhar Prasad Singh, who was appointed Receiver by the Calcutta High Court. No one has appeared on behalf of the mortgagee-decree-holder and it has been suggested that we should make no order without issuing a further notice to her. It appears to us that it is unnecessary to issue any further notice to her. The question whether the mortgagee or the holder of the money-decree is entitled to proceed against the property in the hands of the Receiver is a matter upon which we express no opinion. We grant formal permission to *Musammat* Mulka Rani Kuar to execute her decree by attaching money in the hands of the Receiver.' Having obtained that order Mulka Rani Kuar in execution of her decree [which I should have mentioned was obtained in the Court of the Subordinate Judge (second Court), Chapra] applied for attachment of Rs. 28,000 odd in the hands of the Receiver. It is said, and we may assume for the present purpose, that the attachment was regularly carried out. *Musammat* Mulka Rani Kuar then applied to the Subordinate Judge (second Court) for an order upon the Receiver to pay the sum of Rs. 28,000 to her and an order for payment was issued. This is one of the orders and indeed the principal order of the Subordinate Judge which the applicant asks us to set aside. She contends that the Subordinate Judge (second Court), Chapra, had no jurisdiction to order payment of the money in the hands of the Receiver to the 3rd respondent. Her case is that she is mortgagee of the rents and profits of the property and she is entitled to those rents and profits as against any one holding a money-decree against the judgment-debtor. These conflicting claims to a portion of the money in the hands of the Receiver must be decided by some Court and the question is by which Court the dispute should be decided. It appears to me quite clear that the Subordinate Judge (second Court) had no power to decide this dispute. Order XXI, rule 52, lays down the procedure to be follow-

ed where the property to be attached is in the custody of a Court. In the present case the money to be attached must be regarded as being in the custody of the Court, as the Receiver is admittedly an officer of the Court. Then the proviso lays down that where such property is in the custody of the Court, any question of title or priority arising between the decree-holder and any other person not being a judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment or otherwise shall be determined by such Court. This proviso appears to apply exactly to the facts of the present case and, in my opinion, the Court to decide the present dispute between the mortgagee and the holder of the money decree is the Court in whose custody the money is, and not the Court of the Subordinate Judge (second Court), Chapra. I am unable to follow the decision in *Gopee Nath Acharje* v. *Achcha Bibee* (1). I hold that the order passed by the Subordinate Judge (second Court), Chapra, directing payment of Rs. 28,000 odd to the 3rd respondent was made without jurisdiction and it must be set aside. The applicant, besides asking this Court to set aside the order of the Subordinate Judge (second Court) for the payment of this money, asks us to decide that she is entitled to the money, in other words, she asks this Court to decide the dispute between the parties. The learned Vakil for respondent No. 3 contends that his client is entitled to take away the sum which she has attached and that the mortgagee can have no claim to it. In my opinion, we should go no further on the present occasion than to set aside the order of the Subordinate Judge (second Court), Chapra. If the parties consider that this Court is the Court to decide the dispute between them a proper application should be made by one or other of them to this Court. At the present moment we have not before us the necessary materials on which to decide the question. Even the mortgage-deed is not here. In conclusion I wish it to be clearly understood that I do not hold that this Court should decide the question. It appears to me, as at present advised, extremely doubtful whether respondent No. 1, the Receiver appointed by the Calcutta High Court, should be treated as a Receiver appointed by that Court and not by the Subordinate Judge. I would allow the present application with costs and set aside the order of the Subordinate Judge directing the payment of the sum in question to the 3rd respondent. Hearing fee five gold *mohurs*. The Receiver must await further orders before paying the money.

SHARFUDDIN, J.—I agree.

Order set aside.

(1) 7 C. 553; 9 C. L. R. 395.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 263 OF 1915.

April 14, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

MUTHU REDDI *alias* DURAISWAMY REDDI—PLAINTIFF—PETITIONER

versus

VELU ASARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), *ss.* 9, 10, 60, 80—*Promissory note, endorsement on—Presumption of demand—Negotiation—Prior discharge—Rights of endorsee—Action, right of.*

The endorsement of some payments on the back of a promissory note is not evidence of full discharge of the note and of a previous demand for the return of the note. [p. 593, col. 1.]

Payments by the maker of a promissory note to the payee is no defence against a holder in due course, and the discharge of the note before its negotiation by the payee does not affect the right of the endorsee to recover on it, as the maker cannot be said to have acted 'in good faith and without negligence' in not securing the note after its discharge under section 10 of the Negotiable Instruments Act. [p. 592, col. 1; p. 593, col. 1.]

Dubitante.—Whether, after the passing of the Negotiable Instruments Act, knowledge on the part of the endorsee of a demand by the payee would subject him to the equities subsisting between the latter and the maker. [p. 593, col. 1.]

Glosscock v. *Balls*, 24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155, *Nash* v. *De Freville*, (1900) 2 Q. B. 72; 69 L. J. Q. B. 484; 82 L. T. 642; 48 W. R. 434; 16 T. L. R. 268; *Lickbarrow* v. *Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East. 21 *n.*; 1 R. R. 425; 5 T. R. 367; 683; 2 H. Bl. 211; 4 Bro. P. C. 57; 6 T. R. 131; 1 Sm. L. C. (11th Ed.) 693; 100 E. R. 35; *Commadun Mohideen Saib* v. *Orce Meerah Saib*, 7 M. H. C. R. 271; *Harry Van Ingen* v. *Dhunna Lall Lallah*, 5 M. 108, *Brooks* v. *Mitchell*, 9 M. & W. 15; 11 L. J. Ex. 51, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court, to revise the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Small Cause Suit No. 1739 of 1914.

Mr. *T. M. Krishnaswami Aiyar*, for the Petitioner.

MUTHU REDDI v. VELU ASARI.

Mr. *T. S. Natesa Sastriar*, for the Respondents.

JUDGMENT.—The point for decision is whether it is open to the maker of a promissory note payable on demand to plead, against a holder in due course, that he paid the money to the payee before the endorsement. The learned Vakils who appeared on either side argued the question ably before me. The note in question is dated the 12th August 1912 and is for Rs. 200. Certain payments made towards it are endorsed on it. It is alleged by the defendants that some other payments made by them were, by mistake, not entered on the back of the note. The endorsement to the plaintiff was on the 26th of August 1914. The defence to the suit was that the note was fully discharged before the endorsement and that the assignment was fraudulent. The Subordinate Judge framed no issue on the second plea. He held that on the date of the endorsement, nothing was due on the note and dismissed the plaintiff's suit against the makers.

I am unable to agree with the Subordinate Judge. Mr. Natesa Sastriar, who appeared for the defendants, relied upon section 60 of the Negotiable Instruments Act and on *Commaundun Mohideen Saib* v. *Oree Meerah Saib* (1). It is true that section 60 prohibits negotiation by the payee after payment or satisfaction. This does not affect a holder in due course. By section 59 the holder is affected only if he acquired the note after dishonour.

There is no reference to payment or satisfaction in this section. Section 9 makes a person who has paid consideration "a holder in due course", if he became the possessor of the note before the amount mentioned on it became *payable*. The language is not, before the amount *was paid*. Under section 10 payment must be according to the apparent tenor of the instrument. It further provides that there must be good faith and absence of negligence. To my mind where the maker fails to secure the note after discharging it, he cannot be said to have acted in "good faith and without negligence". Section 82, which deals with the discharge of the maker, says that the payment must have been made in due course. My conclusion is that as there was no payment in due course as defined in section 10, the maker is not discharged from liability.

I shall now deal with the cases cited. *Commundun Mohideen Saib* v. *Oree Meerah Saib* (1) was before the Act. Innes, J., relying on *Bartrum* v. *Caddy* (2), held that a discharge against the payee would be a good defence against the endorsee though for value and without notice. In other words, the learned Judge subjected the holder in due course to all the equities subsisting between the maker and the payee. Mr. Justice Kernan was inclined to the view that the equity would apply only to holders of note overdue. In *Bartrum* v. *Caddy* (2) Lord Denman, C. J., put the case upon the ground that 55 George III, Chapter 184, expressly prohibited the re-issue of a note by the maker after payment and delivery to him. Patteson, J., also based his decision on the Act of Parliament. This decision is not an authority for the general proposition that payment affects a holder in due course. In *Glasscock* v. *Balls* (3) Lord Esher, M. R., says: "If a negotiable instrument, remains current, even though it has been paid, there is nothing to prevent a person to whom it has been endorsed for value without knowledge that it has been paid from suing." Referring to *Bartrum's* case (2) the Master of the Rolls said that as the note never came into the hands of the maker and was re-issued by him the case did not apply. The other Lords Justices concurred. The principle applicable to these cases is stated by Colins, L. J., in *Nash* v. *De Freville* (4) thus: "it resolves itself into a simple question, and may be decided in accordance with the familiar principle laid down in *Lickbarrow* v. *Mason* (5), namely, 'That wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.'" It is on this principle, the sections of the Act to which I referred are based. In this case, it is the act of the maker in having left the note with the

(1) 7 M. H. C. R. 271.

(2) 9 Ad. & E. 275; 1 P. & D. 207; 1 W.W. & H 724; 8 L. J. (N. S.) Q. B 31; 112 E. R. 1216; 48 R. R. 502.

(3) 24 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R 155.

(4) (1900) 2 Q. B. 72; 69 L. J. Q. B. 484; 82 L. T. 642; 48 W. R. 434; 16 T. L. R. 268.

(5) 2 T. R. 63 at p. 70; 1 H. Bl. 357; 6 East 21n; 1 R. R. 425; 5 T. R. 367, 683; 2 H. Bl 211; 4 Bro P.C. 57; 6 T. R. 131; 1 Sm. L. C. (11th Ed.) 693; 100 E. R. 35.

payee that enabled the latter to endorse it to the plaintiff. Therefore the maker must suffer the consequences of his carelessness. In *Harry Van Ingen* v. *Dhunna Lall Lallah* (6), which was also a decision before the Act, a distinction is drawn between on-demand notes which have become overdue and those which have not matured. The learned Judges, of whom Mr. Justice Innes was one, followed the dictum in *Commundun Mohideen Saib* v. *Oree Meerah Saib* (1) and pointed out that before a note can be said to be overdue there must have been a demand. See also 9 Mason's Weekly 15. Mr. Natesa Sastriar relied on this observation and contended that the endorsement of payments on the back of the note is evidence of a previous demand. I doubt very much whether after the Act knowledge on the part of the endorsee of a demand by the payee would subject him to the equities subsisting between the latter and the maker.

At any rate I am not prepared to extend by implication the fiction of a demand, because certain payments are entered on the back of the note. The usual presumption would be that no more than what has been entered has been paid by the maker.

I am, therefore, of opinion that payment by the maker will not be a defence against a holder in due course. The other defence leads to the inference that the plaintiff is not a holder in due course. But that issue has not been raised. The Subordinate Judge will now try the issue, whether the plaintiff is a holder in due course. The case is remanded to him. Costs to abide the result.

Petition allowed; Case remanded.

(6) 5 M. 108.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 196 OF 1913.

December 9, 1915.

Present:—Mr. Hayward, A. J. C.

TIKAMDAS MULCHAND AND ANOTHER—PLAINTIFFS

versus

GOKALDAS VISHINDAS AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 92—Charitable trust—Relators—Suit for accounts against non-trustees, maintainability of.

The relators of an author of a charitable trust cannot maintain a suit for an account against a third person, who is not a trustee, on the ground that he obtained possession of trust properties from the last surviving trustee. The relators have no *locus standi* against third parties and cannot demand accounts simply to facilitate recovery of the amount, if any, found due by new trustees, when appointed. [p 593, col. 2; p. 594, col. 1.]

The relators can only claim accounts and enquiries from trustees under clause (*d*) of sub-section (1) of section 92, Civil Procedure Code. [p. 593, col. 2.]

An order for accounts and enquiries against third persons in possession of trust properties and for recovery of the amount, if any, found due on the enquiries can only be made in a properly constituted suit brought for that purpose by trustees duly appointed. [p. 594, col 1.]

Such a suit, when brought, would be outside the contemplation of section 92, Civil Procedure Code. [p. 594, col. 1.]

Ghelabhai Gavrishankar v. *Uderam Ichharam*, 12 Ind. Cas. 577; 36 B. 2.); 13 Bom. L. R. 989; *Malhar Bhagvant Kulkarni* v. *Narsinh Krishna Majli*, 17 Ind. Cas. 665; 37 B. 95; 14 Bom. L. R. 941; *Collector of Poona* v. *Bai Chanchalbai*, 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690, referred to.

The Hon'ble Mr. *Harchandrai* and Mr. *Vishindas*, for the Plaintiffs.

Messrs. *Fatehchand Assudamal*, for Defendant No. 1.

JUDGMENT.—The plaintiffs sue as relators interested in certain charitable trust property for an account from the defendant No. 1, who is alleged to have obtained possession of certain portions of the charitable trust property from his deceased father Vishindas, alleged to have been the last surviving trustee of the charity created by the Will of one Bhagwandas. The defendant No. 1 pleads that the relators cannot claim any account from him, a third party, or obtain any order against him, a third party and not a trustee of the charity. But he has now withdrawn his further objection to the appointment of new trustees as he has dropped his contention that no charitable trust was created by the Will of the deceased Bhagwandas within the meaning of section 92 of the Civil Procedure Code.

It seems to me that defendant No. 1's objections to the right of the relators to demand from him an account in these proceedings must prevail. The relators have no *locus standi* as against third parties. They can only claim accounts and enquiries from

trustees. This is the case in which it is sought to obtain accounts from a third party merely in order to facilitate the recovery of the amount, if any found due, by the new trustees when appointed. It is not a case of accounts and enquiries claimed against a trustee under clause (*d*) of sub-section (1) of section 92, Civil Procedure Code. It would be useless to direct such enquiries and accounts in this suit as admittedly no order could be made for the recovery of the amount, if any, found due on the enquiries. Such an order could only be made in a properly constituted suit brought for that purpose by the new trustees. Such a suit when brought would be outside the contemplation of section 92 of the Civil Procedure Code, as indicated in the cases of *Ghelabhai Gavrishankar* v. *Uderam Ichharam*(1) and *Malhar Bhagvant Kulkarni* v. *Narsinh Krishna Majli* (2). Nor, since the creation of the trust is no longer denied, is this a case similar to that of the *Collector of Poona* v. *Bai Chanchalbai* (3).

The suit against defendant No. 1, so far as it relates to taking of accounts, must, therefore, be dismissed. But it must be decreed as far as it relates to the appointment of new trustees and the vesting in them of such property as may be ascertained to be the property of the charitable trust under the Will of the late Bhagwandas. It seems to me that the proper persons to be appointed new trustees are one of the relators Tikamdas Mulchand and the two additional persons Tikamdas Sukhramdas and Gordhandas Vishindas, agreed upon by both the parties. They are accordingly appointed trustees and in them is vested the property of the charitable trust created under the Will of the late Bhagwandas, under section 92 of the Civil Procedure Code. With regard to costs the order must be that each party bear his own costs. The suit against defendant No. 2 is dismissed. No order as to costs.

Suit partly allowed.

(1) 12 Ind. Cas. 577; 36 B. 29; 13 Bom. L. R. 989.
(2) 17 Ind. Cas. 665; 37 B. 95; 14 Bom. L. R. 941.
(3) 12 Ind. Cas. 30; 35 B. 470; 13 Bom. L. R. 690.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 83 OF 1914.

July 17, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

YELLAMPALLE VENKATAPPA—PLAINTIFF—APPELLANT

versus

MATAM NANJAPPA—DEFENDANT—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 182—*Execution—Dismissal of first application for non-payment of* batta—*Second application made more than* 3 *years after—Interval spent in contesting suit by third party—Second application, whether revival of first.*

Where the first application for execution, dated 27th April 1907, was dismissed for non-payment of *batta* and the plaintiff applied again on 22nd October 1912 and in the interval the decree-holder's right to attach the property was contested in a suit by a third party which was finally decided in the decree-holder's favour on 11th August 1911:

Held, that, as the dismissal of the first application had nothing to do with the suit brought by the third party, it could not be treated as pending during the time taken in that litigation and the second application having been made out of time was liable to be dismissed. [p. 595, col. 1.]

Chalavadi Kotiah v. *Polavai Alimelammah*, 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 328, distinguished.

Appeal against the decree of the District Court, North Arcot, in Appeal Suit No. 680 of 1913, preferred against the order of the Court of the District Munsif, Madanapalle, in Execution Petition No. 811 of 1912, in Original Suit No. 219 of 1906, on the file of the District Munsif's Court, Chittoor.

Mr. *K. P. Shunmugam Pillai*, for the Appellant.

JUDGMENT.—Plaintiff's first application for execution was on 27th April 1907; his second application was on 22nd October 1912. It is *prima facie* barred by limitation. To save it from this bar, two arguments have been advanced before us. It is *first* contended that the second application should be treated as a continuation of the first one. The facts are that when properties were attached in pursuance of the first application one Nanjappa claimed them as his; his claim was dismissed. He thereupon brought Original Suit No. 383 of 1908 to establish his right. He got a decree in his favour for item No. 2 on 31st December 1909. Plaintiff appealed and on his appeal that decree was reversed on 11th August 1911. It is argued that execution under his first appli-

cation should be treated as pending during the time he was litigating to remove the obstacle placed in his way by Nanjappa's claim and suit, and that this present application is one to revive it and carry out the prayer in the first application. There might be force in this argument, if it had not been that plaintiff's first application was dismissed for non-payment of *batta*. That dismissal had nothing to do with the claim or suit brought by Nanjappa. In the case cited, *Chalavadi Kotiah* v. *Poloori Alimelammah* (1), the first application was dismissed as the Munsif received an order of stay without notice to either party and in their absence. That order was treated as a direction to the officers of the Court to remove the proceedings from the pending list. Such an execution petition may be asked to be revived, but not one in which there is an order, as in the present case, dismissing the execution petition for the plaintiff's own default in paying *batta*. The argument should, therefore, be disallowed.

The *next* argument is that the time between the dates of the 1st Court's decree in Nanjappa's suit which declared the property was not attachable and the decree in appeal which reversed it, should be deducted in plaintiff's favour under section 15 of the Limitation Act. It is argued that the decree of the 1st Court was tantamount to an order staying execution of the plaintiff's decree against the property to which it referred. It is not, however, necessary to decide this question as the time that plaintiff would be able to deduct, if his argument is right, will not make his 2nd application to be in time. We agree with the lower Courts that plaintiff's application is barred by limitation and dismiss it.

Appeal dismissed.

V. R. P.

(1) 31 M. 71; 18 M. L. J. 46; 3 M. L. T. 328.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 776 OF 1913.

June 23, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

GANGA CHARAN DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

AKHIL CHANDRA SAHA ON THE DEATH OF RADHA RAMAN SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14, Expl. 1—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Return of plaint—Time necessary for re-filing, exclusion of—Proceedings in suit, termination of, by return of plaint.

Where a suit was filed on the last day of limitation but the Court returned the plaint as being undervalued allowing five days' time to re-file the plaint in the proper Court, and on that very day ordered the plaintiff to pay costs to the defendant, but the order assessing the amount of costs was recorded in the order-sheet three days after the return of the plaint, and the plaint was re-filed within the five days allowed by Court:

Held, that the suit was barred by limitation as there is no provision in the Limitation Act (IX of 1908) or in the Civil Procedure Code (Act V of 1908) for allowing further time to re-file a plaint, and the order allowing further time must be considered a nullity. [p. 597, col. 1.]

When a plaint is returned under Order VII, rule 10, Civil Procedure Code, the proceedings in the suit terminate on the day of the return of the plaint, and not on the day when the costs ordered to be paid by the plaintiff on such return are assessed and recorded in the order-sheet. [p. 597, col. 1.]

Haridas Roy v. *Sarat Chandra Dey*, 18 Ind. Cas. 121; 17 C. W. N. 515, referred to.

Appeal against the decree of the Additional District Judge, Dacca, dated the 9th October 1912, affirming that of the Additional Subordinate Judge of that place, dated the 25th July 1912.

FACTS of the case appear from the judgment.

Babu *Ramesh Chandra Sen*, for the Plaintiffs-Appellants.—Plaintiffs' suit is not barred by limitation; section 14 of the Limitation Act covers the case. The proceeding commenced on 2nd September 1909, on which date the plaint was filed in the Munsif's Court, and the proceeding terminated on 30th June 1910, on which date the Munsif passed the last order in the proceedings; if the period from 2nd September 1909 to 30th June 1910 be deducted, as it should be under section 14 of the Limitation Act, the plaintiffs' suit would be within time. The proceeding in the Munsif's Court did not termi-

nate with the return of the plaint on 27th June 1910; even after that date something remained for the Munsif for the exercise of his judicial decision and that decision was made on 30th June 1910, and the proceeding cannot be held to have terminated without that order of the Munsif.

Even if the proceeding in the Munsif's Court be held to have terminated with the return of the plaint on 27th June 1910, then also the plaintiffs' case would be within time. Under section 14 of the Limitation Act the period commencing from 2nd September 1909 and ending with 27th June 1910 must be deducted, and the learned Munsif had ample jurisdiction to allow the plaintiffs a reasonable time so as to enable them to re file the plaint in the proper Court, and the plaint being re-filed in proper Court within the time allowed by the Munsif, the plaintiffs' suit is within time. Vide *Haji Shah Mumtaz Hossain* v. *Raghu Nandan Sahu* (1) and *Nibaran Chandra Banerjee* v. *S. C. Mukherjee* (2).

In this case it has been held that reasonable time should be given for carrying out the order of the Court if there is nothing in law to the contrary, and it is the duty of the Court to decide what reasonable time is. In the present case the learned Munsif granted five days' time for carrying out his orders, and the plaint being filed within the time thus allowed the suit is within time, and the five days' time allowed by the Munsif is not unreasonable in the present case.

Dr. *Sarat Chandra Basak* (with him Babus *Bipin Chandra Basu* and *Sarat Chandra Dutt*), for the Defendants Nos. 1 to 5.—The proceeding in the Munsif's Court terminated with the return of the plaint on the 27th June 1910; there remained nothing left for the Munsif to decide. The order passed on the 30th June 1910 was merely a clerical order, and the Munsif had nothing to do but to put his signature. No judicial discretion was exercised in the matter. After the return of the plaint, the plaintiffs cannot be said to have carried on any proceeding in the Munsif's Court; the proceeding so far as the Munsif's Court is concerned terminated by the return of the plaint.

The Munsif had no jurisdiction to extend the period of limitation. Section 14 of the Limitation Act entitled the plaintiffs to exemption of the time during which the case remained pending in his Court, and the law does not authorise any extension of that period by any Court. See *Haridas Roy* v. *Sarat Chandra Dey* (3).

In this case, the case cited by the learned Vakil for the appellants was considered and dissented from. See also *Abhoya Churn Chuckerbutty* v. *Gour Mohun Dutt* (4).

Maulvi *A. K. Fazlul Huq* (with him Babus *Upendra Lal Roy*, *Prokash Chandra Pakrasi* and *Ramandra Mohan Majumdar*), for Defendant No. 8, adopted the arguments of Dr. Basak, and submitted his arguments on the merits of the case.

JUDGMENT.—The plaintiffs attached certain properties in execution of a decree against defendant No. 9. Some of the other defendants claimed the same and were successful. The claims were allowed on the 3rd of September 1908 and the plaintiffs brought this suit on the 2nd of September 1909 in the Court of the Munsif of Dacca. The defendants objected to the valuation of the suit and on the 23rd of June 1910, the learned Munsif held that the suit was undervalued and ordered the plaint to be returned and directed the plaintiffs to pay costs to the contending defendants. The plaint was accordingly returned on the 27th of June. The costs payable by the plaintiffs to the contending defendants were subsequently calculated in the office and on the 30th June an order fixing the amount at Rs. 25 was recorded in the order-sheet. When returning the plaint on the 27th of June the learned Munsif directed that the plaint might be re filed in the proper Court within 5 days. The plaint was actually re-filed on the 1st of July 1910, within the 5 days so allowed. It is contended, however, that the suit is barred by limitation as the learned Munsif had no authority to grant the additional 5 days. The plaintiffs contend, *first*, that the Munsif was right in granting time and *secondly*, that the proceeding in the Munsif's Court ended on the 30th of June when the order assessing costs was made, and in

(1) 5 Ind. Cas. 153; 14 C. W. N. 231.; 11 C. L. J. 216.

(2) 6 Ind. Cas. 637.

(3) 18 Ind. Cas. 121; 17 C. W. N. 515.

(4) 24 W. R. 26.

either case they are within time. Explanation 1 to section 14 of the Limitation Act lays down that in excluding the time during which a former suit was pending the day on which the suit was instituted and the day on which the proceedings therein ended shall both be counted. No further time is allowed as in clause 2 for going from one Court to another. There is no other provision in the Limitation Act or in the Civil Procedure Code for allowing further time and the order allowing further time must be considered as a nullity. See *Haridas Roy* v. *Sarat Chandra Dey* (3). This view of the matter might cause hardship in some cases, as the plaintiff might require time to secure further costs or to reach the new Court. But a plaintiff who files his suit on the very last date available to him under the law of limitation takes the risk, and the law does not make any provision for such time except in cases coming under clause 2 of section 14.

But then if the proceedings in the suit in the Munsif's Court ended on the 30th June the plaintiffs are still within time. Order VII, rule 10, Civil Procedure Code, provides that on returning a plaint the Judge shall endorse thereon the date of its presentation and return the name of the party presenting it and a brief statement of the reasons for returning it. The return of the plaint with these particulars, therefore, seems to terminate the connection of the Court with the plaint, which it cannot entertain. So far as this case is concerned, the costs were ordered to be paid by the order of the 23rd of June, so that no further judicial act remained to be done. The costs were calculated later but the plaintiffs had nothing to do with that; they were not prosecuting the suit in the Court of the Munsif after that Court returned the plaint, and the explanation cannot be read as extending the time excluded beyond the time when the plaintiffs may be said to have been prosecuting their suit In this view of the matter the order for costs passed on the 30th of June cannot be taken into consideration. The suit is, therefore, barred by limitation and it is not necessary to consider any other question. The appeal is dismissed with one set of costs to be divided among three sets of respondents.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 553 OF 1912.

January 14, 1916.

Present:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

JHANDA AND OTHERS—DEFENDANTS—APPELLANTS

versus

DATA RAM—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d)—Suit for redemption—Defendants' claim to occupancy rights—Civil Court, whether can take cognizance of claim.

The plaintiff mortgaged the land in suit, with possession, to the defendants who were recorded as tenants-at-will. On his suing for redemption, the defendants set up a plea that their real position was that of occupancy tenants and that consequently the plaintiff was not entitled to a decree for physical possession of the property:

Held, that the plea of the defendants related to a matter in respect of which they were entitled to bring a suit in a Revenue Court and could not, therefore, be taken cognizance of by a Civil Court. [p. 598, col. 1.]

Haji Muhammad Bakhsh v. *Bhagwan Das*, 3 Ind. Cas. 498; 76 P. R. 1909; 11 P. W. R. 1909 (F. B.); 66 P. L. R. 1910, referred to.

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 7th October 1911, affirming that of the Additional District Judge, Delhi, dated the 28th July 1911.

Pir *Taj-ud-Din*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.

LESLIE JONES, J.—The plaintiff mortgaged the land in suit, with possession, to the defendants, who were then recorded as tenants-at-will of the said land. The plaintiff has now sued for redemption. His right to redeem has not been contested, but the defendants set up a plea that their real position was that of occupancy tenants and that consequently the plaintiff was not entitled to a decree for physical possession of the property.

The Additional Divisional Judge in a judgment dated 7th October 1911, *i.e.*, on a date before Punjab Act III of 1912 was passed, held on the authority of *Haji Muhammad Bakhsh* v. *Bhagwan Das* (1) that this plea could not be entertained, and concurring in the finding of the Additional District Judge, who had come to the same conclusion and had granted the plaintiff a decree for the relief claimed, dismissed the defendants' appeal.

(1) 3 Ind. Cas. 498; 76 P. R. 1909 (F. B.); 11 P. W. R. 1909; 66 P. L. R. 1910.

The defendants have now preferred a further appeal to this Court.

The arguments of Counsel for the defendants-appellants have not been very clear but, having regard to the date of the decision of the appeal, *Haji Muhammad Bakhsh* v. *Bhagwan Das* (1) is of full application, and the only question is whether the plea of the defendants relates to a matter in respect of which they would have been entitled to bring a suit in a Revenue Court [*vide* section 77 (3) of the Punjab Tenancy Act]. If it does, then the Courts below were, under the authority cited, right in ignoring it.

Counsel for the appellants does not admit that the defendants have lost their status as tenants, but the contention is, that as the proprietor had mortgaged his rights, the persons in possession, *i. e.*, the defendants themselves and not the proprietor are the landlords, and that consequently a suit to establish occupancy rights would not have been cognizable by a Revenue Court, because the status of landlord and tenant did not exist between the parties.

There is, of course, no doubt that a mortgagee is a landlord for certain purposes, but we do not think that where the question is one of establishing occupancy rights, the proprietor can be excluded from the category of landlord merely because he has mortgaged his rights. Supposing, for instance, the proprietor has mortgaged his rights to a third party, it would not be open to the tenant to bring a suit to establish such rights against the mortgagee only, without impleading the proprietor as landlord.

The position which a mortgagee holds as such is of a temporary character, and where rights of a permanent character such as occupancy rights are in question, the person principally concerned is the proprietor in his capacity as landlord. As mortgagees the defendants could not have sued to establish such a right, and if, as is contended on their behalf, they are tenants at all, they would be compelled for the purpose of such a suit as is under consideration to recognise the proprietor as landlord.

We think, therefore, that the Courts below were right in declining to entertain this plea. The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 411 OF 1915.

May 23, 1916.

Present:—Mr. Justice Sunder Lal.

GULAB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Khwaja MUHAMMAD ISMAIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Deed, thirty years old—Genuineness—Presumption—Evidence to prove genuineness, if necessary.

A sale-deed more than 30 years old is presumed to be genuine under section 90 of the Evidence Act and no evidence is required to prove its genuineness. [p. 600, col. 1.]

Second appeal from the decision of the District Judge, Aligarh, dated the 23rd December 1914.

Mr. *S. K. Dar*, for the Appellants.

Mr. *Gokul Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption. It appears that on the 24th of March 1863 three persons Baldeo, Kesri and Chattar mortgaged the land now in suit to two persons Kundan and Sita Ram for Rs. 400. The mortgage was for a term of 13 years, at the end of which the land was to be given back to the mortgagors without payment; in other words, the mortgage-money was to be satisfied from the usufruct in the course of the 13 years. On June 1st 1866 the three mortgagors sold a moiety of their rights in the mortgaged property to two persons named Ganga Ram and Ghasi Ram, and on June 21st 1866 they sold the remaining moiety to the mortgagees Kundan and Sita Ram. If these two sales were good and valid, then the mortgagors ceased to have any interest in the property mortgaged by them. But somehow or other the rights of Baldeo and Chattar were sold in execution of a decree on the 20th May 1874 and purchased by the first two defendants. These two defendants then brought a suit for redemption against the mortgagees, which was numbered as 206 of 1892. The mortgagees were the principal defendants in that case and Kesri whose interests were not purchased by the then plaintiffs was impleaded as a *pro forma* defendant. One of the defences set up by the mortgagees in that suit was that they had purchased a moiety of the mortgagors' interests in the mortgaged property on

the 21st of June 1836 and that the claim of the plaintiffs with regard to the interests thus purchased was not maintainable. The Court of first instance held in that suit on 23rd June 1893 that the sale of 21st June 1866 did not convey to the mortgagees a good title. As the mortgage had been satisfied from the usufruct it gave the plaintiffs a decree for possession of 2/3rds share owned by Baldeo and Chattar. The plaintiffs, in that suit, seem to have taken possession of the entire mortgaged property in execution of that decree. The present suit has been instituted by the heirs of Kesri as also by the person to whom these heirs have transferred a moiety of their interests. They say that the interests of Kesri in the mortgaged property still subsist and that the plaintiffs as heirs of Kesri and transferee of the rights of such heirs are entitled to maintain the present suit. The Court of first instance held that the suit was maintainable at the instance of the heirs of Kesri and decreed the claim for redemption, so far as their interests were concerned. It dismissed the suit of the transferee on the ground that the sale in his favour was contrary to public policy and was a fictitious transaction and that consequently he was not competent to maintain the suit. From that decree there were two appeals, one by the defendants Nos. 1 and 2 who appealed in so far as the claim of the heirs of Kesri which was decreed was concerned, and the other by the transferee from the heirs of Kesri in so far as his portion of the claim which was dismissed was concerned. The Court below has dismissed the entire suit, on the ground that by the two sale-deeds dated respectively the 1st of June 1866 and the 21st June 1866 the rights and interests of Kesri were sold to Ganga Ram and Ghasi Ram as also the mortgagees Kundan and Sita Ram and that as nothing was thereafter left to the heirs of Kesri in so far as the latter's interests in the mortgaged property were concerned, the suit for redemption was not maintainable.

Mr. Shyam Krishn Dar has argued in appeal here that the judgment dated the 23rd June 1893 operates as *res judicata* upon the quesion of the effect of the two sales of the 1st June and 21st June 1836. As to the first of these sales, namely, that of the 1st of June 1866 the mortgagees did not set up that sale in their defence to that suit. Indeed it afforded no defence to the suit from their standpoint of view. There was no decision in that suit whether the sale of 1st June 1866 was or was not valid. The decision, therefore, is not *res judicata* in so far as that sale was concerned. Coming now to the second sale of January 21st, 1866, the plaintiffs in that case sued for redemption of the 2/3rds share of Baldeo and Chattar which they had purchased. As the mortgage-debt had been satisfied long before that suit was brought, they were entitled to claim possession of the 2/3rds share only without payment of any amount. The share of Kesri was not in suit in that case and although he was impleaded as a *pro forma* defendant along with the mortgagees, the question relating to Kesri's title to the remaining one-third share was neither put in issue nor decided in the case. Kesri was arrayed on the same side as the mortgagees; the decision in that case cannot operate as *res judicata* upon the question whether Kesri had or had not a subsisting interest in the mortgage. Mr. Shyam Krishn Dar has also argued that the sales of the 1st of June and of the 21st June 1866 were fictitious and invalid. In this connection I may refer to the judgment of the Courts below passed in this case. The Court of first instance in dealing with the issue has observed as follows:—"Now I have to see whether the plaintiff Dharman has any right left to him in the said property. It is urged on behalf of the defendants that two deeds of sale were executed in respect of the mortgaged property. One of the said deeds is dated 21st June 1866 and it is Exhibit 33 on the record of Suit No. 206 of 1892 on the file of the Sub-Judge's Court. This deed was, however, found by the Court to be fictitious and, therefore, it is unnecessary to go through it. A copy of the second deed dated 1st June 1866 is produced here. The deed is more than 30 years old and there is no good evidence to prove that the said deed was fictitious. The plaintiffs have examined Baldeo to prove that the deed in question was not acted upon. But his statement is very vague and doubtful and cannot be relied upon

Moreover he is connected to Gulab plaintiff and has sympathy for him and cannot be believed. The sale was made to Ghasi and Ganga Ram by all the three mortgagors and half of the mortgaged property was sold. Therefore, Kesri's heir, plaintiff No. 2, cannot have any right to redeem the whole. He can redeem only half of Kesri's share in the mortgaged property. I, therefore, find that Dharman plaintiff No. 2 has half share in the mortgaged share of Kesri." On appeal the learned Judge has held that the execution of these two sale-deeds is not in dispute. He observed: "Both these sale-deeds were registered and the fact of their execution is not in dispute. It is alleged, however, that these sales were merely nominal and not intended to have effect.....I decide that these sale-deeds of the 1st and 21st June 1866 represent genuine transactions." On these findings of the lower Appellate Court the plaintiffs have no title left in the property in suit. Mr. Dar has argued that there is no evidence to prove that these sale-deeds were genuine. The sale-deeds were more than 30 years old. The Court below was entitled to presume under section 90 of the Evidence Act that they were genuine sale-deeds. As I have already noted, the fact of their execution was not in dispute in the Court below and the only question was whether the circumstances of the case show that they were nominal transactions. The reasons given by the Court below for holding that they represent genuine transactions are good and cannot be impugned in second appeal. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 551 OF 1915.

May 25, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

SHANKAR LAL—PLAINTIFF—APPELLANT

versus

LATAFAT ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 82—Contribution, suit for—Necessary parties—Plaintiff, duty of—Valuation of items of properties—Principle.

Where a suit is brought for contribution to enforce a statutory charge, mentioned in section 82 of the Transfer of Property Act, all the persons in whom all the mortgaged property is vested should be made parties, inasmuch as it is only when such persons are properly before the Court, that a proper decree finally settling all disputes can be made. [p. 601, col. 1.]

It is the duty of a plaintiff to take every reasonable precaution to have the necessary parties before the Court. If, by some accident, some party is omitted, an application to bring him on to the record ought to be made at the earliest possible opportunity. [p. 601, col. 1.]

In valuing the different items of property the valuation ought to be as at the date of the mortgage, but if the plaintiff adduces evidence to show the value of the property at the time that he purchased it, it lies upon the other side to say that the valuation at the date of the mortgage was different. [p. 601, cols. 1 & 2.]

Second appeal from a decree of the Additional Judge of Saharanpur.

Mr. *Shamnath Mushran* (for Mr. *Motilal Nehru*), for the Appellants.

Dr. S. *M. Sulaiman* (for Mr. *Shafi-uz-zaman*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff under the provisions of section 82 of the Transfer of Property Act. The plaintiff contends that there was a mortgage which affected properties which are mentioned in lists A and B attached to the plaint. He is the purchaser of one of the items mentioned in list A. The suit was brought on foot of the mortgage and the property in list A only was sold. This was sufficient to satisfy the mortgage-decree. He made defendants to the suit all the persons whom he believed, as he alleged, to be the purchasers of the properties mentioned in list B. He omitted to make parties to the suit some of the other purchasers of the property mentioned in list A. The Court of first instance dismissed the plaintiff's suit on two grounds: (1) that one of the purchasers of the property mentioned in list B was not made a party, (2) that he had failed to prove the values of the several properties. The lower Appellate Court dismissed the appeal.

The plaintiff comes here in second appeal, and contends that he ought to have been allowed an opportunity of bringing the necessary parties on to the record and that the valuation of the property ought to be taken as found in the sale deeds and sale-certificates.

In our opinion, it is the duty of a plaintiff to take every reasonable precaution to have the necessary parties before the Court. If by some accident some party is omitted, an application to bring him on to the record ought to be made at the earliest possible opportunity. It is obviously very inconvenient that parties should be added after issues have been framed and evidence given. The addition of fresh parties means that the case must, practically speaking, be heard *de novo*. The issues ought to be re-framed and the evidence taken afresh in the presence of the new parties. It also leads to the waste of public time. Under the circumstances, however, of the present case, we are prepared to allow the plaintiff an opportunity of bringing the necessary parties before the Court, but only on the terms which we shall mention later on. In our opinion, where a suit is brought for contribution to enforce a statutory charge mentioned in section 82 of the Transfer of Property Act, all the persons in whom all the mortgaged property is vested should be made parties. It is only when such persons are properly before the Court that a proper decree finally settling all disputes can be made. In the prese t case, not only all the persons to whom the property mentioned in list B now belongs should be parties, but also the owners of the property mentioned in list A not purchased by the plaintiff. It was by the sale of all or the greater part of the property mentioned in list A that the mortgage-decree was discharged. The purchaser of this property will also have a charge against the defendants, if it is found that their property had to bear more than its rateable share of the mortgage-debt. It is impossible to satisfactorily ascertain the value of the different items of the property unless the owners are before the Court.

Another matter dealt with by the Courts below is the question as to the date at which valuation of the different items of property is to be taken. There is no doubt that the valuation ought to be as at the date of the mortgage, but we think that if the plaintiff adduced evidence to show the value of the property at the time that he purchased it, it would lie upon the other side to say that the valuation at the date of the mortgage was different. The Court would be wrong in refusing the plaintiff's relief merely on the ground that the evidence he adduced as to the valuation of the property referred to its value at the present time or at the time of sale. We allow the appeal, subject to the conditions hereafter mentioned, and remand the case to the first Court, through the lower Appellate Court, with directions to re-admit the suit on its original number and to allow the plaintiff an opportunity of bringing on to the record all necessary parties The plaintiff, however, must pay the costs incurred in this Court and in both the Courts below, as a condition precedent to the case being restored to its original number. If he fails to comply with this condition, his appeal will stand dismissed with costs, which in this Court will include fees on the higher scale. The costs must be paid within three months from the date the record is received back in the lower Court.

Appeal allowed; Suit remanded.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1916.

May 26, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

DHANRAJ SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat LAKHRANI KUAR—PLAINTIFF—RESPONDENT.

Ejectment—Suit for possession—Decree—Decree not executed within time—Second suit for possession, maintainability of—Merger, principle of, applicability of.

If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but the doctrine of merger does not apply to decrees for ejectment. [p. 603, col. 1.]

The mere fact that a plaintiff obtained a decree for possession of a certain land, would not entitle him to get possession of that land in a second suit if he had never been in possession within twelve years, but if after the decree the plaintiff gets into possession, otherwise than in execution, and is dispossessed within twelve years of the second suit, he has a cause of action irrespective of the previous decree and is entitled to bring a second suit for possession, the previous decree being part of his title. [p. 602, col. 1; p. 603, col. 1.]

Quære.—Whether a decree-holder is entitled to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has

become incapable of execution by lapse of time. (p. 603, col. 2.)

Letters Patent Appeal against the decree of Mr. Justice Walsh, in Second Appeal No. 1676 of 1914, dated the 8th January 1916, reported as 32 Ind. Cas. 634.

Mr. *Girdhari Lal Agarwala*, for the Appellants.

Mr. *Anandi Prasad Dube* for Dr. *Surendra Nath Sen*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for possession of certain immoveable property. The plaintiff obtained a decree for possession of this very land in 1906. On appeal this decree was confirmed. Admittedly, the plaintiff did not obtain possession through the Court and when she made an application for execution of the decree, her application was rejected on the ground that the decree was more than three years old. She then instituted the present suit. In the Court of first instance she succeeded in obtaining a decree. On appeal, the learned District Judge held that not having executed the decree within three years, her suit was barred by the provisions of section 11 of the Code of Civil Procedure, and also by the provisions of section 47 of the Code of Civil Procedure. In second appeal to this Court, the learned Judge reversed the decree of the lower Appellate Court and restored the decree of the Court of first instance.

An issue was framed in the Court of first instance as to whether or not the plaintiff had been in possession within twelve years. It was, of course, necessary from every possible aspect of the case for the plaintiff to prove that she had been in possession within twelve years of the institution of the present suit. The mere fact that she had obtained a decree for possession of the land would not, in our opinion, entitle her to get possession in the present suit if she had never been in possession within twelve years. Two witnesses were produced who deposed for and against the alleged possession of the plaintiff, one witness for the plaintiff and the defendant for himself. The plaintiff's witness was Ram Dawan Singh. He deposed that a year after the decree had been obtained, the plaintiff got possession and that she was subsequently put out by the defendants. He mentioned that she had cultivated the land. The defendant stated that he has been for eighteen years in possession and that he had cultivated the land himself and by tenants. His evidence was somewhat vague. The learned Munsif says, in dealing with the witness Ram Dawan Singh, that no connection of this witness with the plaintiff and no enmity with the defendant is shown or proved. He then points out that the defendant is an interested witness and that he places no reliance on his statement, and then he says he believes the witness for the plaintiff. In the memorandum of appeal no specific ground was taken against the finding of the Munsif that the plaintiff had been in possession within twelve years. Now the only evidence of her possession was the evidence of this witness and the possession he proved was possession after the decree, therefore, when finding that she was in possession within twelve years the Munsif must have found that she was in possession after the decree. The learned District Judge arrived at no finding on this point. He decided the case against the plaintiff purely on the question of law. The learned Judge of this Court considered that he was bound by the finding of the Munsif on the question of fact. This, we think, was wrong. He was entitled either to refer an issue on this question of fact or he might have exercised the powers conferred on the High Court under section 103, and decided the issue himself. We consider that this is an important issue. We consider that it is a fit case for this Court to exercise the jurisdiction it has under section 103. The evidence is on the record and is sufficient to enable us to decide the issue. The learned Munsif had the advantage of hearing and seeing the witnesses on this point. He believed the witnesses for the plaintiff and has given reasons for believing them. Furthermore, there is considerable probability that the evidence is true. After the plaintiff had finally got a decree for possession in 1907, it is improbable that she would have remained absolutely quiet for three years unless she had got into possession of the property. It is also probable that the defendants would not have resisted her in getting possession at first, though it is quite likely that finding her a defenceless woman they would have gradually attempted again

to dispossess her. This is really what we believe actually happened. We find upon the evidence that the plaintiff did get into possession after the decree. On this finding of fact it seems to us that the plaintiff had a cause of action irrespective of the previous decree. The previous decree would, no doubt, be part of her title. We do not think that the mere fact that she obtained a decree for possession in 1907 would prevent her again suing for possession, if her possession was again interfered with, nor do we think that the doctrine of merger applies to decrees for ejectment. No doubt if a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees. In Broom's Legal Maxims, Second Edition, page 251, in dealing with ejectment, under the Maxim, "*Nemo debet bis vexari pro una et eadem causa*" the learned author says:—"With respect to the action of ejectment, we may further specially remark that by the judgment in this action the lessor of the plaintiff obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had; if, therefore, he had previously a freehold interest in them, he is in as a freeholder; if he had a chattel interest, he is in as a termor; and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner, without any re-entry on his part. Moreover, although it has recently been decided that a judgment in ejectment is admissible in evidence in another ejectment suit between the same parties, yet it is not conclusive evidence because a party may have a title to possession and to grant a lease at one time, and not at another. Neither can a judgment in ejectment be pleaded by way of estoppel, because the defendant is bound, by the terms of the consent rule, to plead not guilty and hence there is a remarkable difference between ejectment and other actions with regard to the application of the maxim under consideration." It seems to us that if the plaintiff had got formal possession in execution of her decree and her possession was again interfered by the defendants she has a right to bring a fresh suit. If she succeeded in getting possession without applying to the Court, we see no reason why she should not be in as good a position as if she had got formal possession through the Court.

What we have said above is sufficient to dispose of the appeal. The learned Judge of this Court, however, seems to have held that the plaintiff's cause of action merged in the decree and then to have considered that it is always open to a decree-holder to bring a suit on the decree at any time within twelve years notwithstanding that the decree has become incapable of execution by lapse of time. This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is a very alarming situation. It is difficult to understand why the Legislature should have expressly limited the time within which a decree can be executed and at the same time allow decree-holders to bring suits upon decrees, thereby putting the parties to extra expense and vastly extending limitation. With regard to ordinary decrees we think that section 47, which provides that no separate suit shall be brought in respect of matters relating to the discharge of decrees, prevents a fresh suit being brought upon a decree. We do not think it necessary to say anything further on the point, *first*, because it is not necessary for the decision of the present case and *secondly*, because the question has not been fully argued before us. In view of our finding on the issue as to possession and our view of the law, we dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 22 OF 1914.

April 12, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAMJI—PLAINTIFF—APPELLANT

versus

KOMAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch I, O. VI, r. 4—Fraud, no specific allegation of—Account, suit for accounts, re-opening of, when allowable—Evidence, admissibility of.

In a suit in which the plaintiff claimed that the defendant might be ordered to render correct accounts of the profits of certain property and upon taking of those accounts a certain document in

favour of the defendant be held to be valid only for the amount found due on taking of the accounts, no specific fraud was alleged to have been committed in execution of the document, except that a certain debt was fraudulently entered as consideration:

Held, that under the circumstances of the case the plaintiff alleged no fraud entitling him to go into evidence to re-open the accounts which were settled at the time the document was executed. [p. 605, col. 2.]

First appeal from the decision of the Subordinate Judge, Muttra, dated the 3rd January 1914.

The Hon'ble Mr. *Moti Lal Nehru* and Mr. *Gulzari Lal*, for the Appellant.

The Hon'ble Dr. *Sundar Lal* and Mr. *Baldeo Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claims that the defendant No. 1 might be ordered to render correct accounts of the profits of certain property and that upon the taking of those accounts the document, dated 4th August 1910, should be held to be valid only for the amount that should be found due on taking of the accounts. The circumstances are shortly as follows. The plaintiff is one of the three sons of one Tipsi. Defendant No. 2 is the widow of Tipsi and mother of the plaintiff and the defendants Nos. 3 and 4 who are still minors. Defendant No. 1 is the mortgagee under a mortgage, dated the 4th of August 1910, executed by *Musammat* Gopi as mother and guardian of the plaintiff and of his brothers, defendants Nos. 3 and 4, under authority granted by the District Judge. It appears that Koman Das, defendant No. 1, held 8 usufructuary mortgages. One of these was executed by one *Musammat* Unku as well as by Tipsi. *Musammat* Unku was the widow of a brother of Tipsi. There were two other documents, one for Rs. 1,200 and one for Rs. 600, which were executed by *Musammat* Unku alone. As early as 1906 *Musammat* Gopi had been endeavouring to raise money to pay off the debts left by her husband Tipsi. She presented her first application for leave to make a mortgage for Rs. 18,000 on the 24th of August 1906. Rs 14,000 of this 18,000 was estimated as the debt due to the defendant No. 1. The remaining Rs. 4,000 was supposed to be due to one Baiju. A draft was put up before the Judge who authorised the raising of a loan of Rs. 18,000. Nothing appears to have been done and on the 18th of November 1909 *Musammat* Gopi presented a further application in which she stated that the person who was about to lend the money had backed out of his arrangement. Still the money was not raised and on the 2nd of August 1910. *Musammat* Gopi made a third application to the Judge in which she stated that the defendant No. 1 was ready to advance the money but only on the terms of a simple mortgage being made. A draft was put up along with the application. The Court granted the application and on the 4th of August 1910 the mortgage was executed. It was in the form of a simple mortgage, the principal sum being Rs. 17,000 and the interest being 10 annas per cent. per mensem. The document itself sets forth that a sum of Rs. 17,000 was secured. The account of the amount due to the defendant No. 1 is mentioned. This amount was arrived at by including the amount of the two bonds executed by *Musammat* Unku alone and the amount of decree, and in the body of the mortgage it is stated that in order to avoid disputes the sum of Rs. 2,000 is omitted. This Rs. 2,000, as appears from the last clause of the mortgage, included the Rs. 1,200 and Rs. 600 being the principal sums due on the bonds executed by *Musammat* Unku. The document was duly registered and from the certificate of the Registrar it appears that *Musammat* Gopi admitted all the consideration, but stated that she did not admit the two documents executed by *Musammat* Unku. The document itself and the circumstances of the case do not in any way suggest fraud. What is stated in the bond is quite clear and easy for any one to understand. There was no particular hurry about carrying the matter into execution, and it would rather seem as if *Musammat* Gopi was glad to be able to get defendant No. 1 to consolidate his claims and enable her to pay off the other debts. It has been suggested in the argument that the fact that part of the consideration was the sum of Rs. 4,500 secured by the bond, dated the 18th of March 1891, itself shows that the consideration was invalid to the extent

of Rs. 2,250. This suggestion is based on the fact that this bond was executed by *Musammat* Unku as well as by Tipsi. We are, of course, unaware what were the relations between *Musammat* Unku and Tipsi. If Tipsi and his brother were joint *Musammat* Unku would have nothing to say to the debt or to the property, but still her name may have been recorded for the satisfaction of the mortgagee. However this may be and whether Tipsi and his brother were joint or not, the minors' property was liable for the whole Rs. 4,500 and, therefore, there was nothing improper in making the whole sum secured by the bond part of the consideration for the fresh mortgage. We merely mention this to show that on the face of the transaction there does not appear to have been any fraud or sharp practice. It was contended on behalf of the appellant that the Court below ought to have allowed them to go into evidence and prove their case, no matter how improbable it might appear to the learned Judge. This, no doubt, might be a good plea if we could see that the plaintiff specifically alleged fraud, which he was ready to prove. Reading the plaint as a whole, it would appear as if the main ground of complaint was that the defendant No. 1 had not rendered an account of the profits he had received prior to the execution of the mortgage of August 1910. This, of course, would not amount to fraud. The only specific allegation of fraud is contained in the 18th paragraph of the plaint. There it is said that the defendant No. 1 fraudulently caused the debt due from *Musammat* Unku to be entered as consideration for the bond. If this vague allegation refers to the fact that the first item in the details of consideration was the bond of the 18th of March 1891, which we have already stated to have been executed by *Musammat* Unku as well as Tipsi, the allegation has no foundation and we have already stated the reason why, namely, whether or not as between Tipsi and Unku, *Musammat* Unku was liable for half the debt, the property of the minors was nevertheless liable. If in the allegation in the 18th paragraph it is meant to refer to the two bonds which were executed by *Musammat* Unku alone, then the allegation is also without foundation because the amount of these two bonds had been omitted from the consideration for the bond. In our opinion, the plaintiff alleged no fraud entitling him to go into evidence to re-open the accounts which were settled at the time the mortgage was executed. We think the decree of the Court below was correct and we dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL No. 18 OF 1915.

May 2, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

SURENDRA NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS—PETITIONERS

versus

DWARKA NATH CHAKRABUTTY AND ANOTHER—DEFENDANTS—RESPONDENTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 110, para. 2—Appeal to Privy Council—Value of subject-matter—Material date for determination of value—Question of law, inference deducible from facts, if is.

The question whether or not upon certain given facts or *data* a tenancy is to be regarded as one at will or one of a permanent nature is a mixed question of law and fact. [p. 606, col. 2; p. 608, col. 1.]

In determining the value of the subject-matter of a suit for the purpose of section 110, para. 2, Civil Procedure Code, its value at the date of the decree from which the appeal is to be made to His Majesty in Council, and not the value at the institution of the suit, is to be taken into account. [p. 606, col. 2; p. 607 col. 2.]

Allan v. *Pratt*, 13 A. C. 780; 57 L. J. P. C. 104; 59 L. T. 674; *Macfarlane* v. *Leclarie*, 15 Moor. P. C. 181; 8 Jur. (N. S.) 267; 10 W. R. 324; 15 E. R. 462; *Dalgleish* v. *Damodar Narain Chowdhry*, 33 C. 1286, followed.

Bank of New South Wales v. *Owston*, 4 A. C. 270; 48 L. J. P. C. 25; 40 L. T. 500; *Gooroopersad Khoond* v. *Juggutchunder*, 8 M. I. A. 166; 3 W. R. (P. C.) 14; 13 Moor. P. C. 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 463; *Motichand* v. *Ganga Prasad Singh*, 29 I. A. 40; 24 A. 174; 6 C. W. N. 362 (P. C.); *Nand Kishore Singh* v. *Ram Gulam Sahu*, 17 Ind. Cas. 221; 39 C. 1037; 16 C. W. N. 1089, referred to.

Per *Sanderson, C. J.*—A plaintiff who brought his suit in the Munsif's Court paying Court-fees on the annual rental of Rs. 4-4, is not debarred from asserting afterwards (when applying for leave to appeal to the Privy Council) that the property in dispute is in fact worth Rs. 10,000 or more. [p. 607, col. 1.]

Application for leave to appeal to His Majesty in Council.

Babus *Dwarka Nath Chakrabutty* and *Kalikinkar Chakrabutty*, for the Petitioners.

Babu *Jyotish Chandra Hazra*, for the Opposite Parties.

JUDGMENT.

SANDERSON, C. J.—This is an application by the plaintiffs for leave to appeal to His Majesty in Council. An action was brought by the plaintiffs against the defendants claiming ejectment from certain property. The plaintiffs allege that the defendants are tenants at-will only, while the defendants allege that they had a permanent tenancy which had been granted by the plaintiffs' predecessor to the defendants' predecessor, and the Munsif before whom the action was brought gave judgment for the plaintiffs and came to the conclusion that the tenancy was a terminable one on notice. Then there was an appeal to the District Judge, who accepted the findings of fact arrived at by the Munsif but came to the conclusion that the tenancy was a permanent one and gave judgment for the defendants. Thereupon the plaintiffs applied to a Division Bench of this Court for permission that the appeal should be admitted under Order XLI, rule 11, of the Code of Civil Procedure. That application was rejected on the 14th December 1914. The applicant now asks this Court for leave to appeal to His Majesty in Council against the order of this Court dismissing his application under Order XLI, rule 11.

The *first* question raised by the Vakil for the opposite party is under section 110. He says that under that section the subject-matter of the suit must be of the value of Rs. 10,000 at the date of the *institution* of the suit, and also that it must be of that value at the date of the decree from which the appeal to His Majesty in Council is desired. Now I think that, without deciding whether this case does come within the first paragraph of section 110 of the Code of Civil Procedure, as to which there may be some difficulty inasmuch as there was no evidence as to the value of the subject-matter while this case was in the Court of first instance, I think this matter does come within the second paragraph of section 110 of the Code of Civil Procedure, seeing that the decree or final order involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000. The decree or final order must be the decree or final order from which the appeal is made, that is, the decree of the High Court of December 1914 and when one remembers that the question which it is desired to argue is this, whether upon certain given facts or *data* the tenancy is to be regarded as one at will or one of a permanent nature, it seems to me that this is a matter in which a substantial question of law is involved.

The *other* question which I have to consider is whether the property is of the value of Rs. 10,000 or upwards. We have the report which was made at the instance of the High Court dated January 1916, which is to the effect that the property was worth Rs. 11,400. The learned Vakil says that this is all very well. The property may have been worth Rs. 11,000 in 1916 but it does not follow that it was worth that amount at the date of the institution of the suit. I do not think myself that that is the material date. I think the material date is the date of the decree of the High Court from which the appeal is to be made and that date is admittedly December 1914. It may be said that even if that was the value of the property in January 1916, it does not follow that the value was the same in December 1914 inasmuch as according to the report the property has gone up by leaps and bounds within the last few years. When we look at the report, especially at the materials upon which the Munsif made his report, we find from the evidence given by the valuer that the property was valued at Rs. 300 a *cotta*. He corroborated his opinion by referring to two conveyances of the land in the immediate neighbourhood which are dated the 4th and 9th April 1914, and there seems to have been no other transaction subsequent to the dates on which the valuer based his opinion and consequently I think that the value arrived at by Mr. Warwick at Rs. 300 per *cotta* may be taken to have been the value of the property in 1914. Therefore, the value of the property was above the requisite amount in December 1914, and for this reason the case comes within the second paragraph of section 110 of the Code of Civil Procedure.

The property was at the date of the decree worth more than Rs. 10,000, but the learned Vakil went on to argue that the plaintiff could not now assert that the

property was worth Rs. 10,000 inasmuch as he brought his suit in the Munsif's Court and he paid Court-fees on the annual rental of Rs. 4-4.

Speaking for myself, I do not think that the plaintiff is debarred from raising the point that the property which is in dispute is in fact of the value of Rs. 11,400. It may very well be that at the time he instituted the suit he thought if he could, according to the Rules of the Court, bring his case within the jurisdiction of the Munsif he would be well advised to do so. The point taken by the learned Vakil may have been a good one, for objecting to the jurisdiction of the Munsif in the Court of first instance, at the most, it could only be taken as an admission and it was one that might be rebutted by subsequent evidence that it was worth more than Rs. 10,000.

For these reasons I think the application should be allowed and leave to appeal to His Majesty in Council granted.

MOOKERJEE, J.—I agree that the petitioners have established that their application for leave to appeal to His Majesty in Council fulfils the requirements of section 110 of the Code of Civil Procedure. The petitioners rely upon the second paragraph of the section which deals with cases where the decree involves, directly or indirectly, some claim or question to or respecting property of the amount or value of Rs. 10,000. They do not rely upon the first clause, which refers to cases where the amount or value of the subject-matter of the suit in the Court of first instance is Rs. 10,000 or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is also the same sum or upwards. They cannot take advantage of the first clause, inasmuch as there are no materials on the record to show that the value of the subject-matter of the suit in the Court of first instance, or in the Court of Appeal, was of the prescribed amount. The Trial Court, however, has reported that the value of the property affected by the decree is over Rs. 10,000. The finding of that Court is somewhat loosely expressed and it may be plausibly contended that the value as determined by that Court refers to the value in 1916. But the evidence on which the finding is based relates to transactions which took place in 1914, and, consequently, we may legitimately hold that the Trial Court has found that the value of the property affected by the decree was above Rs. 10,000 in 1914. The suit, which was instituted in 1912, was decreed by the Court of first instance on the 7th July 1913. On appeal to the District Judge, the suit was dismissed by him on the 18th June 1914. A second appeal to this Court was dismissed under Order XLI, rule 11, on the 15th December 1914. This dismissal operates in law as an affirmance of the decree of the District Judge. The petitioners now pray for leave to appeal to His Majesty in Council against the decree of this Court dated the 15th December 1914, and the question consequently arises, with reference to what point of time is the value of the property affected by the decree to be determined for the purposes of section 110. In my opinion, it is plain that when section 110 provides that the decree must involve, directly or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 or upwards, the intention of the Legislature is that the value is to be determined with reference to the date of the decree under appeal. This view is supported by the decision of the Judicial Committee in *Allan* v. *Pratt* (1), where the Earl of Selborne quotes with approval the observation of Lord Chelmsford in *Macfarlane* v. *Leclarie* (2) "that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The proper measure of value for determining the question of the right of appeal is the value of the judgment." It is on this principle that the Judicial Committee, in *Mohideen Hadjiar* v. *Pitchery* (3), held that in determining the value for the purposes of an appeal, the mesne profits up to the date of the decree are to be taken into account, and this view was followed by this Court in the case

(1) 13 A. C. 780; 57 L. J. P. C. 104; 59 L. T. 674.
(2) 15 Moore. P. C. 181; 8 Jur. (N. S.) 267; 10 W. R. 324; 15 E. R. 462.
(3) (1893) A. C. 193; 62 L. J. P. C. 96.

of *Dalgleish* v. *Damodar Narain Chowdhry* (4). The same principle was adopted by the Judicial Committee, when in the cases of *Bank of New South Wales* v. *Owston* (5), *Gooroopersad Khoond* v. *Juggutchunder* (6), *Motichund* v. *Ganga Prasad Singh* (7) they ruled, that interest up to the date of judgment is to be taken into account in determining whether the appealable value has been reached or not [*Nand Kishore Singh* v. *Ram Gulam Sahu* (8)]. In my opinion, it is perfectly plain that under section 110, the point of time to be considered is the date of the judgment under appeal. If this principle is adopted, there is no room for controversy that in the case before us, the decree against which leave to appeal is sought does affect property of the value of Rs. 10,000 and upwards.

The only other question is, whether the decree appealed against, which is in affirmance of the decree of the Court immediately below, involves a substantial question of law. As already explained by the Chief Justice, the question in controversy relates to the nature of the tenancy held by the defendants under the plaintiffs; was that a permanent tenancy or a tenancy terminable by notice to quit? The District Judge has in effect accepted the findings of the Court of first instance, but he has drawn from those findings a conclusion precisely contrary to that drawn by the Trial Court. The question thus is, what inference may legitimately be drawn from the facts found, and this clearly is a mixed question of fact and law, as appears from a long line of cases reviewed in *Mahoram Sheikh Chaprasi* v. *Telamuddin Khan* (9) and *Rajah Makund Deb* v. *Gopi Nath Sahu* (10). In my opinion, there is no room for doubt that the appeal does involve a substantial question of law, and that a certificate must consequently issue that the case fulfils the statutory requirements both as regards nature and value.

Application granted.

(4) 33 C. 1286.
(5) 4 A. C. 270; 48 L. J. P. C. 25; 40 L. T. 500.
(6) 8 M. I. A. 166; 3 W. R. (P. C.) 14; 13 Moor. (P. C.) 472; 1 Suth. P. C. J. 399; 1 Sar. P. C. J. 742; 19 E. R. 463.
(7) 29 I. A. 40; 24 A. 174; 6 C. W. N. 362 (P. C.).
(8) 17 Ind. Cas. 221; 39 C. 1037; 16 C. W. N. 1089.
(9) 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.
(10) 25 Ind. Cas. 286; 21 C. L. J. 45.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 461 OF 1916.

July 27, 1916.

Present:—Mr. Justice Broadway.

GULAB CHAND AND ANOTHER—DEFENDANTS—PETITIONERS

versus

SHER SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interlocutory order.

Interlocutory orders cannot or, at any rate, should not be interfered with on revision as a matter of course. [p. 609, col. 1.]

Mahtab Rai v. *Kaman Lal*, 51 P. R. 1899, followed.

Abdul Haq v. *Niaz Ahmad*, 7 Ind. Cas. 718; 83 P. R. 1910; 104 P. W. R. 1910; 82 P. L. R. 1910; *Gur Das* v. *Bhag*, 11 Ind. Cas. 231; 96 P. R. 1911; 216 P. L. R. 1911; 143 P. W. R. 1911; *Abdul Rahim Sahib* v. *Kullappa Gowuden*, 30 Ind. Cas. 845; 18 M. L. T. 243, distinguished.

Pokhar Das v. *Kaka Ram*, 31 P. R. 1902; 8 P. L. R. 1902; *Gopi Nath* v. *Livierato and Co.*, 64 P. R. 1905; 101 P. L. R. 1905; *Shib Dit Singh* v. *Devindar Singh*, 7 Ind. Cas. 710; 70 P. R. 1910; 94 P. W. R. 1910; 123 P. L. R. 1910; *Sardar Arur Singh* v. *Bua Ditta*, 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911; *Musammat Misri* v. *Musammat Chauli*, 27 Ind. Cas. 640; 10 P. L. R. 1915; *Delhi Cloth and General Mills Company* v. *R. B. Hardhian Singh*, 6 Ind. Cas. 939; 72 P. W. R. 1910; *Nihala Mall* v. *Bagu Ram*, 11 Ind. Cas. 880; 243 P. L. R. 1911; 164 P. W. R. 1911, referred to.

Petition, under section 44 of Act III of 1914, for revision of the order of the Senior Subordinate Judge, 1st class, Rohtak, dated the 4th March 1916, rejecting defendants' application as regards jurisdiction.

Rai Shaib Lala *Moti Sagar*, for the Petitioners.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—In this case the petitioner asks me to revise an order passed by the Senior Subordinate Judge, Rohtak, on the 4th of March 1916 on an application made by him asking that the first issue relating to the jurisdiction of the Court to try the case should first be disposed of, and that the evidence should be confined to that issue

The learned Senior Subordinate Judge ordered that the plaintiff was entitled to produce such witnesses as he considered necessary and to examine them on other issues as well, in order to save the time and expense which would be entailed if they were not fully examined on all the facts within their knowledge which had a bearing on the case as a whole. Mr. Tek Chand on behalf of the respondent raises a preliminary point to the effect that this order is an interlocutory one and that, therefore, no revision lies. He refers me to section 44 of the Punjab Courts Act, 1914, and to the following rulings: *Mahtab Rai* v. *Kaman Lal* (1); *Pokhar Das* v. *Kaka Ram* (2); *Gopi Nath* v. *Livierato and Co.* (3); *Shib Dit Singh* v. *Devindar Singh* (4); *Sardar Arur Singh* v. *Bua Ditta* (5) and *Musammat Misri* v. *Musammat Chauli* (6). He also relies on Order XIV, rule 2, and Order XVIII, rule 1. In all these cases it was held that interlocutory orders dealing with decisions on questions of jurisdiction are not open to revision. As against these Mr. Moti Sagar has cited *Abdul Haq* v. *Niaz Ahmad* (7); *Gur Das* v. *Bhag* (8); *Delhi Cloth and General Mills Company* v. *R. B. Hardhian Singh* (9); *Nihala Mall* v. *Bagu Ram* (10) and *Abdul Rahim Sahib* v. *Kullappa Gownden* (11). I have considered all these rulings carefully and it appears to me that the weight of authority is in favour of Mr. Tek Chand. This Court appears to have consistently held that interlocutory orders cannot or, at any rate, should not, be interfered with on revision. The reason seems to be obvious. It was held in *Mahtab Rai* v. *Kaman Lal* (1) that the policy of the Code is not to make the High Court take up the work of the lower Courts while the cases are pending before the latter. If interlocutory orders were to be dealt with by this Court on revision, this Court would practically be doing the work which, the Code lays down, should be done by the lower Courts. In all the cases cited by Mr. Moti Sagar a decision on the point before the Court had actually been arrived at as also was the case in the decisions referred to by Mr. Tek Chand. Mr. Moti Sagar argues that as a matter of fact in this case the question of jurisdiction has not yet been decided and that, therefore, this Court should treat the point as "a decided case" and entertain this revision. In *Abdul Haq* v. *Niaz Ahmad* (7) no doubt, this Court did exercise its revisional power but the circumstances were peculiar. In *Gur Das* v. *Bhag* (8) the learned Judge, while interfering with the order in question, did so as an exception and with reluctance. Mr. Moti Sagar urges that in this case irreparable harm will be done to his client if this Court does not interfere with the order in question and that this fact should be considered. Without going into all the facts of the case it is impossible for me to ascertain whether any harm will be caused by this order to the petitioner or whether that harm, if any would be irreparable and I do not think that I am concerned at this stage with this matter.

There is no decision come to by the Court on any point. The plaintiff is entitled to bring such evidence as he thinks fit in support of his case and if he chooses to have his witnesses examined on facts bearing on other issues in the case in order to save time and expense, *prima facie* it does not seem to me to be a matter in which this Court should interfere with his discretion as to the manner in which he conducts his case. I do not understand *Abdul Rahim Sahib* v. *Kullappa Gownden* (11) to hold that revision of an interlocutory order lies as a matter of course, and if that decision does go to that extent I am unable to accept it as correct in the face of repeated decisions to the contrary by this Court.

I, therefore, hold that the present revision is not competent and reject it accordingly with costs.

Revision rejected.

(1) 51 P. R. 1899.
(2) 31 P. R. 1902; 8 P. L. R. 1902.
(3) 64 P. R. 1905; 101 P. L. R. 1905
(4) 7 Ind. Cas. 710; 70 P. R. 1910; 94 P. W. R. 1910; 123 P. L. R. 1910.
(5) 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911.
(6) 27 Ind. Cas. 640, 10 P. L. R. 1915.
(7) 7 Ind. Cas. 718; 83 P. R. 1910; 104 P. W. R. 1910; 82 P. L. R. 1910.
(8) 11 Ind. Cas. 231; 96 P. R. 1911; 216 P. L. R. 1911; 143 P. W. R. 1911.
(9) 6 Ind. Cas. 939; 72 P. W. R. 1910.
(10) 11 Ind. Cas. 880; 243 P. L. R. 1911; 164 P. W. R. 1911.
(11) 30 Ind. Cas. 845; 18 M. L. T. 243.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 337 OF 1914.

July 11, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

PALANIAPPA MUDALI AND ANOTHER—APPELLANTS

versus

THE OFFICIAL RECEIVER OF TRICHINOPOLY AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16, 18, 36, 46—Alienation by insolvent—Order of Court cancelling alienation—Rights of other sharers in property, whether affected—High Court—Order of single Judge in revision under s. 46—Appeal.

The cancellation by Court of a sale by an insolvent does not affect the interests of the other sharers in the property and a Court has no jurisdiction by its order to deal with such shares.

An appeal lies to a Division Bench from the order of a single Judge of the High Court under section 46 of the Provincial Insolvency Act.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Hannay, reported in 25 Ind. Cas. 948, in Civil Revision Petition No. 556 of 1913, presented to the High Court to revise the order of the District Court of Trichinopoly, in Civil Miscellaneous Appeal No. 44 of 1912 (I. P. No. 1 of 1911) on the file of the Court of the District Munsif of Namakkal.

Messrs. *T. Ranga Chariar* and *K. S. Ganapathy Ayyar*, for the Appellants.

Mr. *S. T. Srinivasa Gopalachariar*, for the Respondents.

JUDGMENT.—We think the learned Judge rightly construed the finding of the District Judge, in saying that there was a finding that the appellants were not *bona fide* purchasers. The cancellation of the sale-deeds in so far as they conveyed the share of the insolvent was, therefore, right but the order of the District Judge as it stands may be construed as implying that the appellants acquired no interest at all in the properties comprised in the sale-deeds. The shares of the grandfather and of the father of the insolvent could not vest in the Official Receiver, as they never applied to be declared insolvents. Sections 16, 18 and 36 of the Provincial Insolvency Act are clear on the point. Moreover the application of the Official Receiver was to cancel the sales only so far as the share of the insolvent was concerned and the District Judge had no jurisdiction, under the sections referred to, to deal with the other shares. We must, therefore, modify the order of the District Judge by declaring that the sale-deeds are cancelled in respect of the share of the insolvent only.

A preliminary objection was taken to the maintainability of the appeal, on the ground that section 46 of the Act only gives the High Court a discretion to interfere and as against the exercise of such discretion by a single Judge, there is no right of appeal. The language of section 46 of the Insolvency Act is practically the same as that used in section 25 of the Provincial Small Cause Courts Act, and it is settled law now that as against the decision of a single Judge exercising jurisdiction under that section, there is a right of appeal. The same principle must govern the decision under section 46 of the Provincial Insolvency Act. We overrule the preliminary objection.

In the result, subject to the modification already indicated, the appeal is dismissed. We direct each party to bear his own costs throughout.

Appeal dismissed; Decree modified.

V. R. P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 134 OF 1915.

June 7, 1916.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Chaudhuri.

DEODHARI PANDEY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DAYANAND PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908)—Applicability to rights set up in defence—Bar of claim to enforce rights.

The provisions of the Limitation Act prescribing a limit of time for enforcement of rights and remedies apply only to actions brought by the plaintiff, and not to rights set up in defence. A defendant will not be precluded from setting up a right by way of defence even if he could not have done so under the Limitation Act as plaintiff by way of substantive claim. [p 611, col. 2.]

In a suit for declaration of title to and recovery of possession of a property from the defendants

on the basis of a document, it is open to the defendants to impugn the document, even though their right to get the document set aside or modified by a suit has been barred by limitation. [p. 611, col.2.]

Appeal against the decree of Mr. Justice Mullick, dated the 30th July 1915, in Appeal from Appellate Decree No. 403 of 1912.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Bankim Chandra Sen*), for the Appellants.—If a document has been registered, it cannot be said to be inoperative. There ought to have been a suit for rectification of the document. There was no registered instrument rectifying the previous registered document, there was an *ekrarnama* only, which was unregistered. The lower Appellate Court relies upon a finding of possession arrived at by the Sessions Judge in a criminal case; but that finding should not be relied on by the Judge when deciding the civil suit. Three years is the period of limitation for rectification on the ground of fraud. If the respondent discovered the fraud, he should have sued for rectification of the document within three years. As soon as the deed was registered, it passed a complete title to the appellant. If the deed was fraudulent and no relief was claimed within three years, the document created title in the appellant. Refers to *Lakshmi Doss* v. *Roop Laul* (1) and *Jugaldas* v. *Ambashankar* (2).

Babu *Mohendra Nath Roy* (with him Babu *Manmotha Nath Roy*), for the Respondents.—The findings are clear. The document here is inoperative. The Limitation Act does not say that any right is extinguished, it merely provides periods during which one has got to claim relief. If fraud is proved, the document becomes waste paper. Evidence can certainly be gone into regarding facts which invalidate the document. Section 28 of the Limitation Act has no application here. The defendant is not barred from pointing out that he who wants to turn him out has no title. There is no extinction of title here.

So far as the Sessions Judge's judgment is concerned, it is not referred to in regard to the fact that the document was obtained by fraud. Without claiming possession the plaintiff-appellant claims a declaration of title and rent. This is absurd.

Babu *Jogesh Chandra Roy* was heard in reply.

JUDGMENT.—The main points which are urged in this appeal are, *first*, that the learned Judge is in error in holding that the sale-deed executed by Jugal Kishore conveyed no title to the plaintiff notwithstanding the registration and that it was open to the defendants Nos. 1 and 2 to ask the Court to find that the sale was also in favour of Ambica and that his name was omitted by fraud without bringing a separate suit for declaration of their title, and that it was necessary for them, if they so desired to question the validity of the *kobala*, to sue to have it set aside or modified; but as they have not done so and as the period of limitation has expired the defence cannot now be taken. In our opinion there is no force in this argument, for the Limitation Act is an Act which is applicable to a suit brought by the plaintiff; a defendant will not be precluded from setting up a right by way of defence even if he could not have done so as plaintiff by way of substantive claim. In the present case, however, it is decided as a question of fact that the respondents were in possession. The appellants seek to disturb that possession and produce in support of their case a document which the respondents impugn. It is open, in my opinion, to them to do so. This objection, therefore, fails.

The *other* question relates to certain observations in the lower Appellate Court's judgment which, it is said, show that the learned Judge relied upon evidence which ought not to have been admitted in this case. I am not satisfied that the instances to which our attention has been drawn are instances of reliance upon inadmissible evidence. If they were, I agree in the learned Judge's judgment under appeal that they did not affect the question raised before us and that the material findings are based upon evidence which is admissible.

It is *lastly* contended that though it is said that the claim which is made for *khas* possession cannot be supported, still there should be a declaration of title. This is not a claim which is made in the plaint and moreover the answer is that the title

(1) 30 M. 169; 17 M. L. J. 19; 2 M. L. T. 4.
(2) 12 B. 501.

which is sought to be declared is not made out.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 251 OF 1915.

May 23, 1916.

Present:—Mr. Justice Sunder Lal.

JAI RAM—DEFENDANT—APPELLANT

versus

GULZARI MAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Decision of Revenue Court—Plaintiff not entitled to sue as co-sharer Suit by plaintiff as lambardar, maintainability of—Co-sharer, cultivating, if tenant—Question, decision of.

A decision of a Revenue Court deciding that the plaintiff as co-sharer was not entitled to maintain a suit for ejectment cannot operate as *res judicata* with reference to the question whether the plaintiff as a *lambardar* is entitled to maintain such a suit. [p. 612, col. 2; p. 613, col. 1.]

The question whether a co-sharer cultivating lands in a village in a portion of which he is a co-owner is invariably to be regarded as a co-sharer accountable for the rent to the body of co-sharers at the time of the distribution of profits or as a tenant on behalf of the general body of co-sharers, depends upon the circumstances of each case. [p. 613, col. 1.]

Second appeal from the decision of the District Judge, Saharanpur, dated 2nd December 1914.

Mr. *Pearey Lal Banerji* (with him Mr. *Girdhari Lal Agarwalla*), for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit to eject the defendant under section 58 (*a*) of the Agra Tenancy Act of 1901. The plaintiffs are Gulzari Mal who is *lambardar* and his son Lachman Chand. The defendant Jai Ram is said to be a non-occupancy tenant of 11 *bighas* odd. He also appears to have purchased an area of 5 *bighas* 17 *biswas* comprising several plots in the village. The suit was resisted on various grounds. In the first place it was urged that the plaintiffs as co-sharers could not alone maintain the suit for ejectment. It was further urged that the suit for ejectment was barred by reason of a decision of an Assistant Collector, Mr. Sita Ram Kher, dated the 17th December 1907, and that it was also barred by reason of a Civil Court's decision dated the 3rd of November 1906. The last plea in defence was that the defendant himself was a co-sharer, that he was not a tenant and that the suit against him for ejectment by brother co-sharers was not maintainable. The case came before Mr. Darling, Assistant Collector of the first class, who on the 14th of September 1911 decreed the plaintiffs' suit. The defendant first of all appealed to the Commissioner, that officer returned the memorandum of appeal, which was thereupon filed in the Court of the District Judge. The case then came up for hearing before Mr. Burkitt, who on the 2nd of October 1912 dismissed the plaintiffs' suit. The plaintiffs, thereupon, appealed to this Court and on the 5th of July 1913 Mr. Justice Ratique dismissed the appeal. His decision is reported as *Gulzari Mal* v. *Jai Ram* (1). The plaintiffs then preferred an appeal under section 15 of the Letters Patent and the case was ultimately referred to a Full Bench, which on May 2nd 1914 held that although the plaintiffs as co sharers could not maintain the suit, Gulzari Mal as *lambardar* was entitled to maintain it. This decision is reported as *Gulzari Lal* v. *Jai Ram* (2). The case was then remanded to the lower Appellate Court for the determination of the remaining issues. These have been disposed of by Mr. Tabor in his judgment dated the 2nd of December 1914. Mr. Tabor decreed the suit. The defendant has preferred this appeal.

The two remaining points have been very ably argued by Mr. Pearey Lal Banerji, the *first* of these being whether the present suit is barred by the principle of *res judicata*. Reliance was placed on the judgment of Mr. Sita Ram Kher, dated the 17th December 1907, holding that the plaintiffs as co sharers could not maintain the suit for ejectment. This view was also taken by this Court. But a further point now before the Court is whether as *lambardar* Gulzari Mal can maintain the suit. The Full Bench in this case held that Gulzari Mal as *lambardar* was entitled to maintain the suit. The judgment of Mr. Sita Ram Kher deciding that the plaintiff as co-sharer was not entitled to maintain a suit for ejectment cannot operate as *res judicata*

(1) 21 Ind. Cas. 88; 11 A. L. J. 742.
(2) 24 Ind. Cas. 178; 12 A. L. J. 606; 36 A. 441.

with reference to the question whether the plaintiff as a *lambardar* is entitled to maintain such a suit. The *next* point taken is that the Civil Court, on the 3rd of November 1906, held that the plaintiff's title as a purchaser was not good. It appears that the plaintiff Gulzari Mal acquired property in the first place under a sale-deed of the 18th January 1906 and in the second place at an auction sale of the 24th of November 1906. In that case the plaintiff's title under the auction sale was held to be good. The present suit has been brought by him in the capacity of a *lambardar*. Being a co-sharer at any rate of a portion of the property in suit, he was entitled to become a *lambardar* and as such *lambardar* to maintain a suit for ejectment. I may mention in this connection that in paragraph (1) of the written statement the defendant admits the correctness of the allegation made in paragraph (1) of the plaint to the extent that the plaintiffs are co-sharers of this very *khata*. That being so, the plaintiff's suit is not barred by the rule of *res judicata*. The *second* point raised by Mr. Pearey Lal Banerji is that the defendant himself is a co-sharer and that he cannot be dealt with as a tenant although he holds land in excess of 5 *bighas* 17 *biswas*, his own interest in the land. The question whether a co-sharer cultivating lands in a village in a portion of which he is co-owner is invariably to be regarded as a co-sharer accountable for the rent to the body of co sharers at the time of the distribution of profits or as a tenant on behalf of the general body of co-sharers, is not one admitting of an invariable answer. The person may be a tenant on behalf of the general body of co-sharers. As an illustration I may refer to the case of *Abul Hasan Khan* v. *Bhura* (3), where a Bench of this Court held that by reason of the purchase of a share in the village the person who has been a tenant does not cease to be such. In other words, a man may be a co-sharer as also a tenant of a village at the same time. On the other hand, as Mr. Pearey Lal Banerji has argued, a co-sharer may cultivate land not as a tenant but as a co-sharer, in which case he has to account for the rent of the land in his cultivation. As an illustration of this I may refer to the case of *Indar Lal* v. *Deojit* (4). Each case depends upon its own circumstances. In this particular case, we find that there are four co-sharers in the village. The first of these is Harjas who holds an ancestral share in the village. The plaintiffs Gulzari Mal and his son Lachman Chand are co-sharers, who hold a portion of the village land by virtue of the two purchases. I have already mentioned, and the fourth co-sharer is the defendant Jai Ram who is the purchaser of the specific area of 5 *bighas* 17 *biswas*. The learned Judge has found that the plots in dispute which the defendant cultivated did not form part and parcel of the specific area of 5 *bighas* 17 *biswas* owned by him, nor did they form part and parcel of the land owned by Harjas; but that they are situated in the part owned by the plaintiff. This, I regard as a finding of fact. Mr. Pearey Lal Banerji has argued that it is not a correct finding as it has been arrived at by a process of elimination whereby Harjas and the defendant are excluded from the ownership of the plots in dispute and the plaintiffs alone left as owners. I think for the purpose of this case it is sufficient to say that the defendant is not the owner of, nor has he any share in, the plots in suit. His specific area of 5 *bighas* 17 *biswas* is quite distinct from the area now in suit. Upon the finding, therefore, he could have held the lands only as a tenant-at-will on behalf of other co-sharers. The result is that the appeal fails and I dismiss it with costs.

Appeal dismissed.

(3) A. W. N. (1906) 226; 3 A. L. J. 763; 28 A. 763.
(4) 4 A. L. J. 1; A. W. N. (1907) 26.

CALCUTTA HIGH COURT.
RULE *Nisi* No. 166 OF 1916.
June 27, 1916.
Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.
BEPIN BEHARI SAHA—PLAINTIFF—PETITIONER
versus
ABDUL BARIK AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. IX, rr. 4, 9—Application for restoration of application under rr. 4, 9 dismissed for default—Provincial Small Cause Courts Act (IX of 1887), s. 17, applicability of.

RAMACHANDRA NAIDU *v.* TIRUPATHI NAIDU.

When an application under Order IX, rules 4, 9, Civil Procedure Code, for the restoration of a suit dismissed for the plaintiff's default, is again dismissed for the default of the applicant (the plaintiff), the latter has the right to again apply under Order IX, rule 9, for the re-hearing of that application.

Diljan Mihha Bibi v. *Hemanta Kumar Roy*, 29 Ind. Cas. 395; 19 C. W. N. 758, followed.

Section 17 of the Provincial Small Cause Courts Act does not apply to a miscellaneous application for the restoration of an application under Order IX, rules 4, 9, Civil Procedure Code, dismissed for the default of the applicant.

Rule against the order of the Munsif, 4th Court, Dacca, in Miscellaneous Case No. 161 of 1915.

Babu *Jitendra Nath Roy*, for the Petitioner.

Babu *Manmotha Nath Roy*, for the Opposite Parties.

JUDGMENT.—The plaintiff brought a suit in the Small Cause Court. The suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiff then made an application under Order IX, rules 4 and 9, for restoration and re-hearing of the case. On this occasion also there was a default and then the order dismissing this case was made in the presence of the defendant's Pleader. There was again an application made under Order IX, rule 9, for the re-hearing of the case. The learned Munsif held that Order IX, rule 9, did not apply and, therefore, dismissed the application.

It appears that the plaintiff made an application also for treating it as an application for review. On that application also, the learned Judge said "such application does not lie." We are unable to see the justification of such orders.

In the *first* place, we do not think that Order IX, rule 9, does not apply; and in arriving at this conclusion, we follow the case of *Diljan Mihha Bibi* v. *Hemanta Kumar Roy* (1). There it was held that Order IX, rule 9, was applicable to a case in which an application for setting aside a sale had been dismissed. The application for setting aside the sale was treated there as an original proceeding. In this case also, in a similar way, the application for the restoration of the case, under Order IX, rules 4 and 9, may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case and decided upon evidence.

In this view of the case, we think that the learned Munsif ought to have considered the application on the merits.

Then, as regards the alternative prayer for treating the application as an application for review, we do not understand why the learned Munsif says that Order XLVII, rule 1, has no application. That rule seems to apply to all orders of the Court which may be reviewed under certain circumstances.

The objection, taken by the opposite party was that there was no deposit under section 17 of the Small Cause Courts Act. Section 17 of the Small Cause Courts Act, however, speaks of deposits where there has been an application for review of judgment in cases where an *ex parte* decree has been passed; or a review of judgment evidently in cases where there has been a judgment deciding the case. We do not think that the provisions of section 17 with regard to deposit of security have any application to a miscellaneous application of this kind. If they had any application, the learned Judge might have asked the petitioner to give security or to deposit the amount instead of saying that the application does not lie.

In this view of the case, we make the Rule absolute and direct that the application should be decided on the merits.

We make no order as to costs.

Rule made absolute; Case remanded.

(1) 29 Ind. Cas. 395; 19 C. W. N. 758.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 22 OF 1915.

July 18, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

RAMACHANDRA NAIDU—DECREE-HOLDER PETITIONER—APPELLANT

versus

TIRUPATHI NAIDU AND OTHERS—JUDGMENT-DEBTORS—COUNTER-PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—

RAMACHANDRA NAIDU v. TIRUPATHI NAIDU.

Application for execution—Relief asked for not allowed by decree—Application, whether step-in-aid of execution—Execution petition, error in, effect of.

Any mistake or error in an execution petition does not necessarily render such an application a nullity. [p. 616, col. 1.]

An execution petition may give a fresh starting point of limitation even though the relief asked for is not allowed by the decree sought to be executed. [p. 616, col. 1.]

Varadiah T. v. *Rajakumara Venkata Perumal*, 21 Ind. Cas. 782; (1914) M. W. N. 157; 14 M. L. T. 530; 26 M. L. J. 83; *Samia Pillai* v. *Chockalinga Chettiar*, 17 M. 76; 4 M. L. J. 8, followed.

Where the decree-holder prayed for the arrest of the judgment-debtor in spite of the fact that the decree to be executed did not make the judgment-debtor personally liable:

Held, that this was a step-in-aid of execution and operated to save limitation. [p. 616, col. 1.]

Appeal against the order of the Court of District Judge, Coimbatore, in Appeal Suit No. 195 of 1914, preferred against the order, in Execution Petition for Revision No. 971 of 1913, in Original Suit No. 366 of 1901, on the file of the Court of the District Munsif of Udamalpet.

FACTS appear from the following judgment of the lower Appellate Court :—

"This is an appeal by the decree-holder against an order passed in execution. The question for determination is whether the District Munsif was right in holding that Execution Petition No. 639 of 1912 was barred by limitation. This execution application was presented on 9th April 1912 and it was admittedly barred unless the operation of limitation is saved by the previous application, Execution Petition No. 382 of 1909, which was presented on 14th January 1909.

The facts so far as they are material are as follows:—The appellant obtained a money-decree on 6th February 1901 in Original Suit No. 366 of 1901 on the file of the District Munsif of Udamalpet against the "ancestral properties of the respondents in their hands." The decree directed that the respondents were not personally liable for the decree. Two execution applications, Execution Petition No. 574 of 1904 and Execution Petition No. 187 of 1907 in which the issue of notice to the judgment-debtors was prayed for, were presented on 7th June 1904 and 6th February 1907 respectively. A third execution application, Execution Petition No. 382 of 1909, was presented on 14th April 1909. The only relief asked for in this petition was the arrest of the judgment-debtors. The petition was dismissed on 14th September 1909 on the ground that no personal relief was given under the decree.

The question for decision is whether Execution Petition No. 382 of 1909 was an application "in accordance with the law," within the meaning of Article 182 of the Limitation Act. In my opinion it was not. It has been held in *Chattar* v. *Newal Singh* (1), which was followed in *Munawar Husain* v. *Jani Bijai Shankar* (2), that the term "applying" in accordance with the law means "an application to the Court to do something which by law the Court is competent to do" and it does not cover an application to the Court to do something which, to the decree-holder's direct knowledge or upon his presumed knowledge of law, he must have known the Court was incompetent to do. As I have already stated, the only prayer in the execution petition was for the arrest of the judgment-debtors and the decree expressly provided that no personal relief was given under it.

The appellant's Vakil relies on the rulings in *Samia Pillai* v. *Chockalinga Chettiar* (3), *Annamalai Mudaliar* v. *Ramier* (4) and *Bipin Behari Mitter* v. *Bibi Zohra* (5). These rulings are, I think, not in point as the cases are clearly distinguishable from the present one. In the case of *Samia Pillai* v. *Chockalinga Chettiar* (3), which was followed in *Bipin Behari Mitter* v. *Bibi Zohra* (5), a *bona fide* mistake was made in inserting the name of the deceased judgment-debtor in the application for execution as the person against whom execution was sought. In *Annamalai Mudaliar* v. *Ramier* (4) what was decided was that an application by the transferee of a decree praying to be recognised as assignee-plaintiff in the suit was an application in accordance with law, as it was "a step-in-aid of execution." The appellant's Vakil also relies on section 52 of the Civil Procedure Code, but that section has clearly no application to the facts of the present case.

The order appealed against is, I think, right. The appeal is dismissed with costs."

(1) 12 A. 64; A. W. N. (1899) 200.
(2) 27 A. 619; 2 A. L. J. 376; A. W. N. (1905) 132.
(3) 17 M. 76; 4 M. L. J. 8.
(4) 31 M. 234; 18 M. L. J. 24; 4 M. L. T. 72.
(5) 35 C. 1047.

Mr. *M. S. Mohideen*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—In this case the petitioner sought to save limitation by treating as steps-in-aid of execution two execution petitions in which the decree-holder prayed for the arrest of the judgment-debtors in spite of the fact that the decree to be executed did not make the defendants personally liable. The lower Courts have dealt with the case on the basis that execution petitions asking for a relief which the executing Court was not competent to grant, are not "in accordance with law." The present is not a case of competence or incompetence. It has been held, in cases where the decree did not give the relief asked for, that an execution petition may yet give a fresh starting point for limitation, *e. g.*, applications to sell properties not liable to be sold and applications against a deceased judgment-debtor. *Vide Varadiah T.* v. *Rajakumara Venkata Perumal* (6) and *Samia Pillai* v. *Chockalinga Chettiar* (3).

Any mistake or error in an execution petition will not necessarily render such an application a nullity.

But the District Munsif was of opinion that the decree-holder's action in the present case was not *bona fide*. We do not think that this conclusion can be drawn from the applications themselves.

The first execution petition, dated 7th June 1904, was for realising the decree amount by sending the defendants a notice. This was dismissed for absence of the parties. The 2nd execution petition, dated 1st February 1907, contained a similar prayer. It should have mentioned the method by which the money was to be realised. It was accordingly dismissed. In the third execution petition, dated 14th April 1909, this defect was attempted to be remedied by praying for the arrest of the defendants. It was dismissed because they were not personally liable under the decree. In the fourth execution petition, dated 9th April 1912, the decree-holder asked for notice to the defendants and a warrant for their arrest. The Court, instead of dismissing this petition for the same reason as it dismissed the third petition, directed notice to go to the defendants, and on the 2nd defendant being reported to have died, it ordered his legal representatives to be brought on record. It does not appear that the decree-holder was asked to explain the circumstances under which he sought a personal remedy against the defendants. Under certain circumstances a decree may be executed against a judgment-debtor personally even though the original decree only provided for payment of money out of property in his possession. *Vide* section 52 of the Civil Procedure Code.

We set aside the orders of the Court below and remand the petition to the District Munsif's Court for disposal in accordance with law. Respondents will pay the appellant's costs in this Court and in the lower Appellate Court. Costs in the executing Court will abide and follow the result.

Appeal allowed; *Petition remanded.*

V.R.P.

(6) 21 Ind. Cas. 782; (1914) M. W. N. 157; 14 M. L. T. 530; 26 M. L. J. 83.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 393 OF 1916.

July 27, 1916.

Present:—Mr. Justice Broadway.

GULAB CHAND AND ANOTHER—DEFENDANTS —PETITIONERS

versus

SHER SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 22, 23, 151—"After notice to the other parties," interpretation of —Application of transfer, when to be made—Inherent power of Court.

The words used in section 22 of the Civil Procedure Code, 1908, are mandatory. The words "after notice to the other parties", indicate that the notice must be given prior to the making of an application for transfer of a case and that a notice of the application issued by the Court to which the application is made is not what is intended. [p. 617, col. 2; p. 618, col. 2.]

In a case where issues are settled, the application must be made at or before such settlement is made, and a delay in making such an application would render the application incompetent. [p. 617, col. 2.]

Musammat Amir Begam v. *Sardar Muhammad Ismail Khan*, 25 Ind. Cas. 723; 150 P. L. R. 1914; 65 P. W. R. 1914, distinguished.

GULAB CHAND *v.* SHER SINGH.

Section 151 of the Code of Civil Procedure, does not empower the Court to wholly ignore the provisions of section 22. [p. 618, col. 2.]

Sasibhushan Mookerjee v. *Radhanath Bose*, 25 Ind. Cas. 267; 20 C. L. J. 433; 19 C. W. N. 835; *Jethabhai Nursey* v. *Chapsey Cooverji*, 4 Ind. Cas. 108; 34 B. 467 at p. 482; 11 Bom. L. R. 1014, followed.

Musammat Rabban Bibi v. *Musammat Sohadra Bibi*, 20 Ind. Cas. 758; *Mohabir Pershad Chowdhury* v. *Chandra Shekar Sahai*, 28 Ind. Cas. 304; 19 C. W. N. 1021; *Hindustan Assurance and Mutual Benefit Society* v. *Mulraj Rai*, 27 Ind. Cas. 455, 27 M. L. J. 645, distinguished.

Application under section 22 of the Civil Procedure Code, for transfer of a civil case pending in the Court of the Senior Subordinate Judge, Rohtak, to the Calcutta High Court.

Rai Sahib Lala *Moti Sagar*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

ORDER.—This is an application purporting to be made under sections 22 and 23, Civil Procedure Code, praying for the transfer of a case between the parties pending in the Court of the Senior Subordinate Judge, Rohtak, to the High Court of Calcutta. Mr. Tek Chand on behalf of Sher Singh, the plaintiff in the suit, has raised the preliminary objection that the application is not competent inasmuch as it was not made at the proper time. He points out that the plaint was filed on the 22nd December 1915 and was fixed for the 14th of January 1916, and that on the 4th of February 1916 the defendant in the case filed in his written statement. On the 4th of March 1916 all the issues arising from the pleadings were framed by the Court, and 17th of April 1916 was fixed for the production of evidence by the plaintiff, and the plaintiff summoned certain witnesses among whom was the defendant, who was called upon to appear with his books. On the 17th of April 1916, the date fixed, the defendant appeared but failed to produce his books and was ordered to do so by the 22nd of May 1916. This application for transfer was filed in this Court on the 15th of June 1916. It was, therefore, contended by Mr. Tek Chand that owing to the fact that no notice prior to the filing of the application was given to the other party in the case, and that it was not filed within the time prescribed by section 22, it should not now be entertained. In fact it was argued that this Court had no jurisdiction to entertain it. Mr. Moti Sagar on behalf of the applicant argued that the provisions of section 22 should be construed liberally and that his client was justified, or at any rate that the delay was excused, by the fact that he had applied to the Court to first decide the issue relating to the Court's jurisdiction to try the case. He contended, on the authority of *Musammat Amir Begam* v. *Sardar Muhammad Ismail Khan* (1), that it was not essential that the application should be filed in every case before the first hearing. That authority, however, in my opinion, does not support that contention. The facts of that case are very different from those of the present one and it was there held that inasmuch as there was no proper hearing until certain minors concerned in that case were properly represented, the application was made at the first hearing within the meaning of section 22, Civil Procedure Code. On the point of notice Mr. Moti Sagar urged that it really was not essential, inasmuch as a notice has now been issued on this application by this Court. It seems to me, however, that the provisions of section 22, Civil Procedure Code, are clear and unmistakable. It is there laid down that where a suit may be instituted in more than one Court and is instituted in one of such Courts, any defendant, *after notice to the other parties*, may, in all cases where issues are settled, at or before such settlement, apply to have the suit transferred to another Court. In my opinion the words "*after notice to the other parties*" clearly indicate that this notice must be given *prior* to the making of the application, and that a notice of the application issued by the Court to which the application is made is not what was intended. This, however, is to some extent a minor point. The real difficulty arises as to the time at which the application must be made.

It seems to me perfectly clear that the Legislature intended that the application should be made at or before the settlement of issues and that a delay in making such an application would render the application incompetent. Mr. Moti Sagar then referred

(1) 25 Ind. Cas. 723; 150 P. L. R. 1914; 65 P. W. R. 1914.

me to section 151, Civil Procedure Code, and argued that this Court has inherent power to pass orders which may be necessary for the ends of justice or to prevent abuse of the process of the Court, and he has asked me to exercise this power and direct the transfer of this case accordingly. Mr. Tek Chand, however, strenuously urged that section 151, Civil Procedure Code, does not give this Court power to wholly ignore the provisions of section 22, Civil Procedure Code. He points out that *prima facie* the plaintiff is the *arbiter lites* and has a right to bring his suit in any Court which the law allows and that, therefore, it is only in very exceptional cases that the Court will interfere in his choice of the *forum* in which he wishes his case to be tried. He referred me to *Sasibhushan Mookerjee* v. *Radhanath Bose* (2), in which it was held by a Division Bench of the Calcutta High Court that where a relief claimed is expressly forbidden by some other provision of the Code, it was not intended that that express provision should be overridden by section 151, Civil Procedure Code. He also cited *Jethabhai Nursey* v. *Chapsey Cooverji* (3), where it was held that when certain questions have been removed from the jurisdiction of a Court they cannot be brought within jurisdiction on the plea that the Court has inherent jurisdiction to do what justice requires to the parties before it. Mr. Moti Sagar referred me to *Musammat Rabban Bibi* v. *Musammat Bibi Sohadra* (4), *Mohabir Pershad Chowdhury* v. *Chandra Shekar Sahai* (5) and *Hindustan Assurance and Mutual Benefit Society* v. *Rai Mulraj* (6). The first case has no direct bearing on the point before me and deals with the powers of a Court under sections 22 and 23, Civil Procedure Code, when a proper application is before it. In the second case it was held that although an application under section 152, Civil Procedure Code, to amend a decree was not competent, the High Court had power to make the necessary amendment under section 151 of that Code. Section 152, Civil Procedure Code, is merely a permissive section and, in my opinion, this ruling has no bearing on the point at issue. In *Mohabir Pershad Chowdhury* v. *Chandra Shekar Sahai* (5) the point now before me was not in issue and, therefore, I do not consider it necessary to discuss it further. It seems to me that the words used in section 22, Civil Procedure Code, are mandatory. Notice has to be given before the application is made and the application must be made, in a case where issues are settled, at or before such settlement is made. I, therefore, hold that this application under section 22, Civil Procedure Code, cannot be entertained. With regard to section 151, Civil Procedure Code, after giving the point my careful consideration I am forced to the conclusion that the *dicta* in *Sasibhushan Mookerjee* v. *Radhanath Bose* (2) and *Jethabhai Nursey* v. *Chapsey Cooverji* (3) are correct and I do not think that it was the intention of the Legislature, when this section was embodied in the Code, to give this Court power to wholly ignore the provisions of section 22, Civil Procedure Code.

In these circumstances I am forced to dismiss this application, on the grounds that as far as section 22, Civil Procedure Code, is concerned it is made too late, and that I am unable to take any action under section 151 of the Code. The applicant must pay the costs of the proceedings in this Court.

Application rejected.

(2) 25 Ind. Cas. 267; 20 C. L. J. 433; 19 C. W. N. 835.
(3) 4 Ind. Cas. 108; 34 B. 467 at p. 483; 11 Bom. L. R. 1014.
(4) 20 Ind. Cas. 758.
(5) 28 Ind. Cas. 304; 19 C. W. N. 1021.
(6) 27 Ind. Cas. 455; 27 M. L. J. 645.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 51 OF 1913.

May 9, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

PRIYANATH PAL—PLAINTIFF—APPELLANT

versus

TARINI CHARAN ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B C. of 1885), s. 30—*"Held at a money-rent," meaning of.*

Section 30 of the Bengal Tenancy Act refers to a tenancy where the rent is solely payable in money, and it does not apply to a tenancy of which rent is paid partly in cash and partly in kind. [p. 620, col. 1.]

PRIYANATH PAL *v.* TARINI CHARAN ROY.

The Bengal Tenancy Act is an Act which was passed in the interests of tenants and under it rents are payable sometimes in money, sometimes in kind and sometimes partly in money and partly in kind. [p. 620, col. 1.]

Appeal against the decree of Mr. Justice Chapman, dated the 19th of March 1913, in Appeal from Appellate Decree No. 629 of 1912.

FACTS will appear from the following judgment of

CHAPMAN, J.—This appeal arises out of a suit under section 30 of the Bengal Tenancy Act for the enhancement of the rent of an occupancy *raiyat*, upon the ground that there had been a rise in the average local price of staple food crops during the currency of the present rent. The holding was held at a rent of Rs. 17-15-9 *gandas* in cash and 2 *aras*, that is, about 13 *maunds* of paddy, in kind. The Munsif and the learned Subordinate Judge have both dismissed the suit on the preliminary ground that section 30 of the Bengal Tenancy Act does not apply to a case in which rent is paid partly in cash and partly in kind.

The landlord has appealed and it has been argued, and the argument has been conducted with considerable ability and knowledge of the law of tenancy that has been applied in this country, that the words money rent in section 20 of the Bengal Tenancy Act can be held to mean that portion of the rent which is payable in money, so that the section so interpreted would be read to mean that the landlord of a holding held at a rent payable in cash and in kind can institute a suit to enhance the portion of the rent payable in money This would be straining the language of the section and I have to see whether, as it has been contended, this particular case has been left entirely unprovided for in the Act and, if so, whether it was with intention that it was so left unprovided for. Now the result of the Act of 1885 in this connection was to have rents payable in kind alone, except in so far as the Act provided for their commutation into rent payable in money. This was a change from the previous Act of 1869 which, so far as the law of enhancement was concerned, made no distinction between rents payable in money or in kind.

For the determination of the question whether the Act apart from section 30 provides at all for the enhancement of rent partly payable in cash and partly in kind upon the ground of rise in price I have to turn to the section providing for commutation, and from that section it is clear that there is no provision for enhancement of such rent on the ground of rise in price. Now the question is whether the omission was intentional or not. I observe that when this section was amended in 1907 it was amended in order to expressly provide for a case of this kind, that is, a case in which rent is payable partly in kind and partly in cash. Simultaneously with that amendment an amendment was made that in case of commutation rent may be simultaneously enhanced upon the ground recited in section 30 (*c*), namely, of improvement in the productive powers of the land by reason of improvement made by the landlord. Now when the Legislature went to the length of carefully selecting one of the clauses of section 30 for the purpose of incorporation into the commutation section 40, it is clear that the omission to provide enhancement on the ground of rise in price was intentional so far as the section is concerned.

I, therefore, find that this particular case was intentionally left unprovided for in the other provisions of the Bengal Tenancy Act, and this being so I feel unable to construe the language of section 30 so as to make it include cases when rent is payable partly in money and partly in kind.

I may say that on behalf of the respondents certain preliminary objections to the suit were raised, but having regard to the view which I have expressed on the first point it is unnecessary to go into them.

The appeal is dismissed with costs.

Against this decision an appeal was preferred under section 15 of the Letters Patent.

Babus *Mohendra Nath Roy* and *Jyotish Chandra Hazra*, for the Appellant.

Babus *Sarat Chandra Khan* and *Hirendra Nath Ganguly*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In spite of the argument which has been addressed to us by Mr. Roy, and in which I was personally much interest-

ed, I do not think we should interfere with the judgment of the learned Judge; the short ground is that it is common knowledge that the Bengal Tenancy Act was an Act passed in the interests of tenants, and it is also common knowledge that rents are sometimes paid in money, sometimes in kind, and sometimes partly in money and partly in kind; and when I find the words of section 30 are, "The landlord of a holding held at a money rent," I think it must be taken that the Statute is referring to a tenancy where the rent is solely payable in money. That is borne out not only by the words of the section itself, but also by the words of the other sections to which Mr. Roy drew our attention, especially section 38, as to which I made some remarks during the course of the argument which I need not repeat.

For these reasons the appeal must be dismissed with costs.

MOOKERJEE, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 895 OF 1914.

July 28, 1916.

Present:—Mr. Justice Scott-Smith.

MEHR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOCHET SINGH—DEFENDANT—RESPONDENT.

Alienation—Religious office—Bungas *attached to Golden Temple at Amritsar—Manager, office of, nature of—Alienation of office, if valid.*

The *bungas* attached to the Golden Temple at Amritsar are partly religious and partly charitable institutions, and the office of manager partakes of the nature of a religious office which cannot be alienated for the manager's personal gain. [p. 622, col. 1.]

Gossami Sri Gridhariji v. *Romanlalji Gossami*, 17 C. 3; 16 I. A. 137; 5 Sar. P. C. J. 350; *Kishen Singh* v. *Sardarni Partab Kuar*, 81 P. R. 1902; *Khetter Chunder Ghose* v. *Hari Das Bundopadhya*, 17 C. 557, *Nirodbarani Dassi* v. *Shiba Das Pal Dewasin*, 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084, distinguished.

Phoolbas Koonwur v. *Lalla Jogeshur Sahoy*, 1 C. 226 at p. 235; 25 W. R. 285; 3 I. A. 7; 3 Sar. P. C. J. 573; *Ayancheri Kovilagath Rama Varma Tambaran* v. *Acholathil Varikoli Raman Nayar*, 5 M. 89; *Nur Muhammad* v. *Ghulam Habib*, 106 P.R. 1892; *Lakshmanaswami Naidu* v. *Rangamma*, 26 M. 31, followed.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 20th January 1914, affirming that of the Munsif, 1st class, Amritsar, dated the 25th November 1912, dismissing the claim.

The Hon'ble Pandit *Sheo Narain*, R. B., and Mr. *Sewa Ram Singh*, for the Appellants.

Mr. *Clarence Kirkpatrick* and Bhagat *Govind Das*, for the Respondent.

JUDGMENT.—In the suits out of which these two appeals, Nos. 895 and 896 of 1914, arise the plaintiffs sued for possession of certain *kothris* in *Bunga* Sher Singh, situated in the quadrangle of the Golden Temple, Amritsar. Plaintiff No. 1, Mehr Singh, based his right to sue upon a deed executed in his favour by Raghbir Singh, a descendant of the founders of the *bunga*. The other two plaintiffs joined him in the capacity of worshippers at the *bunga*. The first Court held that it was not proved that the founders had reserved to themselves any rights in the *bunga* or its management and that, therefore, they could not transfer those rights to any one else. It further held that the *bunga* being *wakf* property and a religious institution the right of management could not be sold; it, therefore, held that the plaintiff Mehr Singh had not the right to sue by reason of the deed executed in his favour by Raghbir Singh. It also held that the suit by plaintiffs Nos. 2 and 3 in the capacity of worshippers could not lie in the present form and, therefore, dismissed the suit. On appeal the Divisional Judge agreed with the first Court that there was no right of private property in the *bunga* which the representatives of the founders could dispose of and that it had been absolutely dedicated to religious purposes. As to whether the plaintiffs as worshippers could maintain a suit he stated that no arguments had been addressed to him and that the lower Court's finding upon that point stood unchallenged. He accordingly dismissed the appeal. The plaintiffs have filed a second appeal to this Court and I have listened to lengthy arguments by Counsel. Pandit Sheo Narain on behalf of the appellants cites *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1) and various other authorities in support of the proposition that according to Hindu Law, the office of manager of a religious institution is held to be vested

(1) 17 C. 3; 16 I. A. 137; 5 Sar. P. C. J. 350.

in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise. I do not propose to examine these authorities or to decide the question whether the heirs of the founders of the *bunga* in question have any right of management vested in themselves because in my opinion, the case can be decided on other points. *Kishen Singh* v. *Sardarni Partab Kuar* (2) is the only reported case relating to a *bunga* attached to the Golden Temple at Amritsar, which has been referred to, but it does not touch the point which I am now about to discuss and is of no help towards the decision of the present case.

The other main point argued before me was whether the sale or alienation of the *bunga* or the right of management thereof could be validly effected. The deed under which plaintiff claims, commences by saying that the *bunga* in question is owned and possessed by Raghbir Singh, the actual words used in the deed being *mamluka wa maqbuza khud*, which certainly mean that Raghbir Singh claimed to be the proprietor of the institution. The deed then goes on to say that Raghbir Singh has made over the whole of the *bunga* to the possession of Bhai Mehr Singh and that it is to be managed and superintended by him. The words used are *kul* Bunga *mazkur Bhai Mehr Singh ke kabze wa intizam wa nigrani men hamesha ke lie de diya hai.* Then Raghbir Singh goes on to say that the reason for the transfer is that the *bunga* needs repairs and that he himself cannot afford and has no time to execute repairs. He then says that his own monthly income by way of rent from the *bunga* has been Rs. 5 and that in consideration of this the Bhai Sahib, *i.e*, Mehr Singh, has promised to give him Rs. 1,000 out of which Rs. 500 has already been paid and the other Rs. 500 is to be paid before the Registration Officer. Now there can be no doubt that this is a sale-deed of the *bunga* and of all the rights possessed by Raghbir Singh therein for a consideration of Rs. 1,000. The *bunga* is admittedly *wakf* and, therefore, it could not be sold by Raghbir Singh. But Pandit Sheo Narain argues that the sale of the right of management and superintendence is valid as the transfer was made for the benefit of the institution. In support of his proposition he relies upon *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* (3) and *Nirodbarani Dassi* v. *Shiba Das Pal Dewasin* (4). In the former of these rulings it was held that the gift of an idol and of the land with which it is endowed (being a private endowment) made with the concurrence of the whole family to another family for the purpose of carrying on the regular worship of the idol, if made for the benefit of the idol, is not invalid. The ruling is, in my opinion, clearly distinguishable from the present case, because there the endowment was a private one and the alienation was by way of gift and not for consideration, as in the present, case. In the case of *Nirodbarani Dassi* v. *Shiba Das Pal Dewasin* (4) it was held that an alienation of the office of *shebait* to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu Law. This authority is also distinguishable from the present case. There also the alienation was made for the benefit of the institution and without any idea of personal gain.

On the other side the following authorities have been cited by Mr. Kirkpatrick:—*Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (5). This was a Privy Council case and their Lordships said that there was no authority under the general principles of Hindu Law for holding that the trustees of a temple had any power to make a transfer of their office in the institution to a person unconnected with the family from which the trustees were taken. *Ayancheri Kovilagath Rama Varma Tambaran* v. *Acholathil Varikoli Raman Nayar* (6), in which it was held that a transfer of the right to manage a Malabar temple and its lands by way of lease for a sum of money was illegal. The Privy Council case referred to above was followed. *Nur Muhammad* v. *Ghulam Habib* (7), in which it was held that the transfer of a share in the shrine and the offerings was akin to the transfer of a religious office and was invalid. *Lakshmanaswami*

(2) 81 P. R. 1902.

(3) 17 C. 557.
(4) 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084.
(5) 1 C. 226 at p. 235; 25 W. R. 285; 3 I. A. 7; 3 Sar. P. C. J. 573.
(6) 5 M. 89.
(7) 106 P. R. 1892.

Naidu v. *Rangamma* (8), where it was held that the sale of an office attached to a temple, involving services of a personal nature and entitling the holder of it to receive emoluments, is against public policy and will not be recognized or enforced by the Courts. Hindu Law by Ramakrishna, Volume II, page 451, where it is said "a religious trust, or the right of managing a religious or charitable endowment, or a religious office attached to a temple or any other endowment cannot be alienated by the holder, in the absence of a custom or usage to the contrary or any term in the endowment justifying the alienation." Numerous authorities are quoted in support of this. The rule appears to be subject to the exception that in the case of a private endowment an alienation may in some cases be valid, where it is made for the benefit of the endowment to a person specially interested and without any idea of personal gain.

The description of the *bunga* is given as follows in the judgment of the first Court and it is not contested by either side:—"*bungas* are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men especially by the Rajas and were dedicated to the public as *wakf* property. There was appointed in each *bunga* a custodian called *bungai*, whose duty was to read *Granth Sahib* and arrange for the comfort of the pilgrims staying in the *bunga* and keep the *bunga* in a proper order." This shews that the *bungas* are partly religious and partly charitable institutions and the office of manager may, therefore, be said to partake of the nature of a religious office. The manager, if he has any powers at all, may himself be the *bungai* or he may appoint some one else to perform the duties of the *bungai*, who has to read the *Granth Sahib*. His other duties are to look after the visitors and to take proper care of the building. When, therefore, Raghbir Singh sold the *bunga* and the right of its management and superintendence, he sold a religious office and did so for his own personal gain. I, therefore, hold on the authorities above quoted that the alienation was invalid.

As to the right of plaintiffs Nos. 2 and 3 to maintain the suit as worshippers, no arguments were addressed to me at all. The first Court's finding against the plaintiffs was not challenged in the lower Appellate Court. It has, therefore, apparently been accepted and it is unnecessary for me to discuss its correctness. I, therefore, agree with the lower Courts that the plaintiffs have no *locus standi* to maintain the present suits.

The appeals fail and are dismissed with costs.

Appeals dismissed.

(8) 26 M. 31.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 581 OF 1916.

July 7, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

E. G. STONEWIGG—DEFENDANT—APPELLANT

versus

SHEO RACHHAYA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), *s.* 20 (7)—*Occupancy rights—Lease as* thekadar, *whether confers such rights*—Raiyat, *meaning of.*

A *raiyat* within the meaning of the Bengal Tenancy Act is a person who acquires land for the purpose of cultivating it. [p. 629, col. 2.]

Possession under a lease as a *thekadar* and not as a cultivating tenant does not confer occupancy rights under the Act. [p. 629, col. 2.]

Appeal from a decision of the District Judge, Darbhanga, dated the 28th March 1916.

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *Baidyanath Narain Sinha*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondents for the ejectment of the appellant from 25 *bighas* 9 *cottahs* 19 *dhurs* of land and also a separate area of 3 *bighas* 19 *cottahs* and 9 *dhurs*. The Subordinate Judge decreed the claim in respect of the former area and dismissed it in respect of the latter. Both sides appealed, with the result that the District Judge confirmed, the decision of the first Court as regards the former area and as regards the latter on the appeal

of the respondents decreed the claim in respect of 1 *bigha* 3 *cottahs* and 12 *dhurs*, which is called in the judgment Paltu's holding, being part of the second area mentioned above. It appears that the respondents were proprietors of a 1-anna share in the village and they had in their *khas* possession 30 *bighas* 19 *cottahs* and 14 *dhurs* of land. On November 3rd, 1902, they gave the appellant a lease of the share in the *milkiat* and also of the 30 acres odd. The lease was to run from 1310 *Fasli* to 1320 *Fasli* and, therefore, it expired in 1913 A. D. The present suit was brought on February 20th, 1914.

Of the 30 *bighas* odd 5 *bighas* odd did not pass into the possession of the appellant and may be treated as not being affected by the lease. The remaining 25 *bighas* odd is the first area mentioned above. The appellant resisted the suit on the ground that he had acquired occupancy rights in the 25 *bighas*. It appears that previous to January 5th, 1901, the 25 *bighas* odd were held by a *raiyat* who is not a party to the present proceedings. That *raiyat* surrendered his holding to the respondents on January 5th, 1901. The appellant had been a *shikmi* tenant of the land and seems to have remained in possession of it notwithstanding the surrender of the holding by the *raiyat*. It is found, however, that the respondents in no way recognized the appellant as their tenant and did not accept any rent from him. *Prima facie*, therefore, any possession which the appellant may have had previous to November 1902, when he obtained a lease from the respondents, may be disregarded in considering the question whether the appellant has acquired occupancy rights in the land. The appellant puts his case in this way. He says that the lease of November 1902 gave him the 25 *bighas* odd to cultivate as a tenant and that he cultivated the land throughout the term of the lease as a tenant and up to the date of the present suit and, therefore, under sub-section (7) of section 20 of the Bengal Tenancy Act it should be presumed, until the contrary is proved or admitted, that he held the land continuously for 12 years as a *raiyat*. He says that the finding of the Courts below that it is not proved that the respondents recognized him as a tenant previous to November 1902, may be disregarded as that finding assumes that the onus of proof is upon him, whereas under section 20, sub-section (7), the onus is upon the respondents to prove that he did not hold during that period as a tenant. In my opinion, this question of onus of proof does not arise, for it appears to me to be quite clear that the appellant was not in respect of the 25 *bighas* a *raiyat* within the meaning of the Act, that is to say, that he did not acquire the land under the lease for the purpose of cultivating it. The lease is one in the usual form containing the usual provisions to the effect that the lessee is to carry out all the orders of duly constituted authorities. It reserves one undivided rent in respect of the share in the *milkiat* and the 30 *bighas* odd which had up to that time been in the *khas* possession of the lessors, and provides that the lessee may either cultivate the 30 *bighas* himself or let it out to tenants. We have been referred to several decisions upon other leases. It is impossible to treat decisions on other leases framed in different terms as authorities for the construction to be placed on the lease now in question. In my opinion, it is impossible to read the lease now in question without seeing that it was the intention of both parties that the lessee should hold not only the share in the *milkiat* but also the 30 *bighas* as *thekadar* and not as a cultivating *raiyat*. Both Courts below have come to this conclusion and, in my opinion, they were unquestionably right. I would, therefore, dismiss this appeal as regards the 25 *bighas* odd.

The case as regards the remaining 1 *bigha* 3 *cottahs* and 12 *dhurs* is still more clear. Paltu, who was in possession of the land, abandoned it in or about 1316 *Fasli*. There is nothing to shew that he was restored to possession either by the respondents or by the appellant, their lessee, nor was it the case of the appellant that Paltu was restored to possession. The respondents took a mortgage of the land from Paltu after the expiry of the term of his lease and it is on the strength of this mortgage that the appellant claims to be entitled to retain the land. It is obvious that the

mortgage does not entitle the appellant to retain the land. I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 144 OF 1914.

July 18, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

MOHAMAD ROWTHER—PLAINTIFF—APPELLANT

versus

PICHAI ROWTHER AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Assignment of decree—Execution, application for, by assignee—Assignee benamidar *for judgment-debtor—Proof of title.*

The assignee of a decree, who is found to have taken the assignment *benami* for one of the judgment-debtors, should prove his title before he can be permitted to execute the decree.

Bayyanu Ramayya v. *Nidamurthi Krishnamurti*, 32 Ind. Cas. 952; 3 L. W. 186; 19 M. L. T. 124; (1916) M. W. N. 133, followed.

Appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 143 of 1914, preferred against the order of the Principal District Munsif, Coimbatore, in Execution Petition No. 720 of 1913, in Original Suit No. 1267 of 1913.

Mr. *T. M. Krishnaswamy Aiyar*, for the Appellant.

Mr. *K. S. Aravamuthu Aiyangar* for Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—This is an application by an assignee decree-holder to execute the decree. It is found that the assignment was *benami* for one of the judgment-debtors. On this finding his application was rightly dismissed under Order XXI, rule 16. The transferee must first prove his right before he can be allowed to execute and it is only then any question of adjustment by payment arises. See *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi* (1). The appeal against the appellate order is dismissed with costs.

Appeal dismissed.

V.R.P.

(1) 32 Ind. Cas. 952; 3 L. W. 186; 19 M. L. T. 124; (1916) M. W. N. 133.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 482 OF 1915.

May 24, 1916.

Present:—Mr. Justice Sunder Lal.

SONAI SINGH—PLAINTIFF—APPELLANT

versus

RANDHIR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Interest—Penal stipulation—Discretion.

A bond contained a covenant to pay interest at the rate of Rs. 12 per cent. by a certain date, and if the money was not paid on that date, the interest was to run at Rs. 24 per cent. from the date of the bond:

Held, that the stipulation to have retrospective effect was penal and could not be enforced.

It is in the discretion of the Court to award interest in such cases at such rate as it deems proper.

Second appeal from the decision of the District Judge, Benares, dated the 15th February 1915.

Mr. *J. M. Banerji*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—In this case the only question is, at what rate should interest be allowed to the plaintiff-appellant. The bond in suit contained a covenant to pay interest at the rate of Rs. 12 per cent. by a certain date. If the money was not paid on the said date, the interest was to run at Rs. 24 per cent. from the date of the bond. A stipulation like this to have retrospective effect is penal and cannot be enforced. The Court has power to award such interest as it may consider reasonable. In this case the Court has awarded at Rs. 12 per cent. This was a matter entirely in the discretion of the Court below. I cannot interfere in second appeal and I dismiss the appeal with costs, including fees on the higher scale. Time for payment is extended by three months. Interest will run at Rs. 12 per cent. up to the period of three months to which time for payment is extended.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 79 OF 1916.

June 13, 1916.

Present:—Mr. Justice Rafique.

JAI RAM—OPPOSITE PARTY—APPLICANT

versus

PURNA—PETITIONER—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree, setting aside of—Deposit of decretal amount or security, necessity of.

In order to set aside an *ex parte* Small Cause Court decree the applicant must, at the time of presenting his application, either deposit in Court the amount of the decree or give security as provided for by section 17 of the Provincial Small Cause Courts Act.

Civil revision against the order of the Small Cause Court Judge, Sambhal, District Moradabad, dated the 11th March 1916.

Mr. *Panna Lal*, for the Applicant.

JUDGMENT.—This is an application in revision from the order of the Munsif of Sambhal exercising the jurisdiction of a Small Cause Court Judge. It appears that the applicant had brought a suit for the recovery of the rent of a house in the Court of the Munsif and had obtained an *ex parte* decree on the 22nd November 1915. On the 1st December 1915, the opposite party made an application to the learned Munsif asking for the setting aside of the *ex parte* decree. The decretal amount or security for it was not filed with the application as required by section 17 of the Small Cause Courts Act. In fact the decretal amount was not deposited till some time in January, long after the application for setting aside the *ex parte* decree had been made. The plaintiff-applicant objected on the date of hearing, on the ground that the application of the defendant could not be entertained as the decretal amount or the security for it had not been given on the date of the making of the application. The learned Munsif overruled the objection and allowed the defendant's application and set aside the *ex parte* decree. The plaintiff has come up in revision to this Court and contends that the order of the lower Court is erroneous. No one appears for the opposite party to oppose the application.

It has been ruled by a Division Bench of this Court that section 17 of the Provincial Small Cause Courts Act of 1887 requires that at the time of presenting his application the applicant must either deposit in Court the amount of the decree or give security as provided for by the section, so that the deposit of the decretal amount or the furnishing of the security is a condition precedent to the entertainment of an application to set aside an *ex parte* decree: *Jagan Nath* v. *Chet Ram* (1). The same view was taken in the case of *Nanhe Mal* v. *Harjas* (2). In the present case it appears that the application of the defendant praying to set aside the *ex parte* decree was not accompanied by the decretal amount or a security-bond for it. The order of the learned Munsif setting aside the *ex parte* decree was, therefore, wrong. The application is allowed with costs and the order of the lower Court setting aside the *ex parte* decree is reversed.

Application allowed.

(1) 28 A. 470; 3 A. L. J. 318; A. W. N. (1906) 93.
(2) 5 A. L. J. 295; A. W. N. (1908) 141.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1694 OF 1913.

April 17, 1916.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

D. L. SOORYAPRAKASALINGAM GARU —PLAINTIFF—APPELLANT

versus

SHAW TRIKAMLAL AND OTHERS— DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 56—"Act impossible in itself", meaning of—Practical impossibility—Contract to supply articles of a particular kind within specified time—Breach of contract—Damages, suit for—Defendant, what must prove.

Where impossibility of performance is assigned as a ground for non-performance of a contract, it should be shown that both parties were aware of the implied term as to impossibility. [p. 626, col. 2.]

Emanuel v. *La Compagnie Fermiere De L'Etablissement Thermal De Vichy*, (1889) W. N. 150, followed.

In such cases, what the Courts have to consider is whether it was practically impossible for the promisor to perform the contract not on the date when it was entered into, but within the time specified for its performance. [p. 627, col. 1.]

Inder Pershad Singh v. *Campbell*, 7 C. 474; 8 C. L. R. 501, followed.

SOORYAPRAKASALINGAM GARU *v.* SHAW TRIKAMLAL.

The language of the first part of section 56 of the Contract Act referring to an "act impossible in itself" suggests that the impossibility which would relieve the promisor from liability must not relate to circumstances which render performance impossible, such as failure to keep to the time or difficulties which may have to be experienced in carrying out the terms, as these contingencies are referred to only in the second part of the section, but practical impossibility will excuse the promisor though the act may be physically possible of performance. [p. 627, col. 1.]

Gopalsami Pillai v. *Chidambaram*, 29 Ind. Cas. 151; 2 L. W. 411; *Jones* v. *St. John's College, Oxford*, 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276, followed.

Where, therefore, the plaintiff sued for damages on the ground that the defendant had entered into a contract with him to supply 151 bales of cotton twist of a particular quality within 75 days of the contract, but had failed to perform the contract as agreed upon:

Held, that inasmuch as the defendant had failed to make out that it was practically impossible to perform the contract within the specified time, the plaintiff was entitled to damages for breach thereof. [p. 627, col. 2; p. 628, col. 1.]

Second appeal against the decree of the District Court, Vizagapatam, in Appeal Suit No. 1113 of 1911, preferred against that of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 30 of 1909.

The Advocate-General, for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

This second appeal coming on for hearing on the 30th March 1915 (before Oldfield and Napier, JJ.) and on the 11th and 12th August 1915, and having stood over for consideration till the 17th August 1915, the Court delivered the following

JUDGMENT.—The case for the plaintiff is that the 1st defendant entered into a contract with him on the 8th of April 1909 to supply 151 bales of cotton twist of a particular quality manufactured by the Raipur Mills within 75 days of the contract, that the 1st defendant was one of the partners of a firm of brokers in Ahmedabad of which the 2nd and 3rd defendants are the remaining members and that as the defendants failed to perform the contract as agreed upon, the plaintiff is entitled to damages from them.

The defendants raised various contentions. The 1st defendant denied the suit contract *in toto*. All the defendants demurred to the jurisdiction of the Court and contended that the 1st defendant was a minor at the time of the contract, that he was not a partner, that he had no authority to bind the other partners. The most important defence is thus stated: "The yarn mentioned in the plaint cannot be had at Ahmedabad and so it was impossible to perform the contract and, therefore, the contract is void according to law."

On the subsidiary issues raised in the case, the lower Appellate Court came to the conclusion that the 1st defendant was a major when the contract was entered into, that he was a partner with the other defendants and as such had authority to bind the partnership and that the Vizagapatam Court had jurisdiction. These findings have not been contested in second appeal.

The Courts below decided the 3rd issue "whether the suit contract was impossible of performance and as such it is void" in favour of the defendants. In this Court, Mr. Srinivasa Aiyangar contended that the conclusion arrived at by the learned District Judge on this issue does not dispose of the case. The District Judge has held "that the yarns mentioned in Exhibit A were not available at Ahmedabad Raipur Mills *at the time of the contract Exhibit A* ... . As the Raipur Mills could not supply the yarn desired by the plaintiff, the contract was impossible of performance and, therefore, void."

As we stated at the outset, the contract gives 75 days to the defendants to perform the contract. Consequently what the learned Judge should have considered is, not the impossibility of performance on the 8th of April 1909, but within 75 days of that date. Even then, the liability will not necessarily be at an end. It will have to be shown that both parties were aware of the implied term as to impossibility. See per Lord Esher in *Emanuel* v. *La Compagnie Fermiere De L'Etablissement Thermal De Vichy* (1). As we are not dealing with the case finally, it is not necessary to refer to the evidence which has been let in. However, attention may be drawn to Exhibit P, which shows that the defendants could have obtained from the Raipur Mills *yellow and flower ties*. Reference may also be made to Exhibit H. It is not disputed that the Mills did manufacture twist of the quality

(1) (1889) W. N. 150.

mentioned in Exhibit A. We have referred in passing to this aspect of the case, because what the Courts have to ascertain is whether it was *practically impossible* for the defendants to supply the goods. The decision in *Inder Pershad Singh* v. *Campbell* (2) shows that the question for consideration must be whether it was *reasonably possible* to perform the contract. The language of the first part of section 56 of the Indian Contract Act, which speaks "of an act impossible in itself", suggests that the impossibility which would relieve the promisor from liability must not relate to circumstances which render the performance impossible, such as failure to keep to the time, or difficulties which may have to be experienced in carrying out the terms. The second part of the section refers to some of these contingencies. It was pointed out in *Moss* v. *Smith* (3) that practical impossibility will excuse the promisor, though the contract may be physically possible of performance. See also *Gopalasami Pillai* v. *Chidambaram* (4). In *Jones* v *St. John's College, Oxford* (5) Hannen, J., puts the case against the promisor very strongly: "Undoubtedly, it may be an unwise or unusual contract to enter into, but there is no reason why a man should not enter into such a contract." All the learned Judges who took part in this case held that the promisor must perform or pay the penalty. This aspect of the case has not been considered by the learned Judge. The evidence on the question has to be examined and for that reason we must remit the case for a finding to the lower Appellate Court.

Mr. Govindaraghava Aiyar addressed a long argument to us on the meaning to be attached to the finding of the learned District Judge. His contention was that the contract was subject to a condition that in case the yarn was not available from the Mills within 75 days of the date of Exhibit A, it was not to be insisted upon; and that the finding of the Courts below is to that effect. We are unable to accept this contention. In the first place, there is not a trace of this contention of a condition precedent in the pleadings. It is not one of the issues in the case. The learned Judge in finding on the 3rd issue seems to discuss the question whether the parties contemplated the possibility of the yarn not being available at the agreed time. His inclination apparently is that the performance of the contract depended on the availability of the yarn. He does not say how far the minds of each of the parties were directed towards this contingency. As there was no issue on the question and as the attention of the parties was not drawn to it at the time of letting in evidence, this consideration should not be allowed to influence the decision in the case.

The real question for consideration is whether it was practically impossible for the defendant to get the counts of yarn mentioned in Exhibit A spun at the Raipur Mills and marked with special ties within the period allowed by the contract. We are clear that the elephant mark was not a matter for the Mills.

We must, therefore, remit the following issues for decision:—

(*a*) Was it practically impossible to supply the goods to the plaintiff within the time mentioned in Exhibit A?

(*b*) If not, have the defendants rendered themselves liable to pay any, and if so, what damages?

Time for findings two months and seven days for objections.

In compliance with the order contained in the above judgment, the District Judge of Vizagapatam submitted the following

FINDINGS.— * * * *

4. I must hold, therefore, that defendants have failed to make out that it was practically impossible to perform the contract Exhibit A within the time specified therein.

5. *Issue* 2.—As the contract was not practically impossible of performance within the time allowed, defendants are liable in damages to the plaintiff for not having performed it. Plaintiff has claimed Rs. 3,586-4-0, which amount admittedly concludes both damages and loss of profits.

6. It is admitted that the claim for loss of profits is not sustainable. Damages have to be ascertained by taking the price of the twist at the date of breach of contract, *i. e.*, 22nd June 1909. There is no evidence as to what the prices were on that date, but P. W. No. 3 says that on 24th June 1909 the price of No.

(2) 7 C. 474; 8 C. L. R. 501.
(3) 9 C. B. 94; 19 L. J. C. P. 225; 14 Jur. 1003; 137 E. R. 827; 82 R. R. 307.
(4) 29 Ind. Cas 151; 2 L. W. 411.
(5) 6 Q. B. 115; 40 L. J. Q. B. 80; 23 L. T. 803; 19 W. R. 276.

13 red tie was Rs. 3-11-6 and Rs. 3-12-0 and that No. 20 yellow tie was Rs. 4-0-6. No. 13 in the contract A was Rs. 3-1-6, so if we take the former rate, difference would be 7 annas or 7 annas 6 pies per bundle. If, on the other hand, we take the No. 20 yellow rate and apply the rule that there is a difference of one anna in rate for each number (evidence P. W. No. 3), then Nos. 11 and 11½ yellow tie would be Rs. 3-7-6 and Rs. 3-8-0 respectively, a difference of 5 annas per bundle only.

7. I think that as regards the two yellow tie numbers the yellow tie rate for No. 20 may be taken to determine the rate of damages and that as regards the other two numbers (13 and 14) the No. 13 red tie rate may be taken. At that rate plaintiff would be entitled to damages at Rs. 12-8-0 per bale on 120 bales and at Rs. 17-8-0 per bale on 31 bales in all Rs. 2,042-8-0 on the 151 bales. I find accordingly.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings, reverse the decrees of the Courts below and give a decree to plaintiff for Rs. 2,042-8-0 with 6 per cent. interest thereon from the date of the plaint till payment.

Parties will pay and receive proportionate costs throughout.

Appeal allowed; *Suit decreed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 47 OF 1915.

August 8, 1916.

Present:—Mr. Justice Macleod.

THE INDIAN SPECIE BANK, LTD.—PLAINTIFF

versus

NAGINDAS HURJIVANDAS NANAVATI—DEFENDANT.

Negotiable Instruments Act (XXVI of 1881), s. 76—Bill of exchange—Acceptance—Set-off, right to, by acceptor on due date as against payee—Tender of balance after due date—Discharge of drawer after tender—Notice of dishonour—Drawer, nature of, liability of.

The acceptor of a bill of exchange is entitled to set off on the due date as against the bill any amount due to him by the payee. [p. 629, col. 1.]

On tender of any balance due by the acceptor after such set-off, the drawer is discharged from ability; but till such tender is made, his liability continues as the liability of a surety but only for the balance due after the set-off. [p. 629, col. 2.]

Even in the absence of a tender, the drawer is entitled to the benefit of a set-off existing in favour of the principal debtor as against the creditor, and the latter cannot enforce liability for the whole amount on a notice of dishonour for non-payment on the due date. In spite of dishonour the drawer remains a surety and will always remain a surety, and a surety will always be discharged as soon as the principal debtor acts in such a way as to discharge himself from the principal liability. [p. 629, col. 2.]

Defendant drew a bill of exchange on 31st July 1913 for Rs. 10,000 on *M* payable to the plaintiff Bank twelve months after date. *M* duly accepted the bill. The amount not having been paid on the due date, *i.e.*, 3rd August 1914, the Bank treated it as dishonoured and gave notice of dishonour to defendant on 4th August 1914. The Bank went into liquidation on 23rd November 1913. On 29th August 1914, *M* tendered a sum of Rs. 2,000 to the plaintiff Bank after setting off Rs. 8,000 due to him by the Bank. The plaintiff declined to accept the tender and sued defendant for the full amount, Rs. 10,000. *M* was joined as defendant on a third party notice, and he paid the balance into Court:

Held, (1) that *M* was entitled to the set-off and the defendant was entitled to the benefit of it; [p. 629, col. 1.]

(2) that defendant's liability was running from 3rd August 1914 to 29th August 1914, but was discharged after tender of the balance due by *M* on the latter date; [p. 629, col. 2.]

(3) that the plaintiff was not entitled to enforce the whole claim on the defendant as from the date of dishonour; [p. 629, col. 2.]

(4) that even without the tender, defendant's liability was only that of a surety and he was entitled to claim any equitable set-off in favour of *M*. [p. 629, col. 2.]

Mr. *Jardine*, Advocate-General (with him Mr. *Campbell*), for the Plaintiff.

Mr. *Setalvad* (with him Mr. *Strangman*), for the Third Party.

JUDGMENT.—This is a summary suit filed by the Indian Specie Bank (in liquidation) by its liquidator against Nagindas Hurjivandas Nanavati, who, on the 31st of July 1913, drew a bill of exchange for Rs. 10,000 on Maganlal Motilal payable to the Indian Specie Bank or order at their office in Bombay twelve months after date. On the 10th of August 1913, the bill was accepted by Maganlal Motilal. The bill fell due on the 3rd of August 1914, and, as it was payable at the Bank and the acceptor did not attend to satisfy his obligations on the bill, it became thereby dishonoured. On the 4th of August, notice of dishonour was given to the drawer. The defendant applied for leave to defend the suit and, in support of his application, filed an affidavit on the 23rd of February 1916. He

alleged that the amount due by the acceptor had been duly tendered to the plaintiff but it had not been accepted and he claimed to be entitled to bring in Maganlal Motilal as third party. On the 25th of February, an order was made giving the defendant leave to defend and also giving him leave to serve Maganlal Motilal with a third party notice. Notice was served and when directions were asked for, an order was made on the 1st of April that the third party, Maganlal Motilal, be at liberty to defend the suit on condition that there should not be two sets of costs in the event of the costs being made payable by the plaintiff.

It is not disputed that the acceptor did not pay what was due on his acceptance on the 3rd of August, but, on the 6th of August, his solicitors wrote to the plaintiff:—

"As you are aware the Specie Bank is indebted to our clients in the sum of Rs. 8,000 in respect of two amounts, *viz.*, Rs. 5,500 and Rs. 2,500 borrowed by the Bank on their fixed deposit receipts, dated 24th and 30th September 1913 respectively, and bearing interest at 5 per cent. per annum. The Bank is thus indebted to our client in the total sum of Rs. 8,072-8-11, being the amount of the principal and interest up to the 29th November 1913, the day on which the petition to wind up the Bank was presented. On your consenting to set off the said amount of Rs, 8,072-8-11 against the said sum of Rs. 10,000 our client is ready and willing to pay off the balance, which please note."

It is also admitted that, on the 29th of August, Messrs. Hiralal and Co., on behalf of Maganlal Motilal, tendered to the plaintiff Rs. 1,927-7-1, the balance due on the acceptance after giving credit for the amount due by the Bank on the deposit receipts.

Now it is admitted that the acceptance was not met on the 3rd of August. It is quite clear that, as between the liquidator of the Bank and the acceptor, the liquidator was not entitled to claim from the acceptor the full amount of the acceptances and leave the acceptor to prove his claim on the deposit receipts in liquidation and trust to see what dividend he would get. It would be a most extraordinary state of law if such an action could be permitted on the part of a liquidator. In my opinion a liquidator is bound to allow a set-off in such a case, and, therefore, if Maganlal had gone to the Bank on the 3rd of August and tendered the difference between the amount of the acceptance and what was due on the deposit receipt, the liquidator would have been bound to accept it. It is quite true that, on the 3rd of August, as Maganlal did not do that, the plaintiff had recourse to the drawer, but the liability of the acceptor remained, and if he had at any time afterwards fulfilled his liability, then it must necessarily follow that the liability of the drawer, which was only the liability of a surety, would be released. I will take it that the drawer's liability was running from 3rd August to 29th August, but on the latter date the principal debtor made a good tender of what was due to him on his acceptance and that tender extinguished the liability of the drawer. As a matter of fact it was not accepted by the liquidator and, in my opinion, the liquidator in refusing to accept that tender was wrong.

But assuming that the tender was not made and that the liability of the drawer as a surety still continued, he was still entitled to the benefit of any set-off which existed in favour of the principal debtor as against the creditor, and, therefore, when the difference was paid into Court with the written statement after the third party notice, he would still be entitled to claim relief on payment of that difference. However, not only was a good tender made by the principal debtor on the 29th of August but the full amount that could possibly be recovered from the acceptor is now in Court, and, therefore, it is quite clear that the liability of the drawer is gone

It is suggested that the plaintiff Bank was entitled to recover the full amount from the drawer whetever the acceptor might do, but it would be most inequitable if the Bank could brush aside any claim made by the acceptor and say to the drawer: "Now that the bill is dishonoured on the due date, I am not concerned with what the acceptor may do. I am not concerned with any tender he may make. I am determined to get the money out of you on your liability as a surety and leave you to your remedy against him." In spite of dishonour the drawer remains a surety and will always remain a surety and a surety will always be discharged as soon as the principal debtor acts in such a way as to discharge himself from the principal liability.

Therefore, in my opinion, the suit must be dismissed, the plaintiff being at liberty to

take the money out of Court if it is not taken already. Plaintiff to pay the third party's costs and the defendant's costs up to 1st of April including costs reserved.

Suit dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3410 OF 1914.

July 4, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

LOCHAN BHINMALI AND OTHERS—DEFENDANTS—APPELLANTS—

versus

ADHAR CHANDRA MAHANTA—PLAINTIFF—RESPONDENT.

Hindu Law—Sudra, *if can become* yati *or* sanyasi—Byragee mahant—*Inheritance—Usage and custom, finding of, if questionable in second appeal—Evidence, sufficient to establish usage or custom.*

A *Sudra* cannot become a *yati* or *sanyasi* according to the Smritis. [p. 630, col. 2.]

A person who once renounced the world and adopted a religious order like that of a *byragee mahant* would not, by reverting to worldly affairs in his new life, cease to be a *byragee mahant* and if a well-defined usage or custom governs the succession in the new order there is nothing in Hindu Law to prevent the said usage or custom binding him and his property after his death. [p. 631, col. 1.]

Teeluck Chunder v. *Shama Churn Prokash* I W. R. 209; *Juggunnath Paul* v. *Bidianund Dutt*, 10 W. R. 172; 1 B. L. R. A. C. 114; *Khoodeeram Chatterjee* v. *Raokhinee Boistobee*, 15 W. R. 197; and *Harish Chandra Roy* v. *Sheikh Atir Mahmud*, 18 Ind. Cas. 474; 40 C. 545; 17 C. W. N. 517, referred to.

The *chela* of a *byragee mahant* who has been nominated by him as his successor can inherit the properties left by him, if there is an usage or custom to that effect. [p. 631, col. 1.]

The finding of the first Appellate Court as to the existence of a custom or usage cannot be questioned in second appeal on the ground that the evidence to establish the said custom or usage is not sufficient. [p. 631, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 27th August 1914, reversing that of the Munsif, Narainganj, dated the 5th April 1914.

Babu *Rajendra Chandra Guha*, for the Appellants.

Babu *Gopal Chandra Das*, for the Respondent.

JUDGMENT.—The plaintiff, Adhar Das *Mahant*, says he is the *chela* and heir of Guru Das *Mahant* deceased and as such brings a suit on a mortgage-bond executed by the defendants in favour of the said Guru Das *Mahant*.

The main question fought out is whether the plaintiff is the heir of Guru Das. The first Court held he is not and the Court of First Appeal has held he is: the question before us is which is the correct view. Guru Das was a *Barui* by caste and admittedly a *Sudra*. He could not, therefore, become a *yati* or *sanyasi* according to the Smritis. He could not and did not become a *yati* or *sanyasi* but he became a *byragee*. The learned Judge finds: "From the evidence we find that Guru Das entered the order of the *byragees* and was cut off once for all from his family and society and till his death acquired properties and left them at his death. He initiated the plaintiff as his principal disciple called *chela* and nominated him as his successor", and further on, "the evidence adduced by the plaintiff about usage or custom establishes the fact that their *chelas* inherit the properties left by *byragees*."

These findings are in favour of the plaintiff. It is contended, however, that the question of custom could not arise unless it were shown that there was a complete renunciation of the world. In the case of *Teeluck Chunder* v. *Shama Churn Prokash* (1) the respondents who had become *byragees* were held not to have lost their right of succession as they had not given up all worldly cares and transactions. No question of special custom was raised in that case. In the case of *Juggunnath Paul* v. *Bidianund Dutt* (2) the plaintiff became a *byragee* and went out on pilgrimage leaving his properties with his nephew who was to take them if he did not return but to return them if he did. The learned Judges said: "it appears to us indisputable that a Hindu becoming a *byragee*, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, does an act which may be morally wrong, but in which he will not be restrained by the Courts." The suit was decreed and the property recovered from a purchaser from the nephew. Then in the case of *Khoodeeram*

(1) 1 W. R. 209.
(2) 10 W. R. 172; 1 B. L. R. A. C. 114.

Chatterjee v. *Rookhinee Boistobee* (3) it was held that a Hindu by becoming a *byragee* does not divest himself of all title in his family estate, which on his death devolves on his heirs and not on his *seba-dasi* or kept mistress who performed his *sradh*. In the case of *Harish Chandra Roy* v. *Sheikh Atir Mahmud* (4) it was held that a *Sudra* who becomes an ascetic is not excluded from inheritance unless some usage is proved to the contrary. In none of these cases was any custom or usage in this connection proved.

In the present case, however, the lower Appellate Court has found the existence of a custom or usage by which a *chela* succeeds to a *byragee mahant* of the type of Guru Das, and in second appeal we cannot say that the evidence is not sufficient.

It is not alleged or proved that Guru Das did not, when he entered the *byragee* order, give up his paternal properties or that he retained anything. If he once renounced the world and adopted a religious order like that of a *byragee mahant*, he would not by reverting to worldly affairs in his new life cease to be a *byragee mahant* and if a well-defined usage or custom governs the succession in the new order, there is nothing in Hindu Law to prevent the said usage or custom binding him and his property.

In this view of the case, I think that the plaintiff is entitled to succeed. The appeal is dismissed with costs.

Appeal dismissed.

(3) 15 W. R. 197.
(4) 18 Ind. Cas. 474; 40 C. 545; 17 C. W. N. 517.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1424 OF 1914.

June 19, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

DHARANIDHAR MUKHERJI—DEFENDANT No. 1—APPELLANT

versus

RAKHAL DAS BHATTACHARJEE AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Vendor and purchaser—Contract—Option to re-sell to vendor, if valid—Specific performance of option, suit for—Action, misconception of, by Court—Decree for redemption, effect of—Technical mistake.

An option by a purchaser to re-sell the property to the vendor on certain terms and conditions is a valid contract (subject to any possible question of perpetuity) which the purchaser is bound to fulfil. If the conditions are complied with strictly, specific performance should be decreed in an action to enforce the option. [p. 632, col 2.]

Where the Court, misconceiving the action as based on a mortgage, wrongly decrees redemption instead of specific performance, the decree is only technically wrong and should not be interfered with in appeal as the parties are in exactly the same position as in a decree for specific performance. [p. 632, col. 2.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 2nd of March 1914, reversing that of the Munsif, 1st Court, Bolepur, dated the 7th of October 1912.

FACTS of the case appear from the judgment.

Babu *Baranasibasi Mukerji*, for the Appellant.—The learned Judge in the Court of Appeal below has held that the suit was one for redemption and that the transaction of sale coupled with the simultaneous oral promise to re-convey on payment of the purchase-money amounted to a mortgage in law. I contend that the mortgage on the basis of which redemption has been decreed is unenforceable in law. The oral contract is invalid, the principal amount secured being more than Rs. 100. *Vide* section 59 of the Transfer of Property Act, 1882. Moreover, the oral contract being in contravention of the terms of the registered deed of sale cannot be proved. *Vide* sections 19 and 92 of the Indian Evidence Act, 1872, *Balkishen Das* v. *W. F. Legge* (1), *Achutaramaraju* v. *Subbaraju* (2), *Somana Basappa* v. *Gadigeya Kornaya* (3) and *Faiz-un-nissa* v. *Hanif-un-nissa* (4).

[FLETCHER, J.—But under proviso 2 of section 92, the existence of a separate oral agreement can be proved.]

The Judge in this case finds that the oral agreement was a part of the same transaction and that finding of fact is binding upon your Lordships. As a matter of

(1) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 27 I. A. 58.
(2) 25 M. 7; 11 M. L. J. 370.
(3) 35 B. 231; 13 Bom. L. R. 113.
(4) 27 A. 612; A. W. N. (1905) 129; 2 A. L. J. 360.

fact there is a clear distinction in law between a mortgage and a sale with the option of re-purchase and unless the Judge holds that the condition for re-purchase is a part of the same transaction he cannot find a mortgage.

[FLETCHER, J.—The suit as proved was one for the enforcement of the contract of re-purchase and the lower Appellate Court ought not to have gone into the question of mortgage. But substantially the effect will be the same and we are not prepared to interfere with the decree.]

If the lower Court had proceeded upon the footing of a specific performance of an oral agreement of re-sale defences would have been available to me which have not at all been considered by the learned Judge. The Court of first instance on a review of the whole evidence relating to this agreement had found that there was an understanding between the plaintiff and Brojendra that he would return the properties which "might not have been a hard and fast contract, but it was certainly in the nature of a moral obligation" and further "that the father's promise was not a hard and fast contract is sufficiently clear from all the circumstances." This aspect of the case has not at all been considered by the Judge in appeal, and there ought to be a remand for a fresh trial on the basis of specific performance of a contract. Various other questions might arise on such a trial, for instance, I might have contended that the covenant being of unlimited duration is invalid as offending the rule against perpetuities.

[FLETCHER, J.—But you have not taken that ground in your grounds of appeal, nor did your client take such a defence in the Courts below.]

How can I take a ground which does not arise on the judgment as it stands? I was meeting only a case of redemption on the footing of a mortgage. The omission to take the objection in the written statement is not fatal, as it is a pure question of law which can be raised at any appellate stage.

Babu *Sitaram Banerjee* (for Babu *Surendra Nath Ghosal*), for the Plaintiffs-Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal by the defendant No. 1 against the judgment of the Subordinate Judge of Birbhum, dated the 2nd March 1914, reversing the decision of the Munsif of Bolpur. The suit was brought for specific performance of an option to re-sell certain property, which had been sold to the father of the defendant No. 1. The option, apparently, so far as one can gather, was unlimited as to time and no question has been raised in either of the Courts below nor in the grounds of appeal to this Court as to the option being a perpetuity. We must take the case as presented in the Courts below and in the grounds of appeal to this Court. An option by a purchaser to re-sell the land to the vendor on certain terms and conditions is a perfectly valid contract and there can be specific performance of such contract, as has been directed in many actions brought to enforce such options. Nobody has ever doubted that an option to re-sell the land to the vendor is a perfectly good contract which, if the conditions are complied with strictly, the purchaser is bound to fulfil. In this case, there is a finding that there was an option; but the Judge then applied himself wrongly to the law because he said that, taking into consideration the fact that there was a promise of re-conveyance on payment of the consideration money, the transaction really amounted to a mortgage and he decreed redemption accordingly. Strictly speaking, that is not the correct form of the decree. There ought to have been a decree for specific performance on exactly the same terms as the Judge has decreed redemption. Of course, the point is a technical one and the proper order ought to be to direct specific performance of the contract. The decree for redemption passed in this case leaves the parties in exactly the same position as if there had been a decree for specific performance. That being so, it would be useless to interfere with the decree of the lower Appellate Court and convert it into one for specific performance.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

LABHU RAM *v.* AMIR CHAND.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 46 OF 1915.

March 27, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

LABHU RAM—DEFENDANT—APPELLANT

versus

AMIR CHAND, MINOR, THROUGH HIS GUARDIAN GHANIA SHAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XLVI, r. 1—Reference to Chief Court, when competent—Inherent power of Court, when to be invoked.

The original Court passed a decree excluding certain properties claimed by the plaintiff, but upon an application made by him under sections 151 and 152, Civil Procedure Code, the Court modified the decree by including those properties therein. The defendant appealed, but the Appellate Court being of opinion that no appeal lay against an order passed under these sections, made a reference to the Chief Court for orders as to what should be the procedure to be followed in the case:

Held, that the reference was not competent under Order XLVI, rule 1, as the rule empowers a Court to make a reference only when there is a suit or an appeal before it, in which the decree or order made by it would be final. In the present case, if the adjudication by the Subordinate Court amounted to a decree, a second appeal would lie; and if it was an order, then no appeal lay to the Additional Judge, so that the reference was incompetent in either case. [p. 633, col. 2.]

Where a specific remedy has been provided by the Civil Procedure Code the litigant should not for that purpose invoke the inherent power conferred upon the Court by section 151. The object of that section is to supplement, and not to replace, the remedies provided for in the rest of the Code. [p. 633, col. 2.]

Case referred by the Additional Judge, Lahore, with his No. 720, dated the 27th August 1915, for orders of the Chief Court of the Punjab.

Mr. *Sewa Ram Singh*, for the Appellant.

Messrs. *D. C. Ralli* and *Badr-ud-Din Kureshi*, for Lachman Das.

JUDGMENT.—On the 26th April 1915, the Subordinate Judge passed a decree excluding certain properties claimed by the plaintiff, but upon an application made by him under sections 151 and 152, Civil Procedure Code, the learned Judge modified the decree by including those properties therein. The defendant, Labhu Ram, appealed to the Additional Judge, who held that no appeal lay against the order passed under the aforesaid sections, but he referred the case to this Court for "orders as to what should be the procedure to be followed" by him.

The learned Additional Judge does not refer to the provisions of law under which he has made the reference. Order XLVI, rule 1, which contains the law on the subject, empowers a Court to make a reference only when there is a suit or an appeal before it, in which the decree or order made by it would be final. In the present case it is clear that if the adjudication by the Subordinate Judge amounts to a decree, a second appeal would lie to this Court. If, on the other hand, it amounts to an order then no appeal lay to the Additional Judge, and he was consequently incompetent to make the reference.

Upon the law set out above there can be no doubt that the reference in question is not warranted by the provisions of the Code. We have, however, been asked by the learned gentlemen engaged on both sides to hear the case as a Court of Revision, and settle the dispute between the parties finally. We have acceded to this request; and after hearing arguments at considerable length we are of opinion that, though the procedure adopted by the Subordinate Judge is erroneous, his decision is correct on the merits.

The Court of first instance, in order to determine whether the houses marked *be* (ب) and *jim* (ج) were covered by the previous litigation, had to re-consider the whole evidence and its findings on issues Nos. 2 and 8, and in fact had to examine the *mistri* to explain the relevant plans. It is, therefore, indisputable that this is not a case of clerical or arithmetical mistake within the purview of section 152, Civil Procedure Code; and it seems to us that, when the Code provides a specific remedy, namely, an application for rectifying mistakes on questions of law or facts, the Legislature did not contemplate that the litigant should invoke for that purpose the inherent power conferred upon the Court by section 151. The object of the aforesaid section is to supplement, and not to replace, the remedies provided for in the rest of the Code.

We accordingly hold that neither section 151 nor section 152 has any applicability to the case. It is, how-

ever, manifest that the Court had ample jurisdiction to correct its mistake by review of judgment; and in view of our decision on the merits we think we should not interfere merely because the Court acted under a wrong provision of law. The application made to it can be treated as one for review; and as to the omission to pay the requisite amount of Court-fee it is sufficient to point out that under section 15 of the Court Fees Act, the Court, upon granting the application for review, would have remitted the Court-fee, even if it had been already paid.

Upon the merits we concur with the Subordinate Judge in holding that neither the principle of *res judicata*, nor the rule against the splitting up of a cause of action, bars the claim to houses *be* (ب) and *jim* (ج). The previous suit was based upon a sale-deed relating to *kothas* Nos. 1 and 2; and the plaintiff was not bound to, and did not, as a matter of fact, include in that suit his cause of action with respect to the said houses.

The petitioner is a mere mortgagee and has not proved that he effected any improvements. It appears that his mortgagors expended some money upon the houses, but they had no title thereto, and the petitioner cannot equitably claim compensation for improvements made by them. It is true that he loses a portion of the security for his debt, but there is no cogent reason why the minor plaintiff should suffer for his mistake.

We accordingly decline to interfere with the order modifying the decree, but in the circumstances leave the parties to bear their own costs in this Court. It is hoped that the Court executing the decree shall, as far as possible, avoid the demolition of any building, and adjust the rights of the parties by awarding, if necessary, compensation.

Interference declined.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 52 OF 1914.

June 15, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

GADADHAR BHATTA—DEFENDANT—APPELLANT

versus

SARAT CHANDRA MUKHERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

U. P. Court of Wards Act (U. P. III of 1899), ss. 15, 35, 42, sub-s. (1)—Properties of ward outside territorial limits of the United Provinces Government—Jurisdiction of Court of Wards over—Superintendence after ward's death—Sale—Existence of debts—Consent of heirs—Presumption.

The Court of Wards of the United Provinces of Agra and Oudh has jurisdiction to deal with the property of a disqualified proprietor under its charge situated outside the limits of the territories subject to the Lieutenant-Governor of those Provinces. [p. 636, col. 1.]

As section 15 of the U. P. Court of Wards Act makes no distinction at all between moveable and immoveable properties, properties both within the limits of the Provinces of Agra and Oudh as well as outside thereof are subject to the administration set up by the Act in the event of a person coming under the terms of the Act. [p. 636, col. 2.]

Section 35 of the Act gives a general power to the Court of Wards to sell or mortgage any part of any property under its superintendence subject to the restrictions in regard to property taken charge of by the "Court" under section 9 of the Act. [p. 636, col. 2; p. 637, col. 1.]

After the death of a ward, who was a disqualified proprietor, the Court of Wards may retain charge of his property until the debts and liabilities of the ward have been discharged. [p. 637, col. 1.]

Where the Court of Wards, after the death of the ward, who was a disqualified proprietor, sold his property and there was no evidence to show that there were unliquidated debts and liabilities of the ward and that his widows (who were the heiresses) gave consent to the sale:

Held, that under the ordinary presumption, arising in favour of the acts of the Executive Government, it must be held that there were unliquidated debts and liabilities and that the widows were consenting parties to the sale. [p. 637, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 22nd November 1913.

FACTS of the case appear from the judgment.

Babu *Dwarka Nath Chakravarty* (with him Babus *Bepin Behari Ghose* and *II*

Tarakeshwar Roy), for the Appellant.—The Court of Wards of the United Provinces of Agra and Oudh has, it is submitted, no jurisdiction to deal with the property of a disqualified proprietor situated outside the limits of the territory subject to the Lieutenant-Governor of the United Provinces of Agra and Oudh, because the Court of Wards Act is an Act passed by the Legislative Council of the Lieutenant-Governor of the United Provinces and it extends to that Province and that Province alone.

The Court of Wards established by the Governor of Bengal is the Court which has jurisdiction to deal with properties in suit, as they are situated within its local limits. I rely by analogy on the principle which holds good in private international jurisprudence, that rights and obligations relating to immoveable property are governed by the law of the place where the property is situate. The words "the whole of the moveable and immoveable properties of a ward" in section 15 of the U. P. Court of Wards Act, mean "the whole of such property as is situate within the territory to which the Act applies." There is no section in the Act which relates to property outside the territory.

Secondly, it is submitted that the Court below was wrong in holding that the Court of Wards was competent to retain the property of the disqualified proprietor after his death. There is nothing on the record to show that there were unliquidated debts and liabilities of the disqualified owner.

Refers to section 42, sub-section 1, and section 35, U. P. Court of Wards Act. Then there is no evidence that the widows of the disqualified owner were consenting parties to the sale to the plaintiffs. The plaintiffs cannot succeed unless they prove that they acquired a valid title. The sale cannot confer on them a valid title unless it is proved that the sale was with the consent of the widows.

The defendant was in quiet enjoyment of the property, he was disturbed in his possession and, therefore, the plaintiffs could not demand full rents from the defendant.

Babus *Mohendra Nath Roy* and *Mohini Mohan Chatterji*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against the decision of the learned Subordinate Judge of the second Court of Chinsura, dated the 22nd November 1913. The suit was one for the recovery of certain rent due under a *durpatni*. The original plaintiffs were two Hindu ladies named Srimati Dulari Debi and Srimati Peari Debi, widows and heiresses of one Beni Madhab Das, who was a disqualified proprietor and whose estate had been taken charge of by the Court of Wards of the United Provinces of Agra and Oudh and represented by the Collector of Mirzapur.

During the pendency of the suit, the Collector acting under the Court of Wards sold the property, of which rent is claimed, to the present plaintiffs and the present plaintiffs were substituted in place of the two widows. The case as opened by the learned Vakil for the appellant showed a long and complicated title; but it is not necessary to go through all or the whole chain of title that was set out in the opening. It is sufficient to say that, on the 8th January 1881, a *patni* was granted of the property by Maharaja Sir Jatindra Mohan Tagore in favour of one Bibi Jarao Kumari. On the 27th March 1892, Bibi Jarao Kumari granted a *durpatni* in favour of one Madan Mohan Bhatta. The present defendant admittedly represents Madan Mohan. The only question in this case is "do the plaintiffs represent Bibi Jarao Kumari in the *patni* which was granted by Maharaja Sir Jatindra Mohan Tagore on the 8th January 1881." Beni Madhab Das purchased the interest of this lady Bibi Jarao Kumari at a sale in execution of a money-decree on the 17th April 1905. Subsequently Maharaja Sir Jatindra Mohan Tagore, acting under the *Patni* Regulation, brought the property to sale and purchased it himself. After a long and complicated litigation, that sale was set aside. So the title remained in Beni Madhab Das, subject to certain mortgages which were held by the plaintiffs. On the 14th of July 1909, Beni Madhab Das made over charge of his estate to the Court of Wards of the United Provinces of Agra and Oudh. The application and the assumption of charge by the Court of Wards were made

under the provisions of section 9 of the Act. Beni Madhab died on the 31st October 1911 and the property was acquired by the present plaintiffs on the 17th May 1912. The present suit was instituted on the 15th April 1912 in the name of the two widows of Beni Madhab acting through the Collector of Mirzapur and the substitution of the present plaintiffs was made on the 12th July 1912.

The *first* question that has been urged in this appeal is that the Court of Wards of the United Provinces of Agra and Oudh has no jurisdiction to deal with the property of a disqualified proprietor situated outside the limits of the territories subject to the Lieutenant-Governor of the United Provinces of Agra and Oudh. The argument, though bold, I am satisfied, on the wording of the Statute, has no foundation. The section relating to the matter is section 15. That section enacts that "the whole of the moveable and immoveable property of a ward should be deemed to be under the superintendence of the Court of Wards." Now, what are the words in the Statute that cut down the clear words, "the whole of the moveable and immoveable property." First of all, it is said that it is an Act passed by the Legislative Council of the Lieutenant-Governor of the United Provinces of Agra and Oudh and that, therefore, the words "the whole of the moveable and immoveable property" in the section must be deemed to mean the whole of the moveable and immoveable property within the territorial jurisdiction of the Lieutenant-Governor of the United Provinces of Agra and Oudh. That manifestly is not the meaning. The Lieutenant-Governor of Agra and Oudh has got no authority to legislate for persons residing outside the limits of the Provinces of Agra and Oudh and to regulate the superintendence of their properties. It is quite true that the Statute does not deal with cases in which a person has got property outside the limits of the Provinces of Agra and Oudh; but if the disqualified proprietor has got property within the limits of the Provinces of Agra and Oudh so that the Court of Wards of those Provinces may take charge of his property, then there is nothing in the words of the Statute to cut down the perfectly general words of section 15, in which it is enacted that the whole of the moveable and immoveable property of the disqualified proprietor should become subject to the superintendence of the Court of Wards. Take, for instance, the case of a disqualified proprietor residing in Agra with a heavy deposit in the Bank of Bengal in Calcutta. It is suggested that because the Bank of Bengal in Calcutta is outside the limits of the territory subject to the Lieutenant-Governor of Agra, the Court of Wards at Lucknow or Allahabad has no jurisdiction to deal with the money lying to the credit of the disqualified proprietor in Calcutta. Such a proposition is manifestly unsound. As section 15 makes no distinction at all between moveable and immoveable property, it is quite clear that properties both within the limits of the Provinces of Agra and Oudh as well as outside thereof are subject to the administration set up by the Act in the event of a person coming under the terms of the Act. It is said that there would be a conflict between the Court of Wards of the Presidency of Bengal and the Court of Wards established in the United Provinces. It seems to me that there cannot be any conflict at all. If the Court of Wards of Bengal had taken charge of the property, of course, the acts of the Court of Wards of the United Provinces would have been subject to any local legislation that might be passed, or established by the Government of Bengal. It seems to me quite clear on the section that the words used therein must bear their ordinary signification and that the expression "the whole of the moveable and immoveable property of the ward" means what it says and is not limited to the moveable and immoveable property situated within the limits of the territories subject to the Lieutenant-Governor of the United Provinces of Agra and Oudh.

Then it was argued that, even if that were so, the Court of Wards had no jurisdiction to sell the property at all. Section 35 of the Court of Wards Act of the United Provinces gives a general power to the Court of Wards to sell or mortgage any part of any property under its superintendence. The power conferred by the Act is subject to a proviso, namely, that

where the property has been taken charge of by the Court of Wards under section 9 of the Act, the sale should not be made without the consent of the proprietor. But subject to that, the Court of Wards has jurisdiction to sell any part of a property subject to its superintendence. The question in this case is whether, on the death of Beni Madhab Das on the 31st October 1911 when the property passed to his two widows, the original plaintiffs, this property remained subject to the superintendence of the Court of Wards. The section applicable to this matter is section 42, sub section (1), which runs in these terms: "When a ward dies or when a ward disqualified under clause (*a*) or clause (*c*) of section 8 ceases to be disqualified before the liquidation is completed of the debts and liabilities with which the property is charged, the Court of Wards may either release such property or may retain it under its superintendence until such debts and liabilities have been discharged." The Court of Wards did retain the superintendence of this property. The ordinary presumption must be made in favour of the acts of the Executive Government, namely, that they retained the superintendence because there were debts and liabilities and that these debts and liabilities had not been discharged; and; as a matter of fact, nobody has suggested that the debts and liabilities were discharged. A point was raised that, under the proviso to section 35, the Court of Wards could only sell if the sale was made with the consent of the two widows. Assuming that that view is correct, it appears from the record quite clear that nobody in the Court below raised the question that the two widows were not consenting parties to the sale to the plaintiffs. The substitution of the plaintiffs was made in the place of the two widows after the institution of the suit and it is obvious that the two widows must have consented to the sale. Their consent is recited in the deed of conveyance and as nobody ever raised the question, no express evidence was given as to the widows having consented to the sale. There are two answers to the point that has been raised. The *first* is that, if the defendant meant to raise this question, he ought to have raised it in the Court below. The *second* is that this is an act of the Executive Government and the Court may presume that that act was regularly done and that before the officers exercised the jurisdiction under section 35 they did, in fact, obtain the consent of the widows. There is no force in either of the points raised with reference to the power of the Court of Wards and the consent of the widows.

The *third* point that has been raised in this case is equally bad. It is said that in this case the defendant during two of the years of his possession was disturbed in possession. The disturbance in the first instance is said to have been made by Maharaja Sir Jatindra Mohan Tagore during the time after he had purchased the *putni* and before the sale was set aside by the Court. The sale to the Maharaja was a good sale until it was set aside and the learned Judge of the Court below has found, and that finding has not been challenged by anybody, that the Maharaja restored the moneys he collected after the sale was set aside. The other disturbance by permanent title is the disturbance by the Collector of Mirzapur during such time as he was acting as a Receiver appointed by this Court. The possession of a Receiver is the possession of the Court and when the property was in the custody of the Court, obviously a party cannot complain. The Receiver held the amounts he collected from the tenants subject to the orders of the Court and presumably awarded them to the persons who appeared to the Court to be ultimately entitled to them. In my opinion, the learned Subordinate Judge in this case arrived at a correct conclusion when he decreed the suit in favour of the plaintiffs. Nothing has been shown in the present appeal to make one doubt that the conclusion arrived at by the learned Judge of the Court below is not correct and is not in accordance with the evidence given at the trial. In my opinion, the present appeal fails and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 522 OF 1915.

June 14, 1916.

Present:—Mr. Justice Rafique.

Qazi ABDUR RAZZAQ—PLAINTIFF—APPELLANT

versus

Seth PARTAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Disposal on ground not urged, if proper.

A Judge of the lower Appellate Court is not justified in disposing of an appeal on a ground which was not urged for the defence and in respect of which the plaintiff had no opportunity to give evidence.

Second appeal from the decision of the Additional Judge, Moradabad, dated the 14th January 1915.

Dr. *S. M. Suleman*, for the Appellant.

Mr. *Haribans Sahay*, for the Respondents.

JUDGMENT.—The facts of this appeal are as follows:—One Imdad Husain mortgaged with possession 7 *bighas* and 6 *biswas* by a registered-deed on the 5th June 1869 to Johri Mal and Basiram. Imdad Husain died, leaving him surviving a son Nur Muhammad and a daughter *Musammat* Rahmat-un-nissa. Nur Muhammad died in 1885 without issue, leaving him surviving a widow *Musammat* Shamsi. *Musammat* Rahmat-un-nissa died subsequently, leaving her surviving two sons, *viz.*, Abdur Razzaq and Abdul Haq. *Musammat* Shamsi is also dead. Her two brothers who were her heirs sold her share in the mortgaged property to Partap Singh, son of Johri Mal. On the 25th September 1913 Abdur Razzaq, one of the sons of *Musammat* Rahmat-un-nissa, instituted the suit out of which this appeal has arisen, for the redemption of the mortgage of the 5th of June 1869 on the payment of Rs. 40, or any other sum that the Court may find due. The claim was brought against Partab Singh and the legal representatives of Basiram, the other mortgagee. The chief contesting defendant in the case was Partab Singh. He resisted the suit on the ground, among others, that he had purchased the rights of Nur Muhammad, and all that Abdur Razzaq was entitled to was redemption of 1/3rd of the property. The Court of first instance found that the purchase by Partab Singh from the two brothers of *Musammat* Shamsi could only convey legally to him the interest of *Musammat* Shamsi, which would be one *siham* out of six *sihams*. The claim for the redemption of 5 *sihams* out of six *sihams* was accordingly decreed. On appeal the District Judge modified the decree of the first Court by holding that the share of Imdad Husain at the time of the mortgage of 5th June 1869 was not 7 *bighas* and 6 *biswas* but ten-nineteenths in the *khata*, according to which calculation the area of the land would be considerably less. Abdur Razzaq has come up in second appeal to this Court and contends that there was no dispute between him and the defendants as to the area of the mortgaged property on the share of Imdad Husain. No objection with regard to the share of Imdad Husain or the area of the land mentioned in the mortgage-deed of 1869 was taken in the written statement and no issue was framed upon it, nor any objection seems to have been taken in the grounds of appeal to the lower Appellate Court. I think that the contention of the appellant is correct. The dispute between the parties seems to have been, whether the purchase by Partab Singh from the brothers of *Musammat* Shamsi conveyed to him the whole of the share of Nur Muhammad or only the share of *Musammat* Shamsi. In my opinion, the finding of the first Court was correct on the point. The learned Judge of the lower Appellate Court was not justified in disposing of the appeal on a ground which was not urged for the defence and in respect of which Abdur Razzaq had no opportunity to give evidence. I allow the appeal and set aside the decree of the lower Appellate Court and restore that of the first Court. Costs are allowed to the appellant.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1018 OF 1915.

June 26, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

HEM CHANDRA BISWAS—DEFENDANT No. 1—APPELLANT

versus

PURNA CHANDRA MOOKERJEE AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Interest, not

HEM CHANDRA BISWAS *v.* PURAN CHANDRA MOOKERJEE.

expressly paid as such, if could be taken as payment of principal — Payment in handwriting of debtor —Presumption.

A payment on a mortgage-bond, which cannot be taken as payment of interest under section 20 of the Limitation Act by reason of not being proved to have been expressly made as such, will be considered as payment towards the principal under the section (so as to give a fresh start to limitation), if the fact of the payment appears from a document in the handwriting of the debtor making the same.

Appeal against the decree of the District Judge, Burdwan, dated the 30th January 1915, modifying that of the Munsif at that place, dated the 10th February 1914.

Babu *Monmatha Nath Roy*, for the Appellant.

Babu *Sarat Kumar Mitter*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the first defendant from the judgment of the learned District Judge of Burdwan, dated the 30th January 1915. The suit was brought to enforce a mortgage security and the only question that has been raised in this appeal is one of limitation. The mortgage was dated the 3rd July 1895 and the present suit was instituted on the 20th June 1913. Both the lower Courts have found that three payments were made, namely, Rs. 10 on the 18th August 1900, Rs. 80 on the 25th October 1900 and Rs. 10 on the 3rd February 1903. It is common ground that the plaintiff must succeed, if at all, on proving the payment of 3rd February 1903, which would save the suit from being barred by limitation. The view that has been taken by the learned District Judge is this: First of all, he says: "Was this payment of the 3rd February 1903 a payment on account of interest as such within the meaning of section 20 of the Indian Limitation Act?" The learned Judge apparently came to the conclusion that, the payment not having been expressly made as such, the evidence did not establish that it was made on account of interest as such. He then said that the case did not end there, because admittedly there was a payment and there was also a document (from which the fact of the payment appeared) in the handwriting of the person making the same. The learned Judge said "If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal." That view, I think, is right. In none of the cases, where a different view has been taken, was there a document in writing to satisfy the second part of section 20 of the Limitation Act. In this case, there is a distinct finding by both the Courts below as regards the payment. If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment *plus* the document in writing proving the fact of payment. On that evidence, the learned Judge was entitled to come to the conclusion that the payment was a part-payment on account of principal. As a matter of fact, although not expressed in happy language, the learned Judge has found that this payment was on account of principal, because he uses these words:—"The payment of Rs. 10 made on the 20th *Magh* 1309 B. S. being in the handwriting of the debtor will be considered as payment towards the principal." When the first Court of Appeal in fact says that the payment will be considered that way, it must be considered that way and considered so for all purposes. It seems to me that the learned Judge, on the materials before him, was entitled to come to the conclusion as he did that this payment was a payment towards the principal coming within the meaning of section 20 of the Indian Limitation Act. The present appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

RAMACHENDRA MARDA *v.* MULI PEDHANO.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 663, 664, 666 AND 667 OF 1915.

August 8, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

Sri Sri Sri RAMACHENDRA MARDA RAJA DEO GARU, MINOR, BY HIS AGENT AND NEXT FRIEND THE MANAGER OF KALLIKOTA AND ATTAGADA ESTATES —PLAINTIFF—APPELLANT IN ALL

versus

IN S. A. No. 663 OF 1915

MULI PODHANO—DEFENDANT—RESPONDENT.

IN S. A. No. 664 OF 1915

GOVINDA PODHANO—DEFENDANT—RESPONDENT.

IN S. A. No. 666 OF 1915

KALU PODHANO AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. No. 667 OF 1915

HARI SAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I Mad. of 1908*), ss.* 73, 74, 75*—Order under s.* 75 (7)*, nature of—Subsequent suit for rent for period covered by order, if barred.*

An order passed under section 75 (7) of the Madras Estates Land Act by an officer having jurisdiction is binding on the parties and settles the rent payable for the *fasli*. It has the effect of a 'decree' for arrears of rent for the period covered by the order. [p. 642, col. 2.]

Such an order bars a subsequent suit for rent for the same *fasli* under section 77, even if the order is incorrect or is vitiated by a defect in procedure. The only remedy of the aggrieved party is to file objections to the division made by the Government Officer within a week or to apply in revision under section 205 of the Act to the Collector or the Revenue Board. [p. 642, col. 1.]

Talagapu Tavudu v. *Zamindar of Tarla*, 32 Ind. Cas. 706, distinguished.

Second appeals against the decrees of the District Court, Ganjam, in Appeal Suits Nos. 422, 423, 425 and 426 of 1913, preferred against those of the Head-Quarters Deputy Collector, Ganjam, in Summary Suits Nos. 52, 53, 55 and 56 of 1913.

Dr. *S. Swaminathan*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.

SPENCER, J.—These suits were brought by the *Zemindar* of Kallikota and Attagada against certain *ryots* of his estate for the recovery of arrears of rent under section 77 of the Madras Estates Land Act. From the printed papers, the admissibility of which is not disputed, it appears that what happened was this.

On the 22nd January 1912, certain *ryots* applied under section 74 of the Act to the Deputy Collector to depute a Government Officer to make a division of the crops on their holdings, alleging that the estate officials had over-estimated the crop for the current *fasli*, that the *ryots* not agreeing to the estate's estimate sent a notice to the *taluk* officer to have the crop estimated by mediators within two days of the receipt of their letter, stating that, if he would not do so, the crop would be cut and heaped in the threshing-floor, and that, as no one had come within six days, they had got the crop estimated by respectable persons and had cut and heaped it on the threshing-floor. Thereupon, the Deputy Collector sent a notice to the Manager of the estate to attend on a date fixed before the Deputy Tahsildar, informing him that the Deputy Tahsildar had been deputed for the purpose of division of produce under the Act. In his proceedings, dated 31st January 1912, the Deputy Collector directed the Deputy Tahsildar to make a division of the produce according to section 75 of the Act. He ordered him further to take up the work as soon as possible, pronounce his award and submit the records to the Deputy Collector's Office with a report; adding that if the parties agreed to his award the division of the produce might be made accordingly. Seventeen days after this, the Manager of the estate filed an objection petition in the Court of the Deputy Collector in which he stated that the Estate Revenue Inspector had got the crops estimated in December by the Village Officers and that the *ryots* did not object to this estimate, but that they had reaped a portion of the crop before and after the estimate was made and had carried away nearly half of it; and he, therefore, asked the Court to order payment at the rate of 11 *nouties* per *bharanam* on the total produce of paddy and 12 *nouties* on the extent grown with sugarcane, or to order payment at the rate paid by other *ryots* holding similar lands in the neighbourhood or, in the alternative, to have the crop appraised by a Government Officer under section 75 of the Act. A notice was sent in April to the Manager requiring

him to show cause why his application for appraisement of crops should not be rejected for want of standing crops on the lands for appraisement. But it does not appear whether he did show cause against this order and whether any final orders were passed on the subject. The Deputy Tahsildar, in his award dated the 28th May 1912, states that he confined himself to the division of the produce stored in the threshing-floor, noting simply the objection of the estate manager about the removal of a portion of the produce. An assessor was appointed by the *ryots* and the Deputy Tahsildar appointed another assessor for the estate, as the estate officials refused to nominate one. The Deputy Tahsildar then divided the paddy between the petitioners and the estate according to the usual *waram* rate, and appended to his award a statement showing the total produce of the holdings of each petitioner, the *melvaram* paid to the estate and the *kudivaram* paid to the *ryot*. The estate Revenue Inspector gave a receipt for the portion that fell to the estate's share acknowledging it as part-payment of what was due from the *ryots*. The Deputy Collector, on receiving the Deputy Tahsildar's award, waited for more than a month to see if any objections were filed and as none were received, he confirmed the award.

Section 73 of the Act declares that the *ryot* is entitled to exclusive possession of the whole produce until it is divided, but may not remove any portion of the produce from the threshing-floor at such a time or in such a manner as to prevent the due division thereof at the proper time, and clause (4) declares that, if he does so, the produce may be deemed to have been as full as the fullest crop of the same description in the neighbourhood on similar land for that harvest. Section 74 provides for applications being presented either by the landholder or by the *ryot* to the Collector for deputing an officer to make the division or appraisement or determination of the crop. The next section declares what the duties of the officer, who is so deputed, are. If an objection is made that the rent is not taken by division, or appraisement, or that no rent is payable, section 75 (2) requires the officer deputed merely to record the objection, and after appointing assessors and recording their opinions the officer is to make an award. If the parties agree to the award and if the case is one of division of produce, the division is to be made accordingly. If they do not agree to the division, and in all cases where the rent is payable by appraisement of the standing crop or where the value of a full crop has to be determined, the officer deputed is to make an estimate of the produce and determine the rent payable. He then delivers his award and submits a report to the Collector. A week's time is given for parties to file objections. If an objection is filed that the rent is not payable by division or appraisement or that no rent is payable, (which reading section 74 together with clauses (2) and (7) of section 75, I take to be equivalent to a preliminary objection against the application of this summary procedure for ascertaining the rent) and if the Collector upholds the objection, he must set aside the award. If any other objection is filed, or if no objection is filed, the Collector may confirm the award or may, after hearing the parties, modify it and he must then pass an order for the payment of the rent. Such an order is declared to be final and to have the effect of a decree for arrears of rent.

In the present case it does not appear that any objection was filed that the rent was not payable by division, etc., nor was any other objection filed after the receipt of the Deputy Tahsildar's report. But the estate authorities had, at an earlier stage, raised an objection of another sort regarding the removal of the crop, and although this objection was filed before the case was sent to the Deputy Tahsildar for determination, the Deputy Collector might have considered whether it was a good objection and might have passed such orders as were proper in the circumstances of the case. It is now contended that, as there was no appraisement of the standing crop, no finding as to whether any portion of the crop had been removed, and no determination of what would be a full crop, the Deputy Collector's award is no award in law but a nullity. The lower Courts held that the landholder had lost his remedy and must suffer for his own negligence. Even assuming that the Deputy Collector did not do all that he might have done, the question is whether the landholder

is to be allowed to go on with these suits as if there had been no proceedings between the parties for ascertaining the rent of the *fasli* in question. There is no doubt that he might have obtained the remedy he wants if he had taken the necessary steps by filing an objection to the Deputy Tahsildar's award within one week, but he did not do so. Again, if he considered that the Deputy Collector or the Deputy Tahsildar had failed to exercise the jurisdiction vested in them by law or had contravened an express provision of law affecting their decisions on the merits, he might have applied under section 205 of the Act to the District Collector or the Board of Revenue to have the defect remedied. I am of opinion that, where there is an award which is final and when the law provides a means of questioning the legality of that award and the landholder has not chosen to avail himself of it, he cannot be allowed to ignore the award and sue for rent as if the question of the tenant's liability was *res integra*. It is true that the quantity of produce received by the estate Revenue Inspector is deducted in the schedule attached to the plaint from the total amount of rent demanded; but whether any of the produce had been removed by the *ryot* in such a manner as to prevent its appraisement or division, and if so, what was a fair estimate of the fullest crop of the same description in the neighbourhood were essentially questions for the Collector to determine, as provided under sections 73 and 75 of the Act. The land-holder should have taken all the necessary steps to have these questions determined in the manner provided by the Act, and if the officers appointed for the purpose declined jurisdiction he should have adopted the procedure prescribed in the Act for having the award revised. Not having done so, he cannot be allowed to choose his own tribunal and raise the same question again after waiting till all traces of the crop have been removed. The only decision on this part of the Act which has been cited to us is that of *Talagapu Tavudu* v. *Zamindar of Tarla* (1). The learned Judges who decided that case held that a finding of the Collector in the negative on the question whether the rent was payable by division or appraisement, would not operate as *res judicata* so as to bar a subsequent suit for the determination of that question. If the Collector upholds an objection that the rent is not payable by division or appraisement, section 75 (7) requires that he shall set aside the award. In that case there will remain a mere finding between the parties without any final order having the effect of a decree, as in the present case.

For these reasons I consider that the lower Courts were right in holding that these suits are not maintainable and in dismissing them.

Another ground of appeal is that the suits were at least maintainable for the recovery of land-cess amounting to half an anna in the rupee. But this ground was not taken in the memorandum of appeal to the District Court and cannot be advanced for the first time in second appeal. It is also urged that the award was bad because it did not provide for a division of the sugarcane crops, but it appears from the plaint that no claim at all was made under this head.

The result is that the appeals fail and are dismissed, Second Appeals Nos. 664 and 666 with costs and Second Appeals Nos. 663 and 667 without costs.

KRISHNAN, J.—The question for decision in these cases is, whether a landholder can maintain a suit against his tenant for a part of the arrears of rent alleged to be due for a particular *fasli* under section 77 of the Estates Land Act when an order has been previously passed by the Deputy Collector under section 75, clause 7, regarding the rent for that very *fasli*. The lower Courts have dismissed the suits as not maintainable and I think they are right.

An order passed under section 75, clause 7, by an officer who has jurisdiction to do so is binding between the parties and settles what rent is payable for the *fasli*, and by the terms of the clause has "the effect of a decree for arrears of rent." The landholder's claim for rent becomes merged in the decree. He must, therefore, execute the decree to recover his rent; he has no longer a cause of action for that rent or any portion of it to enable him to base a suit on. If the order disallowed a portion of his claim, it is equally binding on him. The landlord, therefore, cannot maintain a suit ignoring the previous order

(1) 32 Ind. Cas. 706.

altogether, as he is attempting to do in these cases.

The ruling reported as *Talagapu Tavudu* v. *Zamindar of Tarla* (1) was cited for the appellant, but that case has no direct bearing on the question here. There a finding arrived at by the Collector on a certain issue in proceedings under section 75 was sought to be used as having the force of *res judicata* on that issue between the parties in a subsequent suit. Their Lordships disallowed it and I entirely agree with their view. The question here, as explained above, is entirely different, and has reference to the effect of the final order under section 75.

It was not seriously denied by the appellant's Counsel that an order under section 75 would bar a subsequent suit for the whole or part of the same rent. He, however, argued that the procedure adopted by the officer deputed under clause (1) of section 75 and by the Deputy Collector was so erroneous that the final order should be treated as a nullity. I think this argument is entirely groundless. We are not now considering the correctness of the Deputy Collector's order in appeal or in revision: indeed we have no power to revise his order under the Act, the authorities that have the power to do so under section 205 being the District Collector and the Revenue Board. The order is pleaded in bar of the suit; the Court before which such plea is raised has no power to examine the validity of the order on its merits. That principle is the very foundation of the doctrine of *res judicata*. No authority is shown for the proposition that an order having the effect of a decree and passed with jurisdiction can be treated as a nullity if there is an error in procedure.

The appellant's argument fails on the facts as well: an examination of the procedure adopted under section 75 does not in my view show that the Deputy Collector or the Deputy Tahsildar committed any error. On receiving an application from the tenants under section 74, the Deputy Collector deputed an officer under section 75, clause (1), to make the division asked for. The landlord, it is true, made an objection subsequently that the *ryots* had cut and removed half the crops clandestinely. The officer deputed rightly recorded that objection under clause (2); he is not shown to have been bound to decide it. He proceeded to divide according to the usual *waram* rate the crop that he found on the threshing-floor and it is not suggested that that division was incorrect. He then delivered his award, and the landlord received his share under it. It is argued that this was a case where the parties did not agree to the division and, therefore, under clause (6), the officer should have estimated the crop in the manner described in section 73 (4). Such an estimation would have become necessary only if the landlord's allegation about the removal of the crops had been established. The landlord's opportunity to prove his allegation was before the Deputy Collector under clause (7) before the award was confirmed, as he had already filed an objection on the point. But though the Deputy Collector waited for nearly two months and though the landlord had notice to show cause why his objection should not be rejected, he apparently took no steps. In these circumstances the Deputy Collector was right in confirming the award as he did under clause (7) of section 75. The appellant's argument, therefore, fails in my view both on law and on facts.

The other grounds of appeal referring to land-cess and sugarcane crops also fail for the reasons stated by my learned brother.

I, therefore, agree in dismissing these appeals as proposed.

Appeals dismissed.

V. R. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 474 OF 1914.

June 30, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

MADHU SUDAN PAL—PLAINTIFF—APPELLANT

versus

PARBATI SUNDARI DASYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 34 (3) — Purchase of insolvent's property from bona fide purchaser thereof—Validity of second purchase with notice of insolvency.

MADHU SUDAN PAL *v.* PARBTI SUNDARI DASYA.

A purchase of an insolvent's property, even with notice of his insolvency, from a person who by purchase of the same in good faith under a sale in execution acquired a good title to it under section 34 (3) of the Provincial Insolvency Act against the Receiver, cannot be set aside. [p. 645, cols. 1 & 2.]

Appeal against the orders of the District Judge, Dacca, dated the 4th May, 10th June and 4th July 1914.

FACTS of the case appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Bepin Chandra Bose*), for the Appellant.—Under section 46, clause 3, of the Provincial Insolvency Act, orders can be appealed against with leave of the High Court, so there can be no ground for saying that the order is not appealable. *Madhu Sudan Pal* v. *Parbati Sundari Dassya* (1). On 21st January 1910 the insolvent executed a mortgage-bond in favour of the appellant Madhu Sudan Pal I. On November 21st, 1910, the husband of Parbati Sundari, a creditor of the insolvent, attached before judgment the mortgaged properties. A *kobala* was executed on 19th September 1912 by the insolvent in favour of Madhu Sudan I. On 23rd December 1912, Madhu Sudan Pal I preferred a claim in the execution case which was begun by the decree-holder on the strength of the *kobala*. On the 15th February 1913, the claim was rejected leaving the question of mortgage open. On 17th February 1913, the properties were sold in execution of that decree and Kali Pal and Amar Pal purchased them. Madhu Pal I obtained a conveyance on 28th February 1913 from Kali Pal, and possession was delivered on 12th July 1913. Order for adjudication was made on 7th February 1913.

The Receiver wanted to re-sell the properties when they vested in him. Here the purchase has been for valuable consideration without notice and the purchaser from such a purchaser even with notice acquires the rights of his vendor. Madhu Sudan here has stepped into the shoes of his vendor Kali Pal: *Le Neve* v. *Le Neve* (2).

Babu *Prokash Chandra Mazumdar*, for the Respondents.—Section 34, sub-section (3), is a general rule covering a case of auction-purchase. The burden of proof is on the purchaser who claims exemption under an exception to a general rule. He ought to prove the *bona fides* of the purchase of Kali Pal. Moreover the question of good faith differs essentially from the question of notice. The analogy of a purchaser without notice does not apply here.

Dr. *Sarat Chandra Basak* was not called upon to reply.

JUDGMENT.—This appeal arises out of orders in an insolvency proceeding, the name of the insolvent being Sanatan Pal. The permission of this Court has been obtained under section 46 of the Provincial Insolvency Act to prefer this appeal after permission had been refused by the District Judge.

One Nanda Kumar Saha obtained a decree against the insolvent on the 24th May 1911.

He took out execution proceedings and some property of the insolvent was sold on the 17th February 1913 to the purchasers Kali Krishna Pal and Amar Chand Pal. Kali Krishna sold the property which he had purchased to the appellant Madhu Sudan, who must not be confused with another Madhu Sudan Pal who is one of the respondents in this appeal. The date of the conveyance to the appellant was 28th February 1913. In the meantime, Sanatan Pal on the 7th October 1912 applied to be declared an insolvent and the order of adjudication was passed on the 7th February 1913. The proceeds of the execution sale were rateably distributed amongst three persons who had decrees against the insolvent. As the sale took place after the order of adjudication, these decree-holders were ordered to refund the money that they had received towards the satisfaction of their decrees. It was objected that the sale was invalid because it had taken place after the order of adjudication and on this objection, the District Judge referred the matter to the Receiver for report on the 21st February 1914.

On the 25th February 1914, the Receiver submitted the following report:—

"Madhu Sudan Pal, who purchased same properties from Kali Krishna Pal, auction-purchaser of some immoveable properties of the insolvent in Execution Case No. 257 of 1912 of the 2nd Munsif of Munshiganj, filed a petition praying that the properties he purchased may be exempted from re-sale by

(1) 29 Ind. Cas. 406; 19 C. W. N. 760.
(2) Wh. & Tu. Eq. Cas. 7th Ed. 197, (8th Ed. Vol. p. 187); Amble, 436.

the Receiver under section 34, sub-section 3 of the Provincial Insolvency Act.

"Sanatan Pal was declared an insolvent on 7th February 1913 and his properties were sold in auction in Execution Case No. 257 of 1912 and purchased by Kali Krishna Pal on 25th February 1913, *i. e.*, more than a fortnight after the order of adjudication."

We may mention here that this date is wrong. It was the 17th February, 10 days after the order of adjudication.

The Receiver's report continues:—

"Two witnesses on each side have been examined in presence of the Pleaders. There is no doubt that the purchaser Madhu Sudan Pal knew of the insolvency proceedings. He is a neighbour of the insolvent and distantly related to him. The properties also seem to have been sold at a low price and the transaction was not without suspicion.

"Under the circumstances, the properties should be re-sold by the Receiver and Madhu Sudan Pal should be ordered to deposit Rs. 122 as early as possible as referred to in my last report."

On receipt of this report, the District Judge passed the following order: "Receiver's report considered. The properties will be re-sold. Madhu Sudan Pal to deposit Rs. 122 by 11th instant." This is the order against which this appeal has been preferred. Madhu Sudan there referred to is the decree-holder-respondent of that name.

The appellant subsequently applied for a review of that order and it was refused on the 10th June 1914. On the 4th July 1914, an application for leave to appeal against this order was refused; but it is not necessary to consider these subsequent orders.

It is clear that the Receiver, in his report on which the order of the learned District Judge was based, has failed to appreciate the real point on which this matter turns.

Section 34 of the Provincial Insolvency Act lays down: "A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the Receiver."

The question which the Receiver had to consider was, not whether Madhu Sudan purchased the property in good faith, but whether Madhu Sudan's vendors, Kali Krishna Pal and Amar Chand Pal had purchased it in good faith. As regards Amar Chand, there does not appear to be any suggestion ever made that he had any knowledge of the insolvency, or was not a *bona fide* purchaser. As regards Kali Charan Shaha it is suggested that he may have been a *benamidar* for Kali Krishna; but there is nothing to support this suggestion. Such facts as have been placed before us support the view that he purchased in good faith in his own interest and only parted with the property to the appellant Madhu Sudan for the reasons stated in the sale-deed, namely, to avoid litigation. If Kali Krishna's title was good, the title of his purchaser Madhu Sudan was also good, irrespective of whether Madhu Sudan knew of the insolvency or not at the time of purchase. If we were to hold that Kali Krishna could not pass a good title to persons who were aware of the insolvency, it would be impossible now for Kali Krishna to transfer his interest, since by this time all persons who have any desire to purchase the property must be aware of the course of events.

We hold, therefore, that both Kali Krishna and Amar Chand purchased the property in good faith and consequently acquired a good title and there is, therefore, no reason for setting aside the sale. We accordingly decree this appeal and reverse the order of the lower Court. The auction-sale in Execution Proceedings No. 257 of 1912 in the Court of the 2nd Munsif of Munshiganj held on the 17th February 1913 will stand good and the order directing the re-sale of property is set aside. The order directing the refund of the purchase-money by the decree-holders will stand. The money will be paid to the Receiver for the benefit of the creditors.

As these proceedings have been rendered necessary by the failure of the appellant to appear before the District Judge on the date fixed for hearing when this order was passed, we direct that the parties do pay their own costs in this appeal.

Appeal allowed.

CHARAPATTADA SIDDALINGA SWAMULU *v.* SONDUR RAMACHANDRA CHARLU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2654 OF 1913.

February 1, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

CHARAPATTADA SIDDALINGA SWAMULU—APPELLANT

versus

SONDUR RAMACHANDRA CHARLU AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Arts. 120, 124, 131, 144—Suit by Temple Committee for declaration of their right of supervision, nature of—Accounts, claim to enforce production of, whether maintainable when suit for declaration time-barred—Office of member of Temple Committee, whether hereditary—Religious Endowments Act (XX of 1863), s. 13.

Where the members of a *Devasthanam* Committee appointed under Act XX of 1863 sued for a declaration that the suit temple was subject to the control of the Committee and for an injunction directing defendant to produce for their inspection all the temple properties and accounts:

Held, (1) that the suit was not one for possession of a hereditary office, as the office of a member of a *Devasthanam* Committee is not hereditary and, therefore, Article 124 of the Limitation Act did not apply; [p. 646, col. 2.]

(2) that Article 144 of the Limitation Act also could not be applied, as there was no prayer for possession of any immoveable property or any interest therein; [p. 646, col. 2.]

Balwant Rao v. *Puran Mal*, 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C. J. 435, distinguished.

(3) that the suit, as framed, fell under Article 120 of the Limitation Act and was time-barred; [p. 647, col. 1.]

(4) that the right to enforce production of accounts could not be severed from the right of supervision vested in the Committee and since the supervision had not been exercised and the suit to declare it was time-barred, plaintiffs could not rely upon Article 131 of the Limitation Act and enforce their "periodically recurring right" of production of accounts. [p. 647, cols. 1 & 2.]

Rajah of Venkatagiri v. *Isakapalli Subbiah*, 26 M. 410, distinguished.

Second appeal against the decree of the District Court, Bellary, in Appeal Suit No. 77 of 1911, preferred against that of the Subordinate Judge, Bellary, in Original Suit No. 18 of 1909.

Mr. *H. Balakrishna Rao* for Mr. *K. Narayana Rao*, for the Appellant.

Mr. *A. S. Visvanatha Aiyar*, for the Respondents.

JUDGMENT.—The only question in this suit which calls for our consideration is that embodied in the 6th issue, whether the suit is barred by limitation.

The learned District Judge has held that the suit falls under Articles 124 and 144 of Schedule I to the Limitation Act, and it is, therefore, within time. This view is not supported in argument before us, and we have no hesitation in dissenting from it. The plaint starts with the assertion that the plaintiffs are the members of the Kudligi Taluq *Devasthanam* Committee appointed under Act XX of 1863; and they pray (1) for a declaration that the suit temple is subject to the control of the Committee, (2) for an injunction directing defendants to produce for their (plaintiffs') inspection all the temple properties and accounts.

It cannot be said that this is a suit "for possession of a hereditary office." The office of a member of a *Devasthanam* Committee under Act XX of 1863 is not hereditary. Nor do plaintiffs seek to obtain possession of it. On the contrary, they allege possession of it: and ask for a declaration of right claimed in respect of it, that is, the right to control (*i.e.*, supervise the management of) the suit temple.

There is no rival claimant to the office sued as a defendant, the defendants being the *dharmakartas* who deny the existence of the office. It follows, therefore, that the argument based on section 28 must also fail, and that the cases where this section was applied to suits to recover possession of an office have no application to the present case.

Nor can Article 144 be applied. For there is no prayer for the possession of any immoveable property or any interest therein. It is obvious, and not disputed, that the property which is asked to be produced for inspection (not, be it noted, for any transfer of possession) is moveable property.

The Privy Council decision in *Balwant Rao* v. *Puran Mal* (1) (the case relied on by the learned District Judge) arose out of a suit of a totally different nature. The plaintiff therein asked "to be recognised as Chief Manager" (by virtue of his hereditary descent from the original grantor) "with power to

(1) 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Sar. P. C. J. 435.

dismiss and appoint a sub-manager and to obtain possession of the temple property by ejectment of the defendants."

It is clear, therefore, that the extremely guarded opinion of their Lordships of the Privy Council in that case as to the Article applicable has no bearing on the case before us; and in default of Articles 124 and 144, it would seem that the suit must fall under the residuary Article 120, in which case it is admittedly time-barred, in the absence of any applicable saving clause in the body of the Act.

The learned Vakil for respondents has, however, sought to support the District Judge's finding as regards limitation on other grounds which we shall proceed to consider. He relies on Article 131 of Schedule I to the Limitation Act, and on section 23 in the body of the Act; and he contends that even under Article 120 the suit is not barred in so far as it is one for production of accounts for the period of 6 years immediately preceding suit.

All these arguments are only applicable in so far as the suit is one for production of accounts. It is the right to require the production of these accounts once a year (conferred by section 13 of Act XX of 1863) which is the "periodically recurring right" that is sought to be brought under Article 131; and it is the refusal to produce these accounts that is the "continuing wrong" relied on for the purpose of section 23. That is to say, it is suggested that, to save limitation, the suit should be treated as one brought for a portion of the second prayer in the plaint.

We do not think this can be done. The suit was brought primarily to declare the *Devasthanam* Committee's right of supervision over the management of the temple by defendants; and *secondly*, to enforce by injunction the exercise of the powers incidental to that right. It is not suggested that plaintiffs can enforce the production of accounts for inspection, unless the right to do so is inherent in them as members of the Committee and it seems to us impossible to maintain that their right of supervision still survives although they have not been exercising it, and although any suit to declare it is barred by limitation. Respondents rely on the judgment of *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2) to support the contrary view; but the cases do not seem to us to be on all fours. That suit had reference to land which had been attached by a Magistrate under section 146, Criminal Procedure Code, and remained under attachment at the time of suit; and this peculiar feature of the case really determined its decision. The learned Judges are at pains to point out that the actual possession of the Magistrate, however long continued, was on behalf of the true owner, whose title was unaffected thereby although a suit for declaration thereof might be barred. In the present case, it cannot be said by any stretch of reasoning that plaintiffs were in possession of the office of supervisor of the temple management, and there is no real analogy between the two cases.

The right to enforce production of accounts cannot be severed from the supervisorship vested in the Committee; and we can see no ground for holding that the supervisorship survives in a Committee which has failed to exercise it, and who are precluded by limitation from suing for a declaration of it.

We allow the appeal and dismiss the suit with costs throughout.

Appeal allowed; Suit dismissed.

V.R.P.

(2) 26 M. 410.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 5 OF 1915.

June 17, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Lindsay.

UMRAI LAL—PLAINTIFF—APPELLANT

versus

Musammat RUKMIN KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior mortgages—Subsequent mortgage to discharge an obligation on property, if can have priority—Salvage, doctrine of—Subrogation, doctrine of.

A Hindu widow obtained a decree for possession of her husband's estate on payment of a certain sum of money, which had been spent in the discharge of debts which were binding on the estate. She raised

the money by a mortgage executed in favour of one *U* and obtained possession. She had previous to this executed two other mortgages in favour of one *K* and one *M* to enable her to prosecute the suit. *U* sued on his mortgage and claimed priority over the mortgages of *K* and *M* on the principles of subrogation and salvage:

Held, that under the circumstances of the case the principles of salvage and subrogation did not apply to the case and that *U*'s mortgage could not have priority over the mortgages in favour of *K* and *M*. [p. 650, cols.1 & 2.]

Subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security; but before the right can arise in favour of the subsequent creditor, there must have been an earlier creditor whose rights devolve upon the later creditor after the latter's debt has been discharged. [p. 650, col. 2.]

The mere fact that money is borrowed and is used for the purpose of paying off a previous charge, does not entitle the lender to the benefit of the discharged security. The right to that benefit depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed, having regard to the circumstances of the transaction, and which must provide that the subsequent lender shall be substituted for the earlier creditor. [p. 650, col. 1.]

The doctrines of salvage and subrogation discussed. [p. 649, col. 2; p. 650, col. 1.]

First appeal from the decision of the Subordinate Judge, Mainpuri, dated the 15th August 1914.

Mr. *Hamilton* and Dr. *Tej Bahadur Sapru*, for the Appellant.

Messrs. *Gulzari Lal* and *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The sole question for decision in these two appeals is whether a mortgage executed by the respondent *Musammat* Rukmin Kuar in favour of the appellant Uumrai Lal on the 15th September 1908 is entitled to priority over two mortgages executed by the same mortgagor in favour of Krishen Sarup and Munnu respectively. Krishen Sarup's mortgage was executed on the 7th November 1905, that in favour of Munnu on the 10th July 1907.

This question of priority has arisen in two suits, one filed by Krishen Sarup and the other by Umrai Lal. The Court below has held in both suits that Umrai Lal's rights as mortgagee must be postponed to those of the two mortgagees who hold the earlier mortgages, and hence these two appeals.

A brief statement of the fact, leading up to the present litigation is necessary in order to show the material points on which the parties are at issue.

Musammat Rukmin Kuar is the widow of a man named Khushbakht Rai, who owned a 20-*biswas* share in Mauza Rampura.

At the time of Khushbakht Rai's death the property was subject to two mortgages in favour of one Ishwar Das.

Kushbakht Rai appears to have got this village recorded in the name of his daughter *Musammat* Bitola and she came into possession. During her lifetime her husband one Banke Behari Lal acting as her agent made mortgages of the property to satisfy the debts created by Kushbakht Rai.

Bitola died leaving a daughter *Musammat* Rania, whose legal guardian was one Rashak Behari Lal. The latter in order to pay off the debts on the estate sold a portion of the property and after this had been done, *Musammat* Rukmin Kuar filed a suit against Rania and her guardian for recovery of the village, claiming as her husband's heir. She also asked for avoidance of the transfers which had been made on behalf of *Musammat* Bitola and *Musammat* Rania

This case was fought out upto this Court and was decided by the judgment of a Bench dated the 1st August 1908.

Musammat Rukmin was found to be entitled to the property, but it was held that she could not recover possession without paying to the guardian of the defendant, *Musammat* Rania, a sum of Rs. 5,394-0-9 which had been spent in the discharge of debts which were binding on the estate.

Accordingly a conditional decree was prepared, by which *Musammat* Rukmin was declared to be entitled to recover possession provided she paid the above sum with interest within a period of three months from the date of the decree.

The decree does not state expressly that failure on the part of the plaintiff *Musammat* Rukmin to pay this amount within the time fixed was to involve the dismissal of her suit, but we take it that that was the intention of this Court when it fixed the period for payment. As a matter of fact the money was so paid and was raised for the purpose by the mortgage executed by Rukmin in favour of the appellant, Umrai Lal, and Rukmin obtained possession over the property.

The only other fact of which it is necessary to take notice is that the sums owing to Krishen Sarup and Munnu on their respective

*UMRAI LAL *v.* RUKMIN KUAR.

mortgages were advanced by them to *Musammat* Rukmin in order to enable her to prosecute the suit against Rania, which resulted in the decree to which we have referred.

The case for the priority of his mortgage which the appellant set up in the Court below is to be found in the third paragraph of the plaint which he filed in the suit brought by him to recover his mortgage-money (see page 5 of the printed book in First Appeal No. 5 of 1915).

There it is stated that *Musammat* Rukmin borrowed the money in order to pay the sum she had to pay as a condition of her recovering the property. This money is described as having been paid "in order to discharge debts due by her husband" which had been contracted before the loans were taken from Krishen Sarup and Munnu.

From the statement of the case it would appear that Umrai Lal's claim to priority was based upon the doctrine of subrogation. His money had been applied for the purpose of extinguishing an earlier incumbrance, and he was entitled, therefore, to be protected against the claims of persons holding securities of later dates.

The Subordinate Judge was of opinion that Umrai Lal could not claim priority. He pointed out that the case was not one in which a subsequent mortgagee by paying off an earlier incumbrancer stepped into the latter's shoes. He further observed that it could not be maintained that the plaintiff's money went to satisfy the debts of Khushbakht Rai, as those debts had long since been paid off by the persons who were in possession of the property after his death. In short the Subordinate Judge held that in fact there was no payment of prior debts by Umrai Lal. *Musammat* Rukmin was in accordance with the High Court decree under an obligation to pay a certain sum of money to the defendants as a conditions of her being allowed to recover the property; if she failed to find the money within the time prescribed she lost her suit. She borrowed the money from the plaintiff under the mortgage and the plaintiff as her agent had the money paid into Court in fulfilment of the condition. For these reasons the lower Court held, that there was no ground upon which Umrai Lal could claim priority.

Mr. Hamilton who has argued both the appeals on behalf of Umrai Lal, has contended that he can claim priority on either of two grounds. *One* of these is that the money advanced by his client was the means whereby the property was saved to *Musammat* Rukmin.

Had the money not been advanced and paid, Rukmin would have lost her suit and the two mortgagees Krishen Sarup and Maunnu would have lost the security they held for the money lent by them on their mortgages. The appellant, therefore, is entitled to priority in accordance with what is known as the doctrine of salvage. The *other* ground urged in support of the appellant's claim is that taken in the Court below; this rests upon the doctrine of subrogation.

With regard to the *first* of these contentions, it might be sufficient to say that the doctrine of salvage has not been recognised by this Court [see the Full Bench ruling reported as *Seth Chitor Mal* v. *Shib Lal* (1)]. But apart from this and assuming that we could apply the principles of salvage to the facts of this case, it seems clear to us that there is no valid reason for postponing the claims of Krishen Sarup and Munnu to that of Umrai Lal. In the first place, it is apparent that when Umrai Lal advanced the money to *Musammat* Rukmin, he had no interest in the property impelling him to make the expenditure nor had he any right or duty in relation to *Musammat* Rukmin in virtue of which he was called upon to spend money on her behalf. He was, to quote the language of Phear, J., in *Moran* v. *Mittu Bibee* (2), "a stranger to the estate and in the situation of an ordinary money-lender with no other motive than the expectation of pecuniary profit from the bargain itself"; and in the next place, it is not pretended that Umrai Lal, before he advanced the loan, consulted the prior mortgagees though he was well aware of the mortgages in their favour. To quote again from the judgment in the Calcutta case referred to above (see page 96 of the report):

"The plaintiffs failing to prove knowledge and acquiescence on the part of the defendants (*i. e.*, the prior mortgagees), there is

(1) 14 A. 273; A. W. N. (1892) 117 (F. B.)
(2) 2 C. 58.

nothing, as it seems to me, in the contention that the matter can be treated as in the nature of a case of salvage. The defendants had a first mortgage as security for a large sum advanced for the season's manufacture, and no reference was made to them before the further advances were taken from the plaintiffs. I am wholly at a loss to comprehend on what principle of equity they, who were present on the spot and might at any time have been appealed to, can be held liable to give priority to the plaintiffs, who were strangers brought in over their heads, without their consent, by the mortgagor's manager."

So much for the contention regarding any right in the nature of salvage claimed on behalf of the appellant. There remains then the claim to priority based upon the doctrine of subrogation, which means the right of one creditor to stand in the place of another and to avail himself of that other's security. The mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit just mentioned depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed having regard to the circumstances of the transaction. And this agreement must be one by which it is provided that the subsequent lender shall be substituted for the earlier creditor.

It is clear enough from the language of the appellant's mortgage-deed that there was an agreement in this sense between *Musammat* Rukmin and himself. It was stipulated that the money advanced by Umrai Lal was to be a first charge upon the property, a charge which was to attach as soon as Rukmin recovered the property by payment of the sum mentioned in the High Court's decree.

But the question remains as to the legal relation created between *Musammat* Rukmin and Rashak Bihari Lal under the decree of the 1st August 1908. As we have already said, that decree provided that Rukmin should recover possession on condition of her paying to Rashak Bihari a sum of Rs. 5,000 odd within three months of the date of the decree; in default her suit was to stand dismissed. If subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security, it necessarily follows that before the right can arise in favour of the subsequent creditor there must have been an earlier creditor whose rights devolve upon the later creditor after the latter's debt has been discharged. In what way is it possible to hold that the relation of creditor and debtor existed between Rashak Behari Lal and *Musammat* Rukmin under the decree? And what security, what remedies had Rashak Behari Lal by virtue of the decree, which can be made available to the appellant by reason of the fact that his money has been applied in discharge of the condition which the decree imposed upon *Musammat* Rukmin?

The fact is that the decree did not place *Musammat* Rukmin and Rashak Behari in the relation of debtor and creditor. As the lower Court observes, Rashak Behari was certainly not the mortgagee of this property and unless it can be held that the decree gave him the status of a charge-holder, there can be no case of creditor and debtor. Section 100 of the Transfer of Property Act defines what a charge is. "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

And the person who holds the charge is by the same section declared to have the rights of a mortgagee entitled to sue for the sale of the property.

Having regard to this definition, it is apparent that the rights which the decree created in favour of Rashak Behari were not those of a charge-holder. He was not given any right which would have enabled him to sue for sale of the property in order to recover the sum specified in the decree. His right was one to retain the property absolutely in case the plaintiff *Musammat* Rukmin failed to pay him that sum within three months from the date of the decree.

In no way can it be said that the legal effect of this decree was merely to constitute the property in suit a security for the payment of money to Rashak Behari, nor is it possible for the appellant to contend that because his money was applied as it was,

he is entitled to the right of Rashak Behari under the decree.

We are satisfied, therefore, that the doctrine of subrogation cannot be resorted to by the appellant for the purpose of claiming priority over Krishen Sarup and Munnu. In our opinion the decision of the Subordinate Judge is correct. Both these appeals fail and are dismissed with costs accordingly, including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 222 OF 1914.

July 7, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

CHANDRA KANTA BHATTACHARJYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAKSHAN CHANDRA CHAKRABARTTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4, 7—Review—"Strict proof," meaning of—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 173—Sufficient cause for excusing delay.

The expression "strict proof" in clause *(b)* of the proviso to rule 4, Order XLVII, Civil Procedure Code, means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction of the judicial mind. It means anything which may serve directly or indirectly to convince a Court and which has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. [p. 651, col. 2; p. 652, col. 1.]

Abed Khondkar v. *Mohendra Lal De*, 29 Ind. Cas. 282; 42 C. 830; 19 C. W. N. 804, referred to.

An application for review of judgment based on the discovery of new evidence made more than 90 days after the date of the decree but shortly after the discovery of the new evidence, which was not within the applicant's knowledge and could not have been adduced by him when the judgment was passed, is not barred under the law of limitation. [p. 652, col. 1.]

Appeal against the order of the Subordinate Judge, 1st Court, Jessore, dated the 23rd March 1914.

Babu *Brojolal Chakrabutty*, for the Appellants.

Babus *Sarat Chandra Roy Chowdhury*, *Satya Chandra Sinha* and *Panchanan Ghose* (for Babu *Hara Prasad Chatterjee*), for the Respondents.

JUDGMENT.—This appeal, preferred under Order XLVII, rule 7 (1), of the Code of Civil Procedure of 1908, against an order granting an application for review of judgment on the ground of discovery of new evidence, is based on the reasons mentioned in clauses *(b)* and *(c)*, namely, *first*, that the application was in contravention of clause *(b)* of the proviso to rule 4, and *secondly*, that the application was made after the expiration of the period of limitation prescribed therefor and without sufficient cause. In our opinion, there is no force in either of these contentions.

Clause *(b)* of the proviso to rule 4 requires that no application for review, on the ground of discovery of new matter of evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, shall be granted without strict proof of such allegation. The appellants contended that the requirement of "strict proof," just mentioned, has not been fulfilled; their argument, in substance, is that the evidence does not conclusively prove that the new evidence, on the discovery whereof the respondents based their application for review, was not within their knowledge and could not have been adduced by them when the judgment under review was passed. This contention is, in our opinion, based upon a misapprehension of the true meaning of the expression "strict proof" in clause *(b)* of the proviso to rule 4. The decision in *Abed Khondkar* v. *Mohendra Lal De* (1) shows that "strict proof" means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction. As Jenkins, C. J., observed, "proof" means either conviction of the judicial mind on a certain fact or the means which may help towards arriving at that conviction; the word "strict" in connection with the term "proof" points to the second of these two meanings. Consequently "strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with

(1) 29 Ind. Cas. 282; 42 C. 830; 19 C. W. N. 804.

the requirements of the law of evidence; it is formality that is prescribed and not the result that is described. In the case before us, the respondents, in support of their application for review, brought forward witnesses to depose that they did not and could not have become aware of the existence of the new evidence till the 9th December 1913. No attempt was made by the appellants to challenge the truth of this allegation by cross-examination, and it is not for us to indicate the class of questions which might have been appropriately put to the witnesses to test their veracity. The decision sought to be reviewed was pronounced on the 23rd May 1913. According to the respondents the new evidence, which forms the basis of the application for review, did not come to their knowledge till the 9th December 1913, and the application for review was actually lodged in Court on the 18th December 1913. In these circumstances, it is plain that there was strict proof of the allegation that the new evidence was not within the knowledge of the petitioners and could not have been adduced by them when the decree was passed. The *first* objection consequently fails.

The *second* objection taken is that the application was made after the expiration of the period of limitation prescribed therefor and without sufficient cause. The judgment was pronounced on the 23rd May 1913; but the decree was not signed till the 30th May 1913. The application for review should have been made within 90 days from that date, that is, on or before the 28th August 1913. But the new evidence was not available till the 9th December 1913; consequently, there was sufficient cause for not making the application for review before the expiry of the period of limitation prescribed therefor. The *second* ground cannot accordingly be sustained.

The result is that the appeal fails and is dismissed with costs. We assess the hearing-fee at one gold *mohur*.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 31 OF 1914.

February 11, 1916.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

BILAWAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

GIANMAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Document, construction of—Partnership—Agreement of partnership defining rights of parties in lands and water-course, construction of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings, when to be allowed—Party not acting bona fide, *whether entitled to amendment.*

On 13th May 1889, *J*, a Muhammadan owning a water-course and lands watered thereby, entered into an agreement with two Hindus, *B* and *T*, whereby, in consideration of the latter supplying money every year for cultivation purposes on certain terms, the former made them partners for ever in the lands and the water-course to the extent of one-third. The important clause ran as under: "I, *J*, give in writing that in Makan Bhatiani and Khajwi there is a Karia which takes its supply from Dhoro Naro. In all the rights and interests of the lands within the limits of this Karia, and in this Karia, I take *B* and *T* as partners with myself having one-third share. From this day, in this Karia and all the rights and interests of the land, one-third share of the above Hindus is and shall remain in force and there are two shares of mine and will remain as such. We become, and shall remain, bound and responsible with each other, according to the following terms."

On 22nd May, 1891, a second document was executed by *J* and one *D* (another Muhammadan) in favour of *B* and *T* as under:—"We, *J* and *D*, give in writing that there is land measuring 350 and 1,000 acres in our possession. In all our rights and interests of this land and of the Karia and in all its branches *B* and *T* have one-third share by a partnership deed dated 13th May 1889, and they are our partners. Now in all the land which we have received this year we have made *B* and *T* third-share partners with ourselves. The terms of our previous deed shall be considered cancelled and we have settled the following terms."

The partnership continued for 20 years, and in the meantime *J* and the two Hindus *B* and *T* died. In 1913, the representatives of the Hindus brought the present suit, seeking partition and possession of one-third share of the immoveable property included in the documents above recited:

Held, that the documents did not effect any absolute transfer of the one-third share in the lands and the Karia to the Hindus, but created a partnership whereby the lands and the Karia became partnership property; consequently the suit, as framed, was not maintainable; [p. 654, col. 1; p. 655, col. 1.]

that the suit should have been one for dissolution of partnership and for accounts of a dissolved partner-

ship, as, the partnership not being for any definite term, it was open to either party to terminate it; [p. 654, col. 2; 655, col. 1.]

that amendment of the plaint could not be allowed, as it would change the cause of action and help the plaintiffs who had not acted in good faith. [p. 655, cols. 1 & 2.]

Appeal against the decision of the 1st class Sub-Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Motiram Ramchand*, for the Respondents.

JUDGMENT.—On the 13th May 1889, Jamin son of Bilawal entered into an agreement with Badal and Teju, the terms of which are recorded in the document Exhibit 5. The important clauses are as follows:—"I, Jamin, son of Bilawal, give in writing that in Makan Bhatiani and Khajwi there is a Karia which takes its supply from Dhoro Naro. In all the rights and interests of the lands within the limits of this Karia, and in this Karia, I take Badal and Teju as partners with myself having one-third share. From this day in this Karia and all the rights and interests of the lands, one-third share of the above-mentioned Hindus is and shall remain in force and there are two shares of mine and will remain as such. We become, and shall remain, bound and responsible with each other, according to the following terms." Then follow the conditions under which the Hindus were to advance whatever money was required for cultivation without interest; if they failed to pay as required, they were to be liable for interest at the rate of Rs. 6-4 per cent. per mensem. Jamin was to make all the arrangements for the cultivation and to sell the produce at Re. 1 per *kharar* less than the market-rate to the Hindus. All advances were to be paid out of the sale-proceeds and the net profit was to be divided, the Hindus getting one-third. Jamin was to be allowed to retain the whole produce of 10 *jerebs* out of the *kharif* crop and 6 *jerebs* out of the *rabi* crop. It was finally declared that the partnership would continue to remain for ever from generation to generation and would be agreed to by the heirs and executors of Jamin.

This document was engrossed on a ten rupee stamp paper and registered.

On the 22nd May 1891, a second document was executed by Jamin and one Daud Jumo in favour of Badal and Teju. This document is also written on a ten rupee stamp paper. The essential portions are the following:—"We, Jamin and Daud, give in writing that there is land measuring 350 and 1,000 acres in our possession. In all our rights and interests of this land and of the Karia, and in all its branches, Badal and Teju have one-third share by a partnership deed dated the 13th May 1889, and they are our partners. Now in all the land which we have received this year we have made Badal and Teju third-share partners with ourselves. The terms of our previous deed shall be considered cancelled and we have settled the following terms." Then follow the terms similar to those in the former deed, except that Rs. 2,000 only were to be advanced without interest, all further sums bearing interest at the rate of 1 per cent. per mensem. The penalty for failure to make the required advance was omitted. The partnership was again declared to be one that would continue in force from generation to generation and would be accepted by all heirs. The net produce was to be divided as before but of the two-thirds, Jamin was to get two-thirds and Daud one-third.

The partnership continued without dispute for about twenty years. Meanwhile, Jamin died and so also Teju and Badal. In 1913 the representatives of Teju and Badal instituted the present suit, seeking partition and possession of one-third share of the immoveable property included in the document above recited. The lower Court has held that the suit is good in form; that plaintiffs could claim partition, notwithstanding that the contract was for ever, and gave judgment for partition and possession as claimed, except that it was ordered that at partition 16 *jerebs* should be retained for Jamin's heirs. With regard to the claim of the defendants that plaintiffs should still finance the cultivation of the two-thirds, the learned Judge remarks:—"Such a condition cannot bind the descendants of the parties. If it does, the defendants can always sue for damages and the deed itself provides that they are to do so in case the plaintiffs failed to supply funds. They can raise money in some other way and recover the loss, if any, from plaintiffs or their successors-in-title or transferees."

On behalf of appellants it is contended that the plaintiffs are not entitled to partition, or that if they are entitled, it should only be on

condition that the partnership generally was settled up

It would be difficult to find words by which a partnership could be more clearly defined and created than those employed in the two documents. The parties agreed to combine their property, labour and capital, up to certain defined limits and to share the profits between them. The Hindus were made partners in the land, while they, on their part, agreed to find Rs. 2,000 every year without interest, and any further sums that might be required at 12 per cent. per annum. The partners became the joint owners of the land in accordance with the ordinary rule as to partnership property The change of *khatta* and the entry in the Records of Rights all support the theory that the land was the joint property of the several partners. The learned Judge of the lower Court takes the view that the land was first transferred. and that the partnership was created afterwards, so that it was never partnership property. But the alternatives which he presented as the only possible ones were by no means exhaustive. He states:—"The question is whether, on the above terms, the parties were merely partners in profits and the land remained the sole property of Jamin and defendant No. 3. Co-owners may cultivate land on partnership terms, There may be a partnership in regard to division of profits and yet the land itself may not be partnership property. The two deeds clearly disclose the transfer of the land itself and also a partnership for cultivation purposes. The body of the deeds, however, clearly shows that an absolute transfer was meant."

The learned Judge has not realised that there might have been a transfer of the whole land to the partnership; this alternative has not been considered by him. It has not been shown when and how this absolute transfer of the one-third share to the Hindus took place; there is certainly no transfer of such an interest in either of the deeds; each deed is stamped as a partnership deed only. The lower Court disposes of the difficulty by saying that no written sale-deed was necessary at the date of the deeds; the deeds had been registered and the parties had acted on them for a length of time. Mr. Motiram, who appears for the respondents, suggests that there was an oral transfer of the share before the execution of the partnership deed, making nothing more than a recital necessary. But it is not explained what the consideration for this transfer was, nor are the very clear words of the first deed, showing that the interest of the Hindus commenced from the date of the deed, accounted for. There was no formal transfer of any share of the land, but there was, we consider, a very clearly expressed intention that the land should become partnership property, and this intention has been acted on for about twenty years.

As the partnership was not for any definite terms it was open to either party to terminate it. But when a party rightfully rescinds a contract, he must restore such benefit as he has received under the contract; and when a partner puts an end to the partnership, there must be an account taken of all the debts and liabilities, not only as between the partnership and third parties, but as between the partners themselves. As partners, the Hindus, or their representatives, have an equitable right that the immoveable property which forms one of the partnership assets be divided; but they are not entitled to have the item on the credit side only of their account taken into consideration; they must put on the other side their liability to find Rs. 2,000 every year for an indefinite number of months without interest, and a further indefinite sum at 12 per cent. This liability, when capitalised, will be a very substantial item on the other side of the account, and may possibly square it up altogether. The view of the lower Court, that the land, which forms the main asset of the partnership and which constitutes the very reason of its existence, should be divided and the partnership terminated, and yet the contractual relations of the parties should remain alive to the extent of giving the Mohammedans a right of suit for damages for not advancing the necessary funds for the cultivation, is altogether untenable. If the partnership is at an end, then the rights and liabilities of the partners *inter se*, as in an existing partnership, are at an end. The Hindus cannot remain under a liability to finance a partnership which is no longer in existence

It is to be noticed that the lower Court has, on partition, given to the Mohammedans 16 *jerebs* of land, because they were entitled

to have the produce of 10 and 6 *jerebs* at the two several harvests; this rough method of adjusting the mutual claims of partners is scarcely in accordance with the best traditions of Courts of Law.

Mr. Motiram, for the respondents, points out that after the death of Jamin, the Hindus took a lease of the lands from the partnership, ignoring the liability to finance the cultivation. There was no written lease and we do not know what were the terms of the lease, nor if this possibility was taken into consideration in settling the rents. Even if the respondents did obtain some advantage over the very youthful representatives of the deceased Jamin, this is scarcely a reason for now giving the former a further advantage to which they are not entitled.

Mr. Motiram also draws to our attention to a decision of this Court in *Sumar* v. *Amaldas* (1), in which a similar deed of partnership was in question and where the Court held that partition could be claimed. But that case was decided on the particular facts and not upon a construction of the document; so it offers no assistance in ascertaining the legal relations of the parties in this case.

The suit is altogether misconceived. The suit should have been one for dissolution of partnership or for accounts of a dissolved partnership. Though the Hindus were on the one hand entitled to their share of the net partnership assets, these assets included their liability to finance the concern during the continuance of the partnership, and it is at least possible, even probable, that after the capitalised value of this liability has been debited against them in their account with the partnership, there will be found nothing due to them. There was never a transfer to the plaintiffs of a one-third share in the land, nor were they at any time entitled to claim it.

We are asked to permit an amendment of the plaint so as to convert the suit into one for winding up the partnership; but we must decline to do so. Plaintiffs chose to take the risk of setting up an absolute right to one-third of the property, altogether ignoring the partnership and its obligations on themselves. They cannot now be allowed to change the cause of action and ask that accounts be taken of a dissolved partnership. Further, we consider that the respondents have not acted in good faith, there has been an unjustifiable attempt to take advantage of less acute businessmen. The appeal is allowed. The suit will be dismissed with costs throughout.

Appeal allowed.

(1) First Appeal No. 59 of 1906.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 467 OF 1915.

July 3, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

MOTI BOULI—DEFENDANT No. 1—APPELLANT

versus

BHAGAWAN MISRI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family fund—Money earned by two brothers, if constitutes joint family property—Appeal, second—Findings of fact unsupported by evidence, if reversible in second appeal.

The mere fact that two brothers of a Mitakshara family coming to Calcutta worked as coolies and out of the money they so earned purchased a house, does not legally warrant the conclusion that the house was acquired out of a joint family fund, in the absence of any evidence that the money earned by them was ever put into a common till or treated as money belonging to the two brothers representing a joint Hindu family. [p. 656, col. 2.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 5th December 1914, reversing that of the Munsif, Howrah, dated the 30th August 1913.

FACTS of the case appear from the judgment.

Babu *Jadunath Kanjilal*, for the Appellant.—The plaintiff in this case is the brother of the deceased husband of defendant No. 1. The plaintiff's case is that the parties are governed by the Mitakshara Law and that the two brothers lived together and this property was purchased from the joint funds. The dwelling-house which is the property in dispute is not ancestral property, nor is it joint family property, but acquired by joint earnings. The parties here would be tenants-in-common as in a partnership. The doctrine of survivorship has no application in the present case. *Vide* Mayne's Hindu Law, 7th Edition, p. 349. The appellant

MOTI BOULI *v.* BHAGAWAN MISRI.

ought not to be ejected. The plaintiff has not made out that he lived with the son of his deceased brother or his widow. The two brothers only lived jointly. It is a case where there is a mutual understanding that the two brothers should have joint funds and buy a house.

Babus *Mohendra Nath Roy* and *Manmotha Nath Roy*, for the Respondent.—The husband of defendant died leaving a posthumous son, who died when he was 8 or 10 years of age. Under the Hindu Law, the widow or the mother could not inherit joint family property. The mother cannot sue for partition of the joint property. There is no suggestion or evidence that there was partition of the joint property. It is not a case in the nature of partnership. Mayne's Hindu Law, section 277, page 354, 8th Edition, relates to properties which are joint property. The birth of the son did not improve the case of the widow. It is doubtful whether, even if the son was alive, he would be a co-parcener and obstruct the 'brother' from getting the property by law of survivorship. Here the property was acquired with *joint funds*. The brother would inherit the property to the exclusion of the son. The plaintiff would get the whole property by survivorship after his nephew's death in the absence of any partition between the former and the latter.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned Subordinate Judge of Hooghly, dated the 5th December 1914, reversing the decision of the Munsif of Howrah, dated the 30th August 1913. The plaintiff was the elder brother of the deceased husband of the defendant No. 1, who is the appellant before us. Apparently, the plaintiff and his brother came to Calcutta from the North-Western Provinces. They came here to work as coolies. There is nothing to suggest that, in that condition, they had any nucleus of the joint family estate. They did work and did save money. There is no evidence to show that that money was ever put into a common till or treated as money belonging to the two brothers representing a joint Hindu family. All the evidence that the learned Judge had before him was that they worked as coolies and, out of the money they so earned, they purchased a house. The learned Judge, on that evidence, has found that these two brothers bought the house out of a joint fund. There was no evidence before him on which he could make such a finding. The fact seems to be that the house is really a hut and was bought by these two coolies out of the money that they both earned. I see no reason to suggest that there is evidence to support the finding of the learned Judge that they bought the hut out of a joint fund. The husband of the defendant No. 1 died leaving a son, who apparently lived $18\frac{1}{2}$ years after the death of his father. That son has been altogether omitted from the plaintiff's claim, although it is obvious that, if the plaintiff took by survivorship, the person on whose death he took was not his brother but his nephew, the only son of the defendant No. 1. The case that has been suggested before us, that the plaintiff took to the exclusion of his nephew and that the father of the boy, that is, the plaintiff's younger brother did intend when he purchased this house that his only son should be turned out of his house into the street, would not commend itself to any person who is accustomed to the way of the Hindus. It is quite clear that these two brothers when they purchased this hut never contemplated that the children and the widow of the one who should die first should be liable to be turned out into the street. I think that is an impossible case on the facts transpiring on the record. Whether or not such a case can take place under the rules of the Hindu Law, it is not necessary for us to say. All the facts in this case are inconsistent with there having been a joint fund. The evidence before the learned Judge seems to me to be altogether insufficient, in fact, there was no evidence, on which he could find that the hut was bought out of the joint fund, and there is nothing to show that the brothers meant that whatever they should acquire should form part of the joint family estate. That being so, I think we ought to set aside the decree of the learned Subordinate Judge, allow this appeal and restore the decree of the Munsif. The plaintiff must pay to the appellant her costs in this Court as well as in the lower Appellate Court.

TEUNON, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1139 OF 1915.

February 14, 1916.

Present:—Mr. Justice Tudball.

RAM BHAROSE AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 424—Appeal—Dismissal—Judgment.

A District Magistrate disposed of an appeal with the following judgment: "No one appears. I see no reason to interfere. I dismiss the appeal:"

Held, that the judgment was not in conformity with the law, inasmuch as it did not disclose whether or not the Magistrate had examined the evidence as it was clearly his duty to do.

Criminal revision from an order of the District Magistrate, Fatehpur.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The three appellants were convicted by a Magistrate of the second class and they appealed to the Court of the District Magistrate, and on the date fixed for the hearing of the appeal no one appeared on behalf of the appellants and the Magistrate wrote the following judgment: "No one appears. I see no reason to interfere. I dismiss the appeal." This judgment is not in conformity with the law. It reads as if the appeal had been dismissed because nobody had appeared. It does not disclose whether or not the Magistrate examined the evidence, as it was clearly his duty to do. I allow this application. I set aside the order of the District Magistrate and direct that the record be returned to him with orders to re-hear the appeal and to decide it according to law.

Application allowed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 34 OF 1916.

June 12, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

EKNATH SAHAY AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 367—

Misdirection to Jury, what amounts to—Heads of charge principles applicable, to preparation of—Functions of Judge and Jury—Cross-examination, scope of, whether can be restricted by Court.

Mere non direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively. [p. 664, col. 2.]

A Judge is not required under section 367, Criminal Procedure Code, to write out *in extenso* the charge which he addresses to the Jury, but he should set forth in writing the headings of his charge; and such headings afterwards form part of the record of the proceedings in the trial before him. As the term "heads of charge" itself implies, the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the Jury, and the nature of his summing up of the evidence, not only for the prosecution but also for the defence. The headings of charge do not purport, nor are they intended by Statute, to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. They should only record, in an intelligent form and with sufficient fullness, the points of law and the directions given by the Judge to the Jury. [p. 658, col. 2; p. 659, col. 1.]

But in considering the language used, one must not parse the headings of charge as if it were an indictment. The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the Judge gave to the Jury, and that they were right and proper, then there can be no ground of complaint, even though the phraseology and form adopted might be open to question. [p. 659, col. 2.]

It is the sole function of the Judge to direct the Jury on all matters of law and the Jury must take their direction in law from the Judge. The Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. [p. 659, col. 1.]

Panchu Das v. *Emperor*, 34 C. 698; 11 C. W. N. 666; 5 Cr. L. J. 427; *Fanindra Nath Banerji* v. *King-Emperor*, 1 Ind. Cas. 970; 36 C. 281; 5 M. L. T. 97; 13 C. W. N. 197; 9 C. L. J. 199; 9 Cr. L. J. 452; *Hooper* v. *Emperor*, 21 Ind. Cas. 686; 14 Cr. L. J. 638; 12 A. L. J. 149, referred to.

A trial Judge can restrict the scope of the cross-examination of witnesses. [p. 658, col. 1.]

Criminal Appeal against the judgment of the Additional Sessions Judge of Patna, dated 20th March 1916, and convicting the prisoners in a case tried with a Jury under section 147, Indian Penal Code.

EKNATH SAHAY *v.* EMPEROR.

Messrs. *Sinha* and *Gour Chandra Pal*, for the Accused.

The Government-Advocate and the Public Prosecutor, for the Crown.

JUDGMENT.

ATKINSON, J.—The five accused together with 18 others were jointly indicted for unlawful assembly, riot, murder and dacoity with the intention of committing hurt and mischief to certain Rajputs on the 10th of September 1915. 18 of the 23 have been acquitted by the Jury who tried this case before Mr. Rowland, Additional Sessions Judge, sitting in and for the District of Patna. The case was heard early in the present year, and after a trial extending over 42 days, on the 20th of March 1916, the Jury brought in a verdict finding the 5 accused guilty of riot under section 147 of the Indian Penal Code, and of unlawful assembly under section 326 read in conjunction with section 149. The trial, as I have said, was a very protracted one, mainly due to much unnecessary and immaterial cross-examination; and I think the Judge would have been perfectly within his rights had he limited and restricted the scope of the cross-examination which was indulged in on behalf of the defence; and in saying this I am fortified by the expression of opinion by the Jury. The Jury negatived the charge of murder and of dacoity with intent to commit hurt; and have merely found the five accused persons guilty of riot and unlawful assembly with the common object of causing hurt to various Rajputs, but particularly towards Somar Rai, and of causing the death of one Ram Lal Rai. From that conviction an application is now made by way of petition on appeal under section 419 of the Criminal Code of Procedure, seeking an order for re-trial of this case on the ground of the misdirection in law of the learned Judge at the trial, and on the further ground that the learned Judge did not fairly put before the Jury matters and circumstances in support of the defence. It is unnecessary to do more than briefly refer to the facts of the case.

Eknath Sahay is a Mukhtear of this Court residing at Panwara, and it appears that he obtained judgment against Ram Lal Rai on foot of a mortgage-bond. Ram Lal Rai resided at Dhodhochak, and the 10th day of September 1915 was appointed as the day upon which execution on foot of the decree was to be levied, and under which Eknath Sahay had become the auction-purchaser of the property of Ram Lal Rai which was sold in pursuance of the decree. Two peons of the Court were commissioned to make the seizure, and deliver possession to Eknath Sahay as the purchaser, and to attach all available moveable property of the judgment-debtor to satisfy the judgment-debt. From the evidence, it appears in support of the case for the prosecution that Eknath Sahay, being a person of some legal qualifications and a man of about 51 years of age, organised on the 10th day of September 1915 at the village of Panwara a crowd of 400 persons from amongst his retainers there, and at the head of this force marched to the village of Dhodhochak one mile distant, and attacked the Rajputs who were living there, causing the death of Ram Lal Rai. The mob, headed by Eknath Sahay, assembled in the village of Dhodhochak between the hours of 2 and 3 o'clock, and then occurred the incidents which gave rise to this prosecution, and wherein Ram Lal Rai lost his life and Somar Rai received grave and serious injuries; and for the part which the five accused persons took in the incidents of that day, the Jury have found them guilty. The defence is that the entire charge is a false one, that there was no riot or unlawful assembly, and that none of them were members of a riotous mob and are not responsible for the incidents that took place on the 10th September.

The petition on appeal contains some 29 grounds, on which it is alleged that this conviction should be quashed and a new trial of the case directed; but of these 29 grounds only 15 were pressed in argument before us. This case was argued before us by Mr. Sinha and the Government Advocate with great ability, energy and determination and we have received much assistance from the arguments adduced to us. The first and perhaps the most important ground was the alleged misdirection of the learned Judge to the Jury in point of law. No doubt, under section 367 a Judge is not required to write out *in extenso* the charge which he addresses to the Jury, but under the section that I have referred to the law requires that the Judge shall set forth in writing the headings of his charge to the Jury, and such headings afterwards

form part of the record of the proceedings in the trial before him. As the term "heads of charge" itself implies, it means that the Judge must faithfully record the *lines* upon which he addressed the Jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the Jury, and the nature of his summing up of the evidence not only for the prosecution but also for the defence. But the headings of charge do not purport, nor are they intended by Statute, to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. It is undoubted law that it is the sole function of the Judge to direct the Jury on all matters of law, and the Jury must take their direction in law from the Judge. It is equally certain that the Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. But this does not mean that he must in every particular and in every detail address himself to every suggestion put forward by the defence. His duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively. And in doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoner's Counsel, in considering his presentation of the evidence to the Jury. As I have said, the function of these heads of charge is for the guidance and information of the High Court, and it is for the Judges on appeal, in applications similar to the present one, to construe the heads of charge as prepared by the Judge, and see if from such heads the Judge has fairly and properly directed the Jury in point of law, and whether he has fairly and properly reviewed the evidence in support of the prosecution and of the defence. I admit that these headings of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, *Panchu Das* v. *Emperor* (1), and that the record should represent with accuracy the substance of the charge by the Judge, *Fanindra Nath Banerji* v. *King-Emperor* (2). I am clearly of opinion that the two cases, I have referred to, lay down the general principle to be applied by Judges in preparing the heads of charge. But it is equally certain that one in considering the language used must not parse the headings of charge as if they were an indictment. The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the learned Judge gave to the Jury and that they were right and proper, then there can be no ground of complaint, even though the phraseology and form adopted might be open to question; *Hooper* v. *Emperor* (3) clearly lays this down. What one has to see and consider from the words used is the direction given, and that it was fair and right. Mere informality in expression or form would not be sufficient to invalidate the conviction. Thus it is for us to construe the heads of charge as best we can, and considering the form adopted by the learned Judge in this case one must be guided by the sequence of legal considerations which affected his mind as set out in the heads of charge. We must bring our reason and common sense to bear upon the consideration of the document, and if we satisfy ourselves from a close inspection and examination of the record set forth by the learned Judge, that he properly directed the Jury in point of law, we must decline to interfere with the verdict of the Jury. Now in the headings of charge in the present case the Judge sets out the charges under which the prisoners were arraigned and the particular sections under which the prosecution was brought. He deals in sequence with every material section bearing upon the main charges coupled with the nature of the evidence given. He keeps in sequence the section applicable to injury done to the immoveable property distinct and separate from the other sections dealing with injury done to the person. He draws the attention of the Jury to how far intention and knowledge are essential ingredients in the commission of crime. He explains the nature of the joint

(1) 34 C. 698; 11 C. W. N. 666; 5 Cr. L. J. 427.

(2) 1 Ind. Cas. 970; 36 C. 281; 5 M. L. T. 97; 13 C. W. N. 197; 9 C. L. J. 199; 9 Cr. L. J. 452.

(3) 21 Ind. Cas. 686; 14 Cr. L. J. 638; 12 A. L. J. 149.

act where more than five persons are involved in the commission of the joint wrong, and, taking the whole of his direction as embodied in the heads of charge, we are satisfied that he directly brought to the Jury's mind every matter and legal consideration having regard to the evidence that was necessary for the Jury to know and to understand. While I fully admit that in the form in which he has prepared his heads of charge they are not as full and as satisfactory as they might be, nevertheless, reading them and considering them and giving them an intelligent and reasonable construction, I have no doubt that in substance he discharged his duty to the Jury and gave them a full and detailed direction in law and amply sufficient for them in considering the evidence for and against the prosecution. This disposes of the *first* and main ground in the argument addressed to us.

The *second* objection that is taken is, that the Judge, in addressing the Jury as to the evidence or the value of the evidence of the two peons who were called as Court witnesses, was unfair, inasmuch as, it is alleged, he made a suggestion to the Jury in considering and weighing the evidence of these witnesses, that was not warranted by the evidence, and that thus he was unfair to the defence. The actual words used were as follows: "Are you prepared to accept that story, or would you consider it as more likely that if the peons went to the village at all, they left it at least as early as midday?" At first I was under the impression on Mr. Sinha's opening of this case, that that was a mere suggestion by the Judge not warranted by the facts, but that impression which I formed, rapidly dissolved when I came to consider and weigh the evidence of the two peons themselves. I think it is abundantly clear on the evidence of these two peons, that they were merely pawns in the hands of Eknath Sahay, who did his bidding and took instructions from him and in whose house they stayed. It was manifestly clear that this suggestion which the Judge did make was one which might be made with every show of reason and with justice. The story told by these peons is an incredible story, and in testing the truth of the evidence which they gave, one cannot leave out of consideration the fact that these witnesses are in no sense disinterested parties, but are pledged up to the hilt as witnesses for the defence. The suggestion made by the Judge was not in violation of the evidence but was consistent with it, and was obviously given to the Jury as a reasonable means of reconciling the conflicting cases of the prosecution and the defence. On this ground we likewise consider there is no reason for our intervention.

The *third* ground alleged for challenging this conviction is that in reference to the *alibi* defence of prisoner No. 2, Bissessar Dayal. This gentleman is a law student, 27 years of age, and a School Master at Bahr. He produced evidence for his defence on the trial that he was in attendance in discharging his academical duties at the School on September the 10th, the day that the outrage was committed, and that, therefore, he did not take part in the unlawful assembly which was organised by his father. The Judge accurately and carefully set out the evidence in support of this prisoner's *alibi*, and the misdirection relied upon is, in telling the Jury that there was no application by the prisoner for cancelling the last two days of his leave, he having been given leave from the 6th for 6 days, inasmuch as the Head Master stated that there was no register kept for recording rescinded leave. As I have said at the beginning of my judgment a Judge is not bound to discuss every little particular and detail of the defence. His duty is, and no more than this, to direct the Jury's attention to the salient features of the case. The omission of the Judge in not stating that the Head Master stated no register was kept for recording rescinded leave, was entirely immaterial to the main matter of defence which the prisoner wanted submitted to the Jury, and I am satisfied that the Judge was not necessarily bound to so inform the Jury, and that if he did not, his omission would not involve such irregularity as would amount to a failure of justice. Likewise on this heading we think there is no ground for our interference. I think the Judge, in his conduct towards this second prisoner, exercised a masterful forbearance, because had he so wished there was ample justification for saying and suggesting to the Jury that the entry of his attendance in the register on the 10th of September was a fraudulent concoction. But without making any suggestion

in disparagement of the *alibi* this prisoner gets, so far as the Judge is concerned, the most favourable consideration for his defence

The *4th* ground alleged of misdirection, is that the Judge kept back Exhibit 15, a letter written by the Head Constable to a superior officer on the evening of the 10th September, and did not contrast it with the contents of the first information made by the complainant and referred to as Exhibit 3. It is solemnly suggested that because the Constable, who had only come upon the scene about 6 o'clock, did not record in the letter that he wrote to his superior officer the incidents of looting, burning of property and plunder and injury to women, all matters referred to in the first information made by the complainant, that the Judge should have stated or told the Jury either that the Constable did not see anything at all, or that the information contained matters that were not true. The Constable only related what he saw, namely, a man lying dead, having been killed by a wound inflicted by a sword, and another man lying on the roadway gravely injured. In my view the learned Judge was quite right in not contrasting the letter of the Constable with the evidence contained in the first information. It was not a document on oath, it was not a document for which the complainant was in any way responsible, it was nothing but the record of what the Policeman himself saw, and it would be obviously improper to utilise that letter contrasted with the first information made, either as effecting the *bona fides* of the Policeman or the justice of the complaint made by the complainant. Thus on this ground we see no cause for our intervention.

The *5th* ground that has been alleged for challenging this verdict is, that the Judge did not state to the Jury the substance of the medical evidence in so far as it showed that Ram Lal Rai's stomach was empty of human food, it having been proved by his son that he and his father had had their breakfast about 11 o'clock, and that thus, having regard to the ordinary period of digestion, death must have been caused at an hour different to that alleged by the prosecution, coupled with the additional fact that when the Constable arrived upon the scene at 6, blood was seen oozing from the wounds of the deceased. The Judge himself says that he directed the Jury's attention to the medical evidence. The doctor's deposition was put in evidence, the Jury had it or its substance before them, and even though the doctor was submitted for cross-examination by the defence he was not asked a single question or cross-examined by the defence as to this alleged ground for asking us to intervene. The entire argument is based upon speculation, and we see no ground whatsoever for impugning this verdict on any such frivolous pretext.

The *6th* ground of misdirection that is alleged is, that the Judge should have pointed out the improbability of the case for the prosecution, that Eknath sent the letter to the Police on the morning of September the 10th, warning them that there was likely to be a disturbance and requiring their aid. It appears that the Government Prosecutor in stating the case to the Jury said that Eknath was the author of the letter alleged to have been written by the peon to the Police. At first I thought, that if that statement was made and was manifestly untrue, it might have affected the Jury's mind, but I am satisfied on reading the evidence of the peons that the Judge would not have been warranted in fact or law in making any such statement to the Jury as it is suggested he ought to have made. The bringing into existence of this letter was entirely the work of Eknath, and the peon was his willing implement to carry out his purpose and object, whatever they may have been. No doubt, he did not write the letter physically, but it was the creation of his brain, and thus there was no earthly reason why the Judge should tell the Jury that it was an improbable story that Eknath should have sent that letter to the Police on the evidence that was before the Court and Jury. Likewise we see no ground for our intervention in respect of this alleged misdirection.

The *7th* is the next ground of objection, and it is stated that the Judge should have drawn the attention of the Jury to the time when it was recorded that the Police received the peon's letter at 3 P. M. on the 10th of September, when it is alleged that the letter was sent at 6 A. M., on

that morning and delivered at the Police barrack 7 miles away at 9 A. M.; and that by reason thereof, the conduct of the Police was so malicious and suspicious as to amount to evidence of collusion on the part of the Police with the Rajputs coupled with the fact that the Police Inspector when he came to Dhodhochak to investigate this outrage stayed at the *kutchery* of the accused's greatest enemy. I see no evidence of collusion or suspicion on the part of the Police in carrying out their investigations in this case. If charges of this kind are to be made against Public Officials, they must be made on evidence warranted to support them; and it is the merest pretence to suggest that the Police were involved in collusion with the Rajputs as to the incidents connected with this outrage. There is not a shred of legal evidence to justify it, and, in my opinion, it is wholly unwarranted; nothing but a vain and unfounded suspicion. But probably the most effective answer to it is to be found in the petition for bail sworn by the accused Eknath himself, Exhibit 4, clause (1), wherein, while suggesting collusion, no attempt is made to impeach the conduct of the Police, and collusion is only alleged as against the arch-enemy of Ekanth, Ram Hari. In my opinion the Judge was perfectly right in not telling the Jury that they should draw the inference of collusion on the part of the Police for the reasons stated. Therefore on this ground we see no cause for our interference.

The eighth ground of misdirection alleged is, that the Judge should have told the Jury that it was unlikely that Eknath should injure his own property, he having become the purchaser of Ram Lal Rai's house and property under the decree in the bond suit which he had obtained against him, and that, therefore, it being his own property, in no sense could it be said that even if he did injure it he was guilty within the meaning of the term "mischief" as defined by section 425 of the Indian Penal Code. However, it is not necessary to labour this matter, because the Jury have acquitted the accused of having unlawfully assembled to do mischief. But irrespective of that I can see no misdirection by the learned Judge whatsoever on this aspect of the case, because I think he fairly and fully put before the Jury every matter that was necessary and proper in support of the defendants' case, and I think it is quite impossible to support this contention as a ground of interference by us.

Now I come to ground No. 9, which deals with the important question of motive, and on this aspect of the case Mr. Sinha pressed us very strongly that the Judge has been guilty of great unfairness in his discussion with the Jury on the question of motive. On page 2 of the heads of charge the Judge commences to set forth the various contentions put forward as to the motive that was suggested in this case, namely, whether the motive was stronger on the part of the Rajputs to make a false case against Eknath and his party, or was stronger on the part of Eknath to commit the crime. And whereas Mr. Sinha takes no objection to the first part, and indeed the major part, of the Judge's summary on the question of motive, but admits it is quite fair, he objects to the concluding passage which runs as follows: "Taking the litigation along with the examination of Eknath under section 342, Criminal Procedure Code, the Jury will consider whether the feelings of the accused towards the Rajputs of Dhodhochak are friendly or hostile, if hostile, whether any argument as to what exact method would be likely to be taken by him in satisfying his grudge would have sufficient weight to enable them to reject the direct evidence." This is the only part of the Judge's charge on the question of motive to which Mr. Sinha takes objection. The phraseology of this clause is not what one would have desired, it is obscure; but when analysed it means no more than this that the Judge told the Jury that speculation as to the method by which Eknath might give effect to his feelings to satisfy his grudge against the Rajputs, if he had any, would not be sufficient to justify them in the rejection of direct evidence. If that is the meaning of this phrase, and I think clearly it is, then surely there is no misdirection whatsoever, because the Judge was obviously right in telling the Jury that speculation as to motives in a man's mind, and the method by which he intends to put those motives into action, cannot override the direct evidence of established facts.

In our view we are clearly of opinion that this clause of the Judge's charge, which I have read out *in extenso* and which has been objected to so strongly by Mr. Sinha, is not in law any misdirection whatsoever. We cannot say whether the motive was stronger to make a false case than that Eknath should commit this crime. However, that was a matter entirely for the Jury and there was undoubtedly evidence to support the finding at which they arrived as a question of fact, and thus on this ground there is no cause for our interference. Undoubtedly the Jury were entitled to take into consideration the letter of Eknath to Somar for the purpose of showing the bent and tendency of his mind to drastic action.

The 10*th* ground of misdirection that is alleged is that the Judge should have drawn the attention of the Jury to the evidence of Chocha Rai Guru before the Committing Magistrate, as to the evidence that he gave before him, when he omitted to state that he saw an assembled mob coming from Panwara on September the 10th with Eknath at its head, and that he should have suggested to the Jury that this omission on the part of this witness was sufficient to discredit the rest of his evidence. Why, one has to only analyse the facts to see the absurdity of this contention, because on the cross-examination of this witness when he is challenged upon this very matter, it appears he told the Police two days after the commission of the crime the fact that he had seen the assembled mob coming to Dhodhochak on the 10th September and ready for action, and that the reason that he did not mention it before the Committing Magistrate was because he was not asked the question. I think the Judge was not bound to refer to this alleged discrepancy in this witness's statement, because it is quite clear from his cross-examination that there was no ground whatsoever for impeaching his credit in this respect, and even if the Judge did not draw the attention of the Jury to the evidence of this witness as given before the Committing Magistrate and as given subsequently in the Sessions Court, it would not be an omission or error which would involve a failure of justice. Therefore we see no reason for our intervention on this ground.

The 11*th* ground on which we are asked to set aside this verdict is, that the complaint was made so tardily after the commission of the crime, that it was evidence on which the Jury might find that the complaint itself was not *bona fide*. And it was suggested that the Judge was wrong in not telling the Jury that the complainant took no step to make his complaint to the Police till they arrived at the village of Dhodhochak at 6-15. I cannot see that there was any tardiness in the making of this complaint, taking all the circumstances into consideration, the hour, the surrounding conditions, the condition of riot that must have existed during the occurrence and for some time after, and the fact that the Police barrack was 7 miles away, point conclusively to the result that there was no undue delay on the part of the complainant in giving information to the Police as to the incidents that had taken place. The moment the Police arrived on the scene, there and then the complaint is made and at 6-15 on the day of the outrage the officers of the law are put in motion by the complainant. We cannot see that there was any delay or that the Judge would have been warranted in telling the Jury there was such delay as would have impressed the complaint that was made with a false character.

The 12*th* ground that is alleged is, that the absence of the female members of the complainant's family from their house on the day of the outrage showed a premeditated design on the part of the Rajputs to put up a fight. I do not agree with this inference at all. I think Ram Lal knew execution and attachment of his property was to take place on that day, and that no doubt with a view of defeating an attachment the female members of his house left with such personal belongings and chattels as they were capable of taking with them from the wreck, but the absence of the females of this household does not at all warrant the assumption that their absence was indicative of the Rajputs as aggressors. We see no ground for our interference in this respect.

The 13*th* ground of misdirection is, that the Judge should have told the Jury

or directed their attention to the unlikelihood of Eknath retaining 4 of the cattle that were stolen while disposing of all the rest of the booty and plunder. I do know from the evidence set out in the heads of the Judge's charge that he deals with the question of cattle, that he puts forward the case for the prosecution and the defence and he invites the Jury to express their opinion as to whether they believe the evidence of the Police Inspector as to having found 4 heads of cattle in the house of Eknath, or whether they believed the evidence of the Tikkadar. I think that was quite a proper direction and the Judge sufficiently reviewed the case to enable the Jury to come to a right conclusion.

The 14*th* ground of misdirection that is alleged is, that the Judge should have directed the Jury's attention to the evidence of the Court witness No. 3, as to the ownership of the cattle. I have no doubt that this witness's evidence was fully relied upon by the learned Vakil on behalf of the defence, that all that could have been suggested in support of this witness's evidence was said, so far as it was calculated to support the defendants' case. But this witness appears to me wholly unworthy of credit. He is really a defence witness and in no sense a disinterested witness, and appears himself to have taken part as one of the mob in the incidents of that day. However, I think the Judge was in no sense bound to have directed the Jury's special attention to this witness's evidence, he having fully and carefully dealt with the salient and outstanding features of the general defence made for the prisoners in this aspect of the case. As to this and the previous ground the prisoners are in no way affected or prejudiced, because they have been acquitted of both charges in respect of which the facts alleged in this and the previous ground are applicable. Therefore on this ground also we see no ground for our interference.

The 15*th* and last ground that is suggested of misdirection is, that the Judge did not call the attention of the Jury to the respective dates when the witnesses were examined by the Police. Between midday on the 11th of September and 17th of September there were no less than 21 witnesses examined, who made statements to the Police as to what they had seen taking place in reference to the outrage that occurred upon the 10th of September. 19 of the 21 were eye-witnesses to the occurrence itself. I think, to say that there was any laxity or want of care or want of expedition in preparing the case for the prosecution is without any foundation, and the Judge would not have been warranted in stating any such fact to the Jury as is suggested, because in every particular the Police proceeded with the preparation of their case as rapidly as human affairs will admit under the circumstances.

The grounds alleged in 11, 12, 13 and 24 of the grounds set forth in the notice to appeal have been abandoned. I desire to quote the following passage from Lord Alverstone's judgment in the *King* against *Stodhart*, Second Criminal Appeal, page 256, where he says, "mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively." Judging by the test there laid down and from the general principles established by the innumerable cases that have been referred to, more especially by the dictum of Lord Halsbury as reported in *Bal Gangadhar Tilak* v. *Queen-Empress* (4) and *Queen-Empress* v. *Nimchand Mookerjee* (5), we are clearly of opinion that in this case there has been no misdirection by the learned Judge on any of the grounds suggested in the petition of appeal, nor has the Judge refrained from putting fairly and honestly before the Jury the salient and prominent features of the case for the defence. I think it would be more desirable, in cases involving such gravity as the present one, that they should be tried by the Senior Judge in the District and not delegated to some Junior

(4) 22 B. 528 at p. 532 (P. C.); 25 I. A. 1.
(5) 20 W. R. 41.

Additional Judge, who may not have the same extensive experience of criminal law and criminal trials as the Senior Judge. But we desire to add that no reflection of any kind can be made upon the learned Judge who tried this case nor upon the Jury.

It remains to consider the propriety of the sentences which the learned Judge has thought fit to impose upon these five prisoners. In my judgment a man of the type of Eknath Sahay is a living and evil danger to any community. He has been sentenced to transportation for life and he has been fined a sum of Rs. 3,000 for causing grievous hurt to Ram Lal. Having regard to his age and also to the fact that it was not his hand that caused the death of Ram Lal we think the sentence is somewhat heavy. We shall, therefore, reduce in his case the punishment to one of transportation for 10 years and the fine of Rs. 3,000 will stand. As to his son Bissesser, the 2nd prisoner, he has been awarded transportation for seven years and a fine of Rs. 1,000. In his case we shall moderate the sentence to one of five years' rigorous imprisonment and the fine will stand. Ram Lal Goala is the 3rd prisoner. His was the hand and by his deed Ram Lal's life was taken, because it is established that he was seen giving a blow which of itself was sufficient to cause death. He has been sentenced to transportation for life. There will be no change in the punishment awarded to him. Amrit Goala has been awarded transportation for life. He appears to have held down Ram Lal while the other man, the 3rd prisoner, struck him, a cowardly and shameful crime and, in my opinion, just as bad as the crime of the man who inflicted the blow which caused death. Therefore in his case there will be no change in the punishment awarded. Basudeo Goala, the 5th prisoner, appears only to have given one blow to Soma Rai. Fortunately his life was not taken, and he is still a living man. The crime was a dangerous one. We shall alter his sentence to one of 5 years' rigorous imprisonment.

JWALA PRASAD, J.– I concur with my learned brother that it has not been shown that there was any misdirection in point of law, or that the case for the defence was not fairly and properly put to the Jury. A careful scrutiny of the heads of the charge recorded under section 367 of the Code of Criminal Procedure will hardly fail to impress one that the learned Sessions Judge has explained to the Jury the law applicable to the facts of the case, and has drawn the attention of the Jury to all the salient facts raised in the defence of the appellants.

We have given our best consideration to the arguments so ably advanced on both sides in this case and also to the evidence that has been brought to our notice in the course of the arguments. It is needless for me to repeat the reasons given by my learned brother to dispose of, *seriatim*, the various objections raised by the learned Counsel for the appellant. It is sufficient to say that it has not been shown that the verdict of the Jury was obtained on account of any misdirection by the Judge, or on account of their not having fully and sufficiently appreciated the law or the facts in this case. It is impossible to hold that the accused were in any way prejudiced, or that there has been a failure of justice in this case.

I also agree with my learned brother in the modification of the sentences passed upon some of the appellants.

Appeals dismissed;
Sentences reduced in some cases.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 697 OF 1910.

July 13, 1910.

Present:—Mr. Justice Harrington and Mr. Justice Teunon.

MANINDRO NATH MITTER—
ACCUSED—PETITIONER
versus
BENGAL NAGPUR RAILWAY Co.—
OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 68, 112, offence under, essence of– Knowledge of breach of Railway rules, if evidence of intent to cheat—Rules, posting of, on Stations – Presumption of knowledge.

The fact that a passenger is travelling by a Railway train and, on being called upon, produces a ticket bearing date of a previous day throwing away another in his possession, cannot lead to an inference of dishonest intention so as to justify a conviction under section 112 of the Railways Act, the essence of the offence under that section being an intent to defraud the Railway Company. [p. 667, col. 1.]

MANINDRO NATH MITTER *v.* BENGAL NAGPUR RAILWAY CO.

In the absence of any evidence from which it can be clearly inferred that a passenger knows that the ticket he is holding has been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger is aware that he is committing a breach of the Railways Act or rules framed thereunder. [p. 366, col 2.]

Where there is nothing on a ticket intimating to its holder that, under the Railway rules, it is only available for a particular train or on a particular day, his knowledge of the Railway rules cannot be inferred from the fact that the rules have been posted on the Railway Stations, unless and until it is proved that the attention of the particular traveller was drawn to them. [p. 667, col. 1.]

Babu *Birendra Chandra Das* (for Babu *Jadu Nath Kanjilal*), for the Petitioner.

Babu *Manmatha Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside, on the ground that the facts found did not disclose the commission of any offence under section 112 of the Railways Act (Act IX of 1890).

Section 112 of the Act makes it an offence in any person to enter a railway carriage in contravention of section 68 of the Act with intent to defraud a Railway administration and section 68 provides that no person shall, without the permission of a Railway servant, enter any carriage on a Railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

In the present case the petitioner was travelling on the 3rd May by a railway train, and when called upon to produce his ticket by a ticket checker he produced a ticket dated the 2nd of May. Now, it appears that though the ticket contained nothing on the face of it to show that this was the case, yet the rules of the Railway Company are that a ticket is only available for the particular railway journey for which it is issued and if a person is unable to travel, by the train by which he intended to travel then he ought to go back to the Station Master for a refund of the money he paid for the ticket. When he was called upon to produce his ticket, it is alleged, and found as a fact, that he had in his possession another ticket, similar to the ticket he produced, which he threw away; and when it was explained to him that this ticket was not available on that day, he offered to pay the fare. Now, the question is whether these facts justify a conviction for a breach of the provisions of section 112 of the Railways Act, bearing in mind that the essence of an offence under that section consists of an intent to defraud the Railway Company.

The learned Vakil who has shown cause against this Rule has argued that the possession of another ticket and the throwing it away indicate that the petitioner was dishonest. We do not think that that can be fairly inferred from the circumstances. The petitioner might have known that he was committing a breach of the Railways Act or rather of the rules regulating the Railway, but we think that until there is evidence from which it could be clearly inferred that he knew that the ticket had been used before, it is very difficult to say that there is anything from which an intention to cheat the Railway Company could be inferred. In this particular case there is no evidence to show that the ticket was issued to any other person than the petitioner and there is no evidence that the ticket in question had been used before. The inference, therefore, is that the ticket properly represents a fare which had been paid and for which the holder of the ticket is entitled to travel by the intended train. Even supposing that a breach of the rules was committed and the man knew that he ought not to have travelled on the 3rd, we think it is very difficult to say that he intended to cheat the Railway Company as long as he held a ticket which represented the fare paid. He chose to avail himself of the ticket on a wrong day instead of going direct to the Station Master for a refund of the money or for a ticket in return—but in that state of facts he would have had, we think, consideration for the money paid and the Railway Company would have received the price of that journey, namely, the cost of the ticket.

With reference to the main knowledge of the Railway rules, it is strenuously argued that the ticket was not available on the following day; but it is to be observed that though these rules are said to

be posted upon the Railway Stations, there is nothing to show that the attention of this particular traveller was ever drawn to them and it is a very strong circumstance, we think, that when this ticket is looked at, there is nothing on the face of it or on its back which would intimate to the holder of the ticket that it was only available for a particular train and we think that, in the absence of any such intimation, it was quite possible for the man to think that it was genuinely usable for another train on the day on which the ticket was issued and perhaps for a train on the day following. The essence of the offence to defraud the Railway Company has not been proved in this case.

For these reasons we think that the conviction and sentence of the petitioner cannot stand.

We, therefore, set aside the conviction and sentence and acquit him.

The fine, if paid, must be refunded to the petitioner.

Conviction quashed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 22 OF 1916.
(CRIMINAL REVISION PETITION NO. 19 OF 1916.)

March 31, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

In re RATHNA PADAYACHI—

1ST ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 199—"In his absence", meaning of—Enticing married woman from father's control—Right of father to complain, when husband stands by—Penal Code (Act XLV of 1860), ss. 498, 499.

The words "in his absence" in section 199 of the Code of Criminal Procedure, refer to the original entrustment and not to the time of the complaint, and the restriction is not intended to afford immunity to an offender but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate. [p. 668, col. 1.]

The object of the law is not so much to afford protection to the husband or the guardian, as to inflict punishment on those who interfere with the sacred relation of marriage. [p. 668, col. 1.]

Where, therefore, the wife was not under the care of her husband at the time when the accused enticed her away and the husband, learning of the elopement, went away and the complaint was filed by the father, without consulting the husband, the latter not being anxious to complain:

Held, that the fact that the husband stood by, did not prevent the temporary guardian from preferring the complaint. [p. 668, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary 2nd class Magistrate, Chidambaram, framing a charge against the petitioner under section 498, Indian Penal Code, in Calendar Case No. 383 of 1915 on his file.

Messrs. *E. R. Osborne* and *P. R. Narayanasawmy Aiyar*, for the Petitioner.

Mr. *P. R. Grant*, for the Public Prosecutor, for the Crown.

ORDER.—The father is the complainant in the case. The facts deposed to by the father of the girl are these: while his daughter was living with him, the accused enticed her away on the 20th of July, 1915, that the husband was aware of it, that he came in search of his wife but went away on learning of the elopement and that this complaint was filed without consulting the husband. In another place, his deposition implies that the husband was not anxious to complain.

On these facts, which have been spoken to by the other witnesses, a charge under section 498 of the Indian Penal Code was framed.

Mr. Osborne asks this Court to cancel the charge. His chief argument is that as the husband has not chosen to complain, it is not competent to the father to institute proceedings. The learned Counsel lays

stress on the words "in his absence", in section 199 of the Code of Criminal Procedure, and contends that it is only where the husband has authorised, either expressly or impliedly, the filing of the complaint, that the Courts can take cognizance. I am unable to accede to this argument. My reading of the section is this: "No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman (who had care of such woman) or, in his absence, by some person who had care of such woman on his behalf." I am prepared to concede that if the wife was under the care of her husband at the time of the offence, and the husband does not want that proceedings should be instituted, it is not open to a person, whether he be the father or the brother, to institute a complaint. But where at the time of the offence, the wife was left under the care of another, the fact that the husband stands by will not prevent the temporary guardian from preferring the complaint. The words "in his absence" refer to the original entrustment and not to the time of the complaint.

Mr. Osborne contends that the object of the Legislature is to protect marital rights, and that, if the husband is unwilling to prosecute, it is not open to others to interfere. It is true the law is designed to protect the rights of the husband; but that is not its sole aim. The violation of the rights of guardianship is also entitled to its protection. I am further of opinion that the object of the law is not so much to afford protection to the husband or the guardian, as to inflict punishment on those who interfere with the sacred relation of marriage.

The restriction in section 199 is not intended to afford immunity to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate.

The learned Counsel admits that he is unable to quote any authority for the position taken up by him, nor have I been able to come across any decision which has considered this point. Nonetheless, I feel no doubt that the construction sought to be placed on the section by the petitioner is not right.

I dismiss the petition.

Petition dismissed.

V. R. P.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 119 OF 1915.

November 23, 1915.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MITHO *wd.* RASHID AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Forest Act (VII of 1878), ss. 41 (b), 42—Rule 4, framed by Government of Bombay under s. 41 (b)—Ultra vires—Interpretation of Statutes—Laws curtailing common law rights or imposing new obligations—Doubtful expression, effect of.

Rule 4 of the Rules for Sind framed by the Government of Bombay under section 41 (*b*) of the Forest Act, prohibiting the moving of timber from private land without a certificate from the holder or manager of such land, is *ultra vires*; consequently a conviction for a breach thereof, under section 42 of the Act, is illegal. [p. 669, col. 2.]

Where the words of a Statute leave the intention of the Legislature in doubt, the Courts will lean against the construction which imposes a burden on the subject. A law which interferes with common law rights or imposes fresh obligations must not operate through implication, but should be expressed in clear and unambiguous language. [p. 669, col. 2.]

Application for revision against the order of the 1st class Magistrate, Kotri.

Mr. *Kimatrai Bhojraj*, for the Applicants.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The four accused were moving eleven camel-loads of firewood which had been lopped on the lands of Seth Vishindas, when they were arrested by a Forest Officer at a place within 3 or 4 miles of two Reserved Forests.

The first class Magistrate, Kotri, has convicted and fined them under section 42 of the Indian Forest Act, 1878.

Section 42 of the Forest Act merely gives power to impose penalties for breach of rules made under section 41.

The Magistrate has not referred to any such rule, but the Public Prosecutor attempts to support the conviction under the rules made for Sind under section 41 (*b*) of the Act and printed at pages 281 and 282 of Bombay Rules and Orders, Vol. I.

Now of the six rules for Sind, rules 3 and 5 refer to firewood brought for sale in specified cities and do not apply.

Rule 3 refers to the produce of Reserved or Protected Forests and is, therefore, equally inapplicable.

Rule 4 deals with the moving of timber (which term includes firewood) in quantities sufficient to make a cart-load or camel-load from land not included in Reserved or Protected Forests. It, therefore, applies to the present case. It prohibits such moving from:—

(*a*) Private land without a certificate from the holder or manager of such land or from

(*b*) Government waste land, without a certificate from the Tapadar.

Under this rule the accused should have been provided with a certificate from Seth Vishindas or his manager.

Rule 6 is merely a corollary to the previous rules and requires the passes or certificates to be produced on demand.

But there is an addendum to rule 6 made by a subsequent notification which gives the Conservator of Forests power to authorize the owner of timber, etc., or his manager to issue passes, for the moving of such timber, etc., and generally regulates the procedure governing the issue of such passes.

It is difficult to understand why this addendum is attached to rule 6. It has no connection with rule 6 at all and seems to have been intended to be an addendum to rule 3. The object was probably to enable contractors to issue passes for the removal of timber felled in Government Forests. At any rate the addendum does not in any way affect rule 4, for rule 4 contemplates a certificate of the owner of the land while the addendum refers to a pass by the owner of the timber.

The case, therefore, depends solely on rule 4. Is that rule a good rule and did the accused commit an offence in moving timber from Seth Vishindas's land without his certificate?

We agree with the contention of the applicants that rule 4 is *ultra vires*. Section 41 (*b*) empowers the Local Government to make a rule prohibiting the moving of timber either

(*a*) without a pass from an officer duly authorized, or

(*b*) otherwise than in accordance with the conditions of such pass.

Now (*b*) may be left out of consideration for it does not come into operation till the pass is issued.

But (*a*) requires as a condition "a pass from an officer duly authorized." Rule 4 imposes the condition of a certificate from the holder or manager of the land. A certificate is not a pass—for a pass implies a license to pass or move, and rule 6 appears to distinguish passes and certificates. Again, even if it be conceded that the certificate is intended to be equivalent to a pass, there is this further difficulty that the landholder or manager is nowhere authorized to issue passes. Therefore, while the section requires a pass by a person authorized, the rule under that section requires the certificate of a person not authorized. It is argued that the rule itself implies an authority to every holder or manager of land to issue passes or certificates. We doubt if that was the intention and when in doubt we must lean against the construction which imposes a burthen on the subject. A law which interferes with common law rights or imposes fresh obligations must not operate through implication. It should be expressed in clear and unambiguous language. We consider that rule 4 of the said rules under section 41 of the Forest Act is *ultra vires*.

We, therefore, reverse the convictions and order the fines, if paid, to be refunded.

Convictions reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 33 OF 1916.

April 13, 1916.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

UDHASING TAHILSING AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), ss. 107, 120B—Criminal Law Amendment Act (VIII of 1913), s. 3—Abetment by conspiracy—Option of prosecution to proceed under s. 107, or s. 120B—"Where no express provision has been made for the punishment of such a conspiracy," meaning of.

Where an offence is committed in conspiracy, it is optional for the prosecution to proceed either under section 107, Penal Code, for abetment of the offence by conspiracy, or under section 120B of the said Code as amended by the Criminal Law Amendment Act, 1913, for the conspiracy as a substantive offence. [p. 670, col. 2.]

The words "where no express provision has been made in this Code for the punishment of such a conspiracy" in section 120B, do not mean that when there is proof of an abetment of an offence, the charge should be for such an abetment. They only include cases where there is express provision for the punishment of the particular conspiracy alleged and the only such case in the Penal Code is that under section 121A. [p. 670, col. 2.]

Application to revise the appellate order of the Sessions Judge, Sukkur, against the order of the Sub-Divisional Magistrate, Shikarpur.

Mr. *F. J. de Verteuil*, for the Applicants.

Mr. *C. M. Lobo*, (Second Assistant Public Prosecutor, Karachi), for the Crown.

JUDGMENT.—This is an application for revision in the case of four applicants who, with seven others, have been convicted by the Sub-Divisional Magistrate, Shikarpur, of an offence under section 120B of the Indian Penal Code.

The conviction and sentences passed by the Sub-Divisional Magistrate were confirmed in appeal by the Sessions Judge, Sukkur.

The case for the prosecution was that all these eleven accused and others had entered into a conspiracy to cheat the public and that there was evidence of particular offences of cheating committed by different members of the gang at different times.

Mr. de Verteuil urges that as there was against his clients definite evidence that they cheated a man named Utamsing, the prosecution should have proceeded against them under section 420, in respect of that particular act of cheating and not generally under section 120B. He contends that his clients have been prejudiced, because if the charge had been under section 420, the evidence adduced would have been differently appreciated. We do not understand why there should have been a different appreciation of evidence if the charge had been under section 420, instead of under section 120B. The question under either section would have been whether certain acts were proved and the intention with which the acts were done. The conclusion on these points would have depended upon the credibility of the evidence. Similarly if a man were charged with riot, it would be no defence to say that he should have been charged for a particular offence of hurt committed by him in the course of that riot. This is not a case in which the trying Magistrate has applied a different section in order to grasp at jurisdiction over an offence which he is not competent to try.

The *next* point raised is that the application of section 120B is excluded by the words in the section "where no express provision has been made in this Code for the punishment of such a conspiracy." These words do not mean that when there is proof of an abetment of an offence the charge should be for such abetment. It only includes cases where there is express provision for the punishment of the particular conspiracy alleged and the only such case in the Code is that under section 121A, Indian Penal Code. It is optional for the prosecution to proceed for abetment of the offence by conspiracy under section 107 or for the conspiracy as a substantive offence under section 120B. This is in accord with the law in England.

Lastly, it is urged that there is no evidence to support the conviction. But the general conspiracy to cheat has been proved not only by the particular instance of cheating in which accused were concerned, but by the fact that accused were associated with other members in the gang against whom other acts of cheating have been proved and further by the similarity of the methods employed in no less than a dozen different cases.

We see no reason to interfere with the sentences. The Sessions Judge has dis-

criminated between different appellants and correctly appreciated the degree of their guilt.

Application rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 183 OF 1915.

January 7, 1915.

Present:—Mr. Pratt, J. C.

JAGAN NATH—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 482, 486—Merchandise Marks Act (IV of 1889), s. 15—Using false trade mark—Limitation for criminal prosecution—"First offence", meaning of.

The recourse to Criminal Courts under sections 482 and 486, Indian Penal Code, for use of false trade marks has been provided as a speedy remedy to traders who are diligent, and any prosecution not filed within three years from the date of the first offence will be barred by section 15 of the Merchandise Marks Act. [p. 671, col. 2]

Ruppell v. *Ponnusami Tevan*, 22 M. 488; 1 Weir 821, referred to.

The expression "first offence" in section 15 of the Merchandise Marks Act, must be construed as the first offence of the series of similar offences regarding the same trade mark [p. 671, col. 2.]

Appeal against the order of the Additional City Magistrate, Karachi.

Mr. *T G. Elphinston*, for the Appellant.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The accused has been convicted of offences under sections 482 and 486, Indian Penal Code, and sentenced to pay a fine of Rs. 200.

The conviction relates to a trade mark on imitation German gold thread imported by the accused in January or February 1914, and detained by the Customs on the information of the complainant, who is the agent of the manufacturers of Russian gold thread.

The Russian trade mark is Exhibit 2 and its essential features are, as stated in the complaint, two queens, one bearing the scale of justice and the other a shield and seated on a floor beneath which are instruments of weaving.

It is proved by the evidence of the Peshawar dealer, Seth Karimbux, that the trade mark has been used for 40 years in gold thread imported from Russia and that the thread described by that mark has acquired a reputation in the Indian market.

I agree with the Magistrate that Exhibit 5, the trade mark on the goods imported by the accused from Germany, is a gross counterfeit. In all the essentials, *i.e.*, the two queens with the scales and shield and the instruments of weaving, it is identical with the Russian trade mark. The difference is only in matters of detail. A floral design and letters have been substituted for a crown, and the word "Moscow" and an Indian god for a shield in the centre of the design. But these differences do not affect the impression produced by the trade mark as a whole and the impression is deceptive. It is reasonably calculated to cause it to be believed that the goods are the Russian goods.

But although the trade mark is false and fraudulent, the accused is not to be dealt with criminally unless the prosecution has been filed within the time limited by section 15 of the Merchandise Marks Act, IV of 1889.

The Magistrate has dealt with the question of limitation within one year of the first discovery, but has not considered whether the prosecution has been filed within three years of the first offence.

The expression "first offence" must be construed as the first offence of the series. As pointed out by the Madras High Court in *Ruppell* v. *Ponnusami Tevan* (1), the recourse to the Criminal Courts is only provided as a speedy remedy to traders who are diligent. If the words "first offence" were applied to the most recent instance of use of a false trade mark it would be open to the party aggrieved to stand by for years and then take action, and this construction would render the provision of law as to limitation entirely nugatory.

Now I think it clear that the import of German imitation thread under a counterfeit trade mark has been going on for many years. The appellant's own witness admits

(1) 22 M. 488; 1 Weir 821.

that this thread has been imported for 30 years. The evidence for the defence shows that accused and other merchants have been importing it prior to 1895. Before 1895 the German trade mark was an even more exact copy than at present. It was Exhibit 21, displaying not only the queens and the instruments of weaving, but also the shield and the crown and the word "Moscow" in Russian letters in the centre of the design. The Customs objected to the word "Moscow" as giving a false description of origin and then other variations were made such as Exhibits 32, 29 and 30. Mr. Raymond contends that these variations are different trade marks constituting different offences to that charged in the present case. But that is not so, for all these trade marks are in the essential particulars of the queens and instruments of weaving identical with the Russian trade mark, Exhibit 2, and the counterfeit, Exhibit 5. This label has been counterfeited many years ago and the accused has given documentary evidence of import under counterfeit labels since 1898 at least.

I must, therefore, reverse the conviction and sentence.

Conviction and sentence reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 46 OF 1916.

March 28, 1916.

Present:—Mr. Hayward, A. J. C.

ALLAHWARAYO—APPELLANT

versus

EMPEROR—OPPONENT.

Railways Act (IX of 1890)—Power of Magistrate to inquire about heirs of deceased Railway servant—Penal Code (Act XLV of 1860), s. 193—Conviction for perjury, legality of, where Magistrate not empowered to administer oath.

There is nothing in the Indian Railways Act, empowering a Magistrate to make an inquiry as to the true heirs of a deceased Railway servant.

A person giving false evidence on oath in such proceedings, cannot be legally convicted for an offence of perjury under section 193, Indian Penal Code, as the Magistrate has no authority to administer an oath.

Empress v. *Chaitram*, 6 A. 103, referred to.

Appeal against the decision of the City Magistrate, Karachi.

Mr. *Abdul Rahman*, for the Appellant.

Mr. *C. M. Lobo*, Second Assistant Public Prosecutor, for the Crown.

JUDGMENT.—The appellant has been convicted of giving false evidence in a proceeding before the Additional City Magistrate, Karachi, under section 193, Indian Penal Code.

The appellant's Counsel, Mr. Abdul Rahman, has unfortunately not appeared. But as the appeal involves a question of law the matter has been considered with the help of the Assistant Public Prosecutor, Mr. Lobo, on behalf of the Crown.

The appellant's false statement appears to have been made in proceedings held by the Additional City Magistrate upon an enquiry made as to the true heir of a deceased driver on the North Western Railway. It does not appear, however, that the Magistrate had any authority to hold any proceedings in such a matter. The proper course would have been to have referred the parties to the District Court for an enquiry under Regulation VIII of 1827, or other Special Act. There does not appear to be any authority for such proceedings by a Magistrate under the Railways Act. The Magistrate, therefore, in holding those proceedings was not a person authorised to administer an oath or affirmation in the exercise of powers conferred upon him by law within the meaning of section 4 of the Oaths Act, X of 1873. The appellant, therefore, was not legally bound by an oath or by an express provision of law to state the truth in those proceedings, within the meaning of section 191 of the Indian Penal Code. He could not, therefore, be legally convicted of having given false evidence under section 193 of the Indian Penal Code. This is supported by a somewhat similar case of *Empress* v. *Chaitram* (1).

The conviction must, therefore, be set aside and the appellant acquitted and discharged.

Conviction set aside.

(1) 6 A. 103.

KRISTA CHANDRA *v.* RATAN RAM PAL.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2021 AND 3306 OF 1914.

August 6, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Newbould.

IN S. A. No. 2021

KRISTA CHANDRA CHOWDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RATAN RAM PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. No. 3306

KRISTA CHANDRA CHOWDHURY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PRASANNA CHANDRA PAL—PLAINTIFF—RESPONDENT.

Hindu Law—Minor, guardian and manager of—Alienation of minor's property—'Benefit of minor's estate', meaning of.

An alienation by the manager of a Hindu infant's estate is justifiable not only when made owing to the necessities of the minor, but also when any benefit is caused to the estate by the alienation. [p. 674, col. 1.]

The rule is applicable not only to mortgages but also to sales. [p. 674, col 1.]

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonwerce*, 6 M. I. A. 373 at p. 423; 18 W. R. 81 *n.*; Sevestre 253*n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, explained.

Gooroopersad Jena v. *Mudun Mohun Soor*, Beng. S. D. A. 1856 p. 980; *Mohanund Mundul* v. *Nafur Mondul*, 26 C. 820; 3 C. W. N. 770, referred to.

But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular alienation is "for the benefit of the estate" within the meaning of the rule, as cases of speculative development of estates of minors are hardly intended to be included within its scope. [p. 674, col. 2.]

Appeal against the decrees of the Additional District Judge, Sylhet, dated the 14th April 1914, affirming those of the Officiating Munsif, 2nd Court, Habiganj, dated the 28th May 1913.

Mr. *A. Rasul* and Babu *Gopal Chandra Das*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Kali Kinkar Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of possession of a share of an estate on declaration of title by purchase. The share in dispute admittedly belonged originally to one Harendra Chandra Chakravarty, who attained his majority on the 21st September 1908. During his minority, there was a scramble for the acquisition of this share by two sets of persons, who may be called the Pals and the Chowdhurys. On the 19th March 1907, the Chowdhurys took a conveyance from the infant. On the 15th April 1907, the Pals took another conveyance of the same share from Sarat Chandra Chakravarty, the father of the infant, who was the *de facto* guardian and manager of his properties. On the 18th December 1909, the Chowdhurys took a second conveyance from Harendra with a view to fortify their title, which was obviously open to attack as based on a conveyance executed by an infant. On the 1st August 1912, the Chowdhurys commenced this action for declaration of title and recovery of possession, as the Pals had, on the 15th April 1912, instituted a suit for rent on the assumption that they had acquired a valid title by their purchase. The Court of first instance made a conditional decree in favour of the Chowdhurys for recovery of possession upon payment of Rs. 700 to the Pals, which represented the consideration paid by the latter to the vendor. On appeal, the District Judge has reversed this decision and has dismissed the suit. He has held that the conveyance by the guardian of the infant, executed on the 15th April 1907, is binding upon the latter and that there was consequently no subsisting title left in him capable of transfer to the Chowdhurys under the conveyance of the 18th December 1909. The District Judge has further found that as the share in dispute was infinitesimal and constituted an inconvenient and expensive property, the sale by the guardian was the act of a prudent person. On the present appeal the decree of the District Judge has been assailed, substantially on the ground that the sale by the guardian was not necessary and cannot be held operative against the infant merely because it was beneficial to him. In our opinion, this contention cannot be sustained.

The power of the manager of an infant heir was defined by the Judicial Committee in the well-known case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1). Knight Bruce, L. J. observed that the power of the manager for an infant heir to charge an estate not his own is under the

(1) 6 M. I. A. 373 at p. 423; 18 W. R. 81*n*; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

Hindu Law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. It is plain that in this passage a distinction is drawn between a case of need and a case of benefit of the estate. The actual pressure on the estate, the danger to be averted, refer to a case of need, and the benefit to be conferred upon the estate in the particular instance is thus differentiated from the other category mentioned. This view has been adopted and applied by the Indian Courts ever since the decision of the Judicial Committee was pronounced on the 26th July 1856. In the decision of a Full Bench of the Sudder Court in the case of *Goorooprasad Jena* v. *Mudden Mohan Soor* (2), where the judgment was pronounced on the 11th December 1856, apparently before the decision of the Judicial Committee reached this country, the same view was independently taken, and it was held that the benefit of the minor creating necessity was a test by which the legality of the transaction must be tried; the rule is that a party filling a fiduciary character, like that of a guardian, is authorised to perform any act which is manifestly for the infant's benefit. A similar view was adopted in *Mohamud Mondul* v. *Nafur Mondul* (3), where Maclean, C. J., and Banerji, J., held that a *de facto* manager of an infant's estate has, in case of necessity or for the benefit of the minor, power to sell his property. In that case the Court further declined to accept the contention that the rule laid down by the Judicial Committee was restricted to cases of mortgage or other forms of partial alienation and was not intended to apply to cases of sale.

Our attention has, however, been drawn to a passage from the standard treatise on the Law of Minors by Sir Ernest Trevelyan, 4th Edition, page 154, where that learned author states that there is no case where the sale of a minor's property has been upheld, except on the ground of its being justified by the necessities of the minor or his estate. The accuracy of this statement need not be disputed. But this does not show that the rule is restricted in its application to cases of necessity alone; the absence of judicial authority may be due to the circumstance that the point has not been regarded as open to serious argument. But it must be remembered that mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate" within the meaning of the rule, which could hardly have been intended to include cases of speculative development of estates of minors, *Radha Pershad Singh* v. *Musammat Talook Raj Kooer* (4), *Kaihur Singh* v. *Roop Singh* (5), *Ganap* v. *Subbi* (6). In the case before us there is no room for controversy, that the alienation was for the benefit of the estate and was such as a prudent owner of the estate might have made. In these circumstances it follows that the transaction was binding upon the estate of the infant and that it was not open to him, after he had attained his majority, to create a valid title by his conveyance in favour of the Chowdhurys on the 18th December 1909.

We have finally been invited to make some provision in the decree for recovery of the purchase-money paid by the Chowdhurys to Harendra on the 19th March 1907. But there are two insuperable difficulties in the way of the appellants. In the *first* place, there was no such claim made against Harendra in either of the Courts below, and, as he is not represented in this Court, it would not be right to make a decree against him on the ground suggested. In the *second* place, the money is alleged to have been paid to Harendra while he was still an infant. If a claim were now put forward against Harendra for recovery

(2) (1856) Beng. S. D. A. 980.
(3) 26 C. 820; 3 C. W. N. 770.
(4) 20 W. R. 38.
(5) 3 N. W. P. H. C. R. 4.
(6) 32 B. 577; 10 Bom. L. R. 927.

of such sum, defences might be available to him which have not been investigated in this case. Whatever remedy the Chowdhurys may have against Harendra, must, consequently, be enforced in a suit properly framed for the purpose.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

In view of our decision in this appeal, the other appeal (Second Appeal No. 3306 of 1914) also will stand dismissed with costs.

Appeals dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 257 OF 1913.

June 22, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Kingsford.

HANUMAN RAI—DEFENDANT 1ST PARTY—APPELLANT

versus

JAGDIS RAI AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Minor—Compromise by guardian, when binding on minor—Leave of Court—Arbitration, reference to, in pursuance of compromise, whether amounts to sanction of compromise—Application for leave withdrawn.

No next friend or guardian can compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings. [p. 676, col. 2.]

The action of a Court in referring a case to arbitration in accordance with a compromise between the guardian of a minor and the other parties to the suit is not equivalent to approving of the compromise on behalf of the minor. [p. 676, col. 2.]

It is open to a guardian to withdraw a petition, asking leave to enter into a compromise, at any time before leave is granted. [p. 676, col. 2.]

Appeal from a decision of the Officiating Additional Sub-Judge, Darbhanga. dated the 20th June 1913.

Mr. *E. P. Pugh*, for the Appellants.

Babu *Ganesh Dutt Singh*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondent Jagdis Rai against his three first cousins and a first cousin once removed for partition of what was alleged to be joint family property. Jadgdis Rai sued by his next friend *Musammat* Lal Kuar. The first defendant to the suit, Hanuman Rai, was described in the plaint as a minor under the guardianship of his mother *Musammat* Rajrani. The plaint was filed on March 15th, 1912. Three days later a petition was presented on behalf of the plaintiff in the suit, alleging that a sum of Rs. 40,000, which appears as item No. 5 in Schedule I attached to the plaint, lay buried in the house occupied by the first defendant. The plaintiff prayed that the floors of the rooms of the house might be dug up and any money found there brought into Court. On the following day *Musammat* Raj Rani presented a petition on behalf of her son objecting to the plaintiffs' petition that the floors should be dug up, and suggesting that if that petition was allowed the floors of the house in the occupation of the plaintiff should also be dug up. The Court directed that the floors of the rooms of both parties should be dug up and a Pleader practising in the Court was appointed to supervise the digging up of the rooms. On March 19th the Pleader went to the houses of the parties. When he was about to have the floors dug up, the representatives of both parties asked him to stay proceedings for a while in order that they might enter into a compromise. After some discussion in which the parties and their Pleaders took part, a document in the form of a petition to the Court was prepared and signed by all parties. It set out that a compromise had been effected on the following terms, namely, that, in consideration of the plaintiff abandoning the order for the digging up of the floors, defendant No. 1 would pay within two months Rs. 2,350 to the plaintiff and Rs. 2,350 to defendants Nos. 2 to 4, and that as regards other moveable and immoveable properties mentioned in the schedule to the plaint or other properties which might be added thereto by either party, it had been agreed that the partition of the same should be referred to three arbitrators, who were named. The rest of the petition of compromise is not material for our present purpose. The petition after being signed was handed over to the Pleader Commissioner and by him was filed in Court on March 22nd. Meanwhile on March 21st *Musammat* Raj Rani filed a petition in Court praying

for leave to enter into the compromise. No order was passed on that application for more than a year. No order could have been passed on it when it was presented, for up to that time *Musammat* Raj Rani had not been appointed guardian *ad litem* of defendant No. 1. The record shews that she was not appointed guardian *ad litem* until March 29th, 1912. The plaint was then amended and on May 1st the Court referred the partition of the property to the three persons named in the petition of compromise. Several applications were made by the arbitrators for further time for submission of their award. Ultimately on April 2nd, 1913, the Subordinate Judge requested the arbitrators to file their award by April 23rd, 1913, or to return the record without the award. On April 23rd the arbitrators asked for further time up to May 19th. Even then the award was not filed and ultimately the reference to arbitration was superseded. In the meantime on April 11th, 1913, the plaintiff applied to the Court to draw up a preliminary decree. The object of this was presumably to obtain a decree for payment of the two sums of Rs. 2,350 mentioned in the award. This application came on for hearing on May 10th, 1913, after the case had been transferred to another Court. *Musammat* Raj Rani put in a petition protesting against the compromise and denying that she had ever signed it or had understood that a compromise was being effected. The Subordinate Judge decided that she was bound by the terms of the compromise and he passed a decree accordingly.

It is quite clear that in one respect at all events the decree of the Subordinate Judge cannot stand, for it leaves the parties to obtain partition of the properties by another suit or other proceedings. If the compromise was binding upon defendant No. 1 and upon all other parties to the suit, the first Subordinate Judge was right in referring the case to the arbitrators mentioned in the agreement. But when they failed to act, the Subordinate Judge should either have appointed other arbitrators or have superseded the arbitration altogether and tried the case out in the ordinary way. The question is whether the *solehnama* is binding on the first defendant. Order XXXII, rule 7, provides that no next friend or guardian to the suit shall, without the leave of the Court *expressly recorded in the proceedings*, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he comes as next friend or guardian. This rule differs from the corresponding provision, section 462, in the Code of 1882 in that it requires the leave of the Court to be *expressly recorded in the proceedings*. Under the Code of 1882 it might perhaps have been held that inasmuch as the Court proceeded to refer the case to arbitration in pursuance of the compromise, it must be taken to have approved of the compromise on behalf of the minor first defendant. Section 462 of the Code of 1882 gave rise to many difficulties and it was no doubt in order to get rid of these difficulties that words were added to rule 7 of Order XXXII requiring the leave of the Court to be expressly recorded in the proceedings. With reference to the present rule, it is impossible to hold that the action of the Court in proceeding to refer the case to arbitration was equivalent to approving of the compromise on behalf of the minor. No express approval was accorded to the compromise until June 20th, 1913, but before that date, namely, on May 10th, 1913, *Musammat* Raj Rani had presented her petition in which she declined to go on with the compromise and alleged that she had been overreached in the matter. It appears to me that it would not be right to hold that the Court was entitled to force the compromise on *Musammat* Raj Rani after she had withdrawn her petition praying for the leave of the Court to enter into the compromise. It was open to her to withdraw the petition at any time before leave was granted. The learned Vakil for the plaintiff-respondent urges that *Musammat* Raj Rani should not have been allowed to withdraw her petition for leave under Order XXXII, rule 7, considering that proceedings in the suit had continued for more than a year since the compromise was filed. One answer to this is that no effective proceedings were taken during the interval and another is that it was the business of the plaintiff to see that the compromise was duly sanctioned by the Court before he proceeded with the suit. I

am not prepared to whittle away the salutary provisions of Order XXXII, rule 7. In my opinion the compromise was not binding on the minor, inasmuch as the leave of the Court had not been obtained before his guardian thought fit to withdraw her application for that leave. I would, therefore, allow this appeal, set aside the decree of the Subordinate Judge, and remand the case to the Court below to be disposed of according to law. But in view of the conduct of *Musammat* Raj Rani I would make no order as to the costs of this appeal.

KINGSFORD, J.—I agree.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1237 OF 1915.

April 28, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts Trotter.

SUNDARESA AIYAR—DEFENDANT No. 7—APPELLANT

versus

KRISHNAMOORTHY AIYAR, MINOR, BY HIS GUARDIAN NATESA AIYAR, AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 6—RESPONDENTS.

Partition—Partial partition, when allowed—Joint family property—Share of one co-parcener sold in execution—Purchaser suing for co-parcener's share in item of property in possession of defendant—Suit, whether maintainable.

Fresh exceptions to the rule against partial partition should be made very sparingly and only on grounds of manifest convenience. [p. 678, col. 2.]

Nanjaya Mudali v. *Shanmuga Mudali*, 22 Ind. Cas. 555; 26 M. L. J. 576 at p. 581; 15 M. L. T. 186; (1914) M. W. N. 356; 38 M. 684; *Venkatarama* v. *Meera Labai*, 13 M. 275; *Sripati Chinna Sanyasi Razu* v. *Sripati Suriya Razu*, 5 M. 196; *Iburamsa Rowthun* v. *Thiruvenkatasami Naick*, 7 Ind. Cas. 559; (1910) M. W. N. 380; 20 M. L. J. 743; 34 M. 269; 8 M. L. T. 269 (F. B.), referred to.

The predecessor-in-interest of the plaintiff purchased at a Court-auction the share of one of four co-parceners sold in execution of a decree obtained by the assignee of the mortgagee of the co-parcener's share. The plaintiff brought a suit for partition against the surviving members of the joint family and was allotted the suit properties by the decree. In execution proceedings he was resisted by the defendant, who claimed under a decree obtained by his predecessor-in-interest against the surviving members of the joint family, according to which possession of the suit properties was delivered to him. Plaintiff's application for delivery of possession having thereupon been dismissed, he instituted the present suit to recover one-fourth share of the co-parcener under whom he claimed in the items of joint family properties in the possession of the defendant. It appeared that in his previous suit he had not made the defendant a party:

Held, that the suit was in effect one for partial partition and as such was not maintainable, as the rights of the plaintiff himself in the share to which he was entitled and the rights of the other parties interested could best be established once for all in a suit for general partition. [p. 678, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit No. 429 of 1914, preferred against that of the Court of the District Munsif, Shiyali, in Original Suit No. 97 of 1913.

The Advocate-General and Messrs. *C. Krishnamachariar* and *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *T. Natesa Aiyar*, for the Plaintiff-Respondent.

JUDGMENT.

WALLIS, C. J.—In this case one of four co-parceners mortgaged his share of the joint family properties in 1895. The assignee of the mortgagee obtained a decree in Original Suit No. 93 of 1901 on the file of the Court of the District Munsif of Shiyali for sale of his interest, which was purchased by one Rama Ayyar through whom the plaintiff claims. The plaintiff instituted a suit, Original Suit No. 200 of 1911 on the file of the Court of the District Munsif of Shiyali, for partition against the surviving members of the joint family, and was allotted the suit properties among others by the decree. When, however, he attempted to execute the decree for possession, he was resisted by the 1st defendant, who claims under a decree obtained by his predecessor-in-title in Original Suit No. 36 of 1904 on the file of the Court of the Subordinate Judge of Kumbakonam against the surviving members of the joint family for specific performance of an agreement to sell and possession, which was executed in 1905 by delivery of the suit properties. In these circumstances the plaintiff's application for delivery of these specific immoveable properties was dismissed, as they were in the possession of third parties claiming under an independent title, and he was left to bring the present suit to establish such right to present possession under Order XXI rule 100

of the Code of Civil Procedure. In this suit he seeks to recover the one-fourth share of the co-parcener under whom he claims in the items of joint family property now in the possession of the defendants, intending apparently to bring other suits, against the persons in possession of other items to recover the co-parcener's share in them also. The difficulty has arisen from the fact that the defendants in possession of these items were not made parties to the present plaintiff's partition suit, Original Suit No. 200 of 1911. If that had been done, the Court, following its ordinary practice, would have allotted other items to the plaintiff in respect of the share of the co-parcener under whom he claims. According to the finding of the Subordinate Judge, it is not shown that the plaintiff's next friend knew of the defendants' rights when he filed Original Suit No. 200 of 1911, but he might easily have found out about them. In this state of things, the defendants have raised the objection that the plaintiff is not entitled to bring a suit for partial partition. This objection was allowed by the District Munsif, but overruled by the Subordinate Judge purporting to act on the authority of certain decisions which, as was admitted at the Bar, do not really conclude the case. As observed by Bakewell, J., in *Nanjaya Mudali* v. *Shanmuga Mudali* (1), the rule against partial partition is a mere processual law. It is dictated by considerations of convenience and has not been adhered to in certain classes of cases in which apparently it was considered to lead to inconvenience. In *Venkatarama* v. *Meera Labai* (2) this Court, applying the rule against partial partition, refused to allow the alienee from one co-parcener of a specific item of joint family property to sue the remaining co-parceners for his alienor's share in that item and left him to enforce his rights in a general suit for partition. On the other hand, in *Sripati Chinna Sanyasi Razu* v. *Sripati Suriya Razu* (3) the Court had held that in the like circumstances the remaining co-parceners were entitled to sue the alienee from one co-parcener for partition of their shares in the specific item, which was in effect to allow others to sue for partial partition; and in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick* (4) a Full Bench of this Court extended this right to the alienees of the remaining co-parceners. Fresh exceptions to the rule against partial partition should, however, be made sparingly and only on grounds of manifest convenience. I fail to see any such grounds in the present case. On the contrary, it seems to me that the rights of the plaintiff himself, in the share to which he is entitled, and the rights of the other parties interested can best be established once for all in a suit for general partition and I would, therefore, set aside the decree of the Subordinate Judge, restore that of the District Munsif and dismiss the suit with costs throughout.

COUTTS TROTTER, J.—I agree.

Appeal allowed ; *Suit dismissed.*

(1) 22 Ind. Cas. 555; 26 M. L. J. 576 at p. 581; 15 M. L. T. 186; (1914) M. W. N. 356; 38 M. 684.

(2) 13 M. 275.

(3) 5 M. 196.

V. R. P.

(4) 7 Ind. Cas. 559; (1910) M. W. N. 380; 20 M. L. J. 743; 34 M. 269; 8 M. L. T. 269 (F. B.).

PATNA HIGH COURT.

SECOND APPEALS NOS. 3677 AND 4117 OF 1913.

July 4, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

SAJIWAN MAHTO AND OTHERS—APPELLANTS

versus

Babu GULAB CHAND LAL AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 30, 105 109A—Enhancement of rent, basis of assessment of—Appeal—Batwara papers, whether evidence against tenants.

A decision, so far as it determines the amount of enhancement, is "a decision settling the rents", within the meaning of section 109A of the Bengal Tenancy Act, and, therefore, no appeal lies against it. [p. 680, col. 1.]

In a suit for enhancement of rent Batwara papers are not evidence against the tenants. [p. 679, col. 2.]

In settling the rate of enhancement under section 30 (*b*) of the Act, the Court must have regard to the nature of the land on which rent is to be assessed. If it is up-land the prices of the up-land staple crop must be considered, while if it is low land the prices of the low-land staple crop must be considered. [p. 680 col. 2.]

SAJIWAN MAHTO *v.* GULAB CHAND LAL.

Appeal from a decision of the District Judge, Patna, dated the 15th June 1913.

Babu *Kulwant Sahay*, for the Appellants.

Messrs. *Pugh, Jayaswal and Mustafa Khan*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—These are appeals against the decree of the Special Judge of Patna modifying orders passed by the Assistant Settlement Officer of Patna. The respondents, who are *maliks* of two Tauzi numbers, applied to the Assistant Settlement Officer under section 105 of the Bengal Tenancy Act to settle the rents of a large number of occupancy tenants most of whom are appellants in this Court. The respondents alleged (*a*) that the tenants held lands in excess of the areas for which they were paying rent (section 52), (*b*) that the rate of rent paid by the tenants was below the prevailing rate paid by occupancy tenants for land of a similar description and with similar advantages in the same village [section 30 (*a*)] and (*c*) that there had been a rise in the average local prices of staple food crops during the currency of the present rent [section 30 (*b*)]. The Assistant Settlement Officer in an admirable judgment—quite a model of what a judgment in such a case should be—found that ground (*b*) had not been made out but that grounds (*a*) and (*c*) had been established. He enhanced the rent of all the tenants by one anna in the rupee.

One of the pleas advanced by the tenants before him was that they were tenants at fixed rates. He rejected that plea. As regards all the tenants but 20 he found that the presumption allowed by section 50 (2) of the Bengal Tenancy Act did not arise, and as regards the 20 tenants he found that the presumption had been rebutted by three kinds of documentary evidence.

Most of the tenants appealed to the Special Judge, urging that they were tenants at fixed rates and that grounds (*a*) and (*c*) had not been made out. The *maliks* filed cross-appeals urging that the enhancement on ground (*c*) had been calculated on a wrong basis. The Special Judge held that ground (*a*) had not been established, and that the presumption in respect of the 20 tenants above referred to had been rebutted. With reference to ground (*c*) the Special Judge held that the enhancement had been calculated on a wrong basis and that it should be 1 anna and $11\frac{1}{2}$ pies in the rupee. He allowed a further enhancement accordingly.

The tenants have appealed to this Court, urging (1) that the Bengal Tenancy Act does not apply to the case at all, (2) that they are not occupancy tenants but tenants at fixed rates and (3) that if an enhancement is allowed, it should be calculated on the basis adopted by the Assistant Settlement Officer. The *maliks* have filed a cross-appeal to the effect that a still larger enhancement should have been decreed.

The *first* ground was not pressed and may be disregarded. There is obviously no substance in it.

The *second* ground was pressed only as regards the 20 tenants. The first Court found that the presumption allowed by section 50 (2) has been rebutted by 3 kinds of documentary evidence—one of which consisted of entries in Batwara papers. The Special Judge ruled, rightly as I think, that the Batwara papers were not evidence against the tenants, but he said: "I accept the statement of the plaintiff that he realised rent on first taking over the *takhta* at the rate shown in the Batwara papers, and, if that statement be accepted as correct, the fact that 32 tenants claiming to be *raiyats* at fixed rates have paid since 1297 a very much larger rent than that shown in the *Batwara* papers is sufficient to rebut the presumption . . . . . they cannot, therefore, be *raiyats* at fixed rates." There is no such statement by the plaintiff on the record and it appears to me that the Special Judge, while ruling that the Batwara papers were inadmissible, has in fact made use of them as evidence. He did not consider at all the other documentary evidence on the point. There must, therefore, be a fresh finding as regards the 20 tenants.

As regards the remaining tenants there is admittedly no ground for holding that they are fixed rate tenants, but we are

asked to restore the decision of the first Court as to the amount of enhancement to be decreed. The *maliks* contend that appeals by the tenants on the question of the enhancement to be allowed are not admissible. Alternatively they contend that a further enhancement should be allowed. It appears to me that that part of the Special Judge's decision which determines the amount of enhancement is "a decision settling a rent" within the meaning of section 109A of the Bengal Tenancy Act and, therefore, no appeal lies against it. The original claim of the *maliks* was that the rents should be settled. In settling the rents the Courts were bound by section 105 (4) of the Act to have regard to the rules laid down in the Act for the guidance of the Civil Courts in increasing or reducing rents. They accordingly applied sections 30 and 39 of the Act. They have, it is true, as will be seen later, adopted different constructions of these sections but they have nevertheless settled the rents. The decision of the Special Judge, so far as it determines the amount of enhancement, is, therefore, a decision settling the rents and no appeal lies against it. The appeal of the tenants, except the 20 referred to above, must accordingly be dismissed.

As there must be a fresh decision by the Special Judge as regards the 20 tenants and he may find that they were not tenants at fixed rates and in that event will have to settle their rents, it would be as well for us to deal with the conflicting views of the Courts below regarding the basis of enhancement under section 30 (*b*) of the Act.

The plots in question are all "up-land". Section 39 (7) provides that the Local Government, subject to the control of the Governor-General-in-Council, shall make rules for determining what are to be deemed staple food-crops in any local area, and for the guidance of officers preparing price-lists under that section. The rules now in force in this Province declare that in the Dinapore Sub-Division (where the land in question lies) the staple crops shall be deemed to be barley on up-land and rice on low land. The Assistant Settlement Officer assessed the enhancement by comparing the average price of barley during the decade 1901-1910 with the average price of barley during the decade 1891-1900. The Special Judge assessed the enhancement by comparing the average prices of barley and rice together during those two decades (he spoke of *makai* but that is probably a slip for barley). He adopted the same principle in the case of *Mangroo Hajam* v. *Musammat Latifan* but his decision was overruled on April 22nd 1915 by Holmwood and Walmsley, JJ., who said: "the idea underlying his decision appears to be this, that the rise in the price of staple-food crops diminishes the purchasing power of the rupee in the hands of the landlord and that, therefore, the law allows the landlord more rupees to make up for the diminishing value of the rupee. It is a kind of exchange compensation allowance. We have never met with this suggestion before, and it does not seem to be in accordance with the views which have been taken by this Court in other cases. We have always understood that the enhancement was based upon this ground that the *raiyat* can get more money for his produce owing to its increase in value, therefore, he is bound to pay more rent to the landlord". In that case the Special Judge had put a general enhancement on all sorts of land belonging to 60 different people at an average rate without finding out how much of the land was paddy or low land and how much of it was high land. I agree with Holmwood and Walmsley, JJ., that regard must be had to the nature of the land on which rent is to be assessed. If it is up-land the prices of the up-land staple crop must be considered, while if it is low land the prices of the low-land staple crop must be ascertained. In the present case all the land is up-land and the calculation must be made with reference to the average prices of the up-land staple food crop, which in this case is barley.

I would, therefore, allow the appeals of the 20 tenants (18 appear to be in one case and two in the other) and remand their cases to the Court of the Special Judge for a fresh decision and I would direct that the costs of their appeals shall be costs in the cause. I would dismiss the appeals of the other tenants but I would make no order as to costs. The cross-appeal

of the *maliks* was not pressed; it is dismissed but without costs.

SHARFUDDIN, J.—I agree.

Appeal accepted in part ; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 23 OF 1914.

January 21, 1916.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

JIWATMAL BHUROMAL—PLAINTIFF—APPELLANT

versus

Musammat GIANIBAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation of widow's estate by widow—Reversioner, next, consent of, effect of.

Where a Hindu widow alienates the whole widow's estate with the consent of the whole of the next reversion, the alienation is valid, irrespective of any consideration of necessity, as the reversioners transfer as heirs, the estate having been accelerated by the widow's disclaimer. [p. 682, col. 2; p. 683, col. 1.]

Nobokishore Sarma Roy v. *Hari Nath Sarma Roy*, 10 C. 1102; *Radha Shyam Sircar* v. *Joy Ram Senapati*, 17 C. 896; *Behari Lal* v. *Madho Lal Ahir Gayawal*, 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, 30 A. 1; 35 I. A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766, 5 A. L. J 1; 17 M. L. J. 605, referred to.

In all other cases, *i. e.*, where only part of the estate is alienated by her with the consent of some or all of the next reversion, or the whole estate is alienated with the consent of some and not of all of the next reversion, the consent raises only a presumption of the propriety of the alienation. Ordinarily, to raise this presumption the consent of the whole of the next reversion is necessary, but in special cases the consent of a part of the next reversion may suffice. [p. 683, col. 1.]

Vinayak Vithal Bhange v. *Govind Venkatesh Kulkarni*, 25 B. 129; 2 Bom. L. R 820; *Collector of Masulipatam* v. *Cavaly Venkata Narainapah*, 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R 631; *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*, 13 M. I. A. 209 (P. C.); 12 W. R. (P. C.) 47; 3 B. L. R (P. C.) 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R 529; *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, 30 A. 1; 35 I. A. 1 (P. C.); 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766, 5 A. L. J. 1; 17 M. L. J. 60; *Jivan Mal* v. *Nihalchand Hiranand*, 1 S. L. R. 196; *Abhesang Tirabhai* v. *Raising Fatesang*, 16 Ind. Cas 561; 14 Bom. L. R. 602, referred to.

Appeal against the decision of the 1st Class Subordinate Judge, Hyderabad.

Mr. *Wadhumal Oodharam*, for the Appellant.

Mr. *Tejumal Hasomal*, for Respondent No. 1.

Mr. *Kimatrai Bhojraj*, for Respondent No. 3.

JUDGMENT.—The plaintiff is the son of one brother Bhuro and defendant No. 1 Gyanibai is the widow of the other brother, Teju. Gyanibai sold the house in suit, which she had inherited from Teju, to Chandiram, defendant No. 3, on the 23rd October 1912, for Rs. 5,000. Bhuro thereupon filed a suit for a declaration that the widow's sale was not binding upon him. The suit was referred to arbitration and was settled by an award made on the 19th February 1912, under which Rs. 2,000 were awarded to Bhuro, Rs. 1,250 to be paid by the purchaser Chandiram and Rs. 750 by Gyanibai out of Rs. 5,000 she had already received.

Plaintiff, a minor son of Bhuro, filed this suit for the same declaration in his own favour.

The lower Court dismissed the suit on various grounds, *viz.*, that plaintiff was not a legitimate son of Bhuro; that as a remote reversioner he was not entitled to sue; that he was bound by the award in favour of his father, and that Gyanibai's sale was for necessity.

Plaintiff appeals, but we shall not consider any of the questions of fact discussed in the judgment of the lower Court, because there are two admitted facts which seem to us to be a conclusive answer to plaintiff's suit. They are (1) that the house was the only immoveable property inherited by Gyanibai from her husband and, therefore, represented the whole widow's estate and (2) that Bhuro was the only next reversioner.

We shall now give our reasons:—

In the first place, it is clear that plaintiff's suit is misconceived, in that he seeks a declaration in regard to the sale by Gyanibai of the 23rd October 1912. That sale was superseded by the award, under which the house is sold by the widow Gyanibai and the next reversioner Bhuro for Rs. 6,250, of which Gyanibai received Rs. 4,250 and Bhuro Rs 2,000.

The suit must, therefore, be treated as a suit in respect of the transaction, evidenced by the award of the 19th February 1913, under which the house was sold by Gyanibai and Bhuro.

That being so, it becomes necessary to state what the law is as to alienations by a Hindu widow with the consent of reversioners.

The question has been approached on the basis of three different theories by the Courts in India. These are:—

(1) That the widow's alienation was validated by the reversioners' release of their claim.

(2) That the reversioners' estate was accelerated by the widow's relinquishment of her estate.

(3) That the reversioners' consent was evidence of the propriety of the widow's alienation.

The *first* theory presented this difficulty that the reversioner has only a *spes successionis* and no transferable estate. (Section 6 of the Transfer of Property Act.) The reversioner who consents may be barred by estoppel, but a more distant reversioner, who by subsequent events becomes the actual reversioner, would not be bound. For instance, if one brother-in-law consents to the sale, why should the sons of another brother-in-law be bound? The Allahabad High Court, in view of this difficulty, held, that the consent of the next reversioner did not bind the more remote reversioner. *Ramphal Rai* v. *Tulakuari* (1). This theory, therefore, leads to no practical result and it seems to have been rejected by the Privy Council in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2).

The *second* theory was that adopted by the Calcutta High Court in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*(3). But the same High Court pointed out in *Radha Shyam Sircar* v. *Joy Ram Senapati* (4) that this theory can only be applied when the alienation is of the whole estate, for it rests on the fiction that the widow has declined the inheritance which, therefore, passed direct to the next reversion. If the alienation is of a part of the estate there is no room for this fiction. There has been no disclaimer by the widow. She has succeeded to the whole estate and then alienates a part of it and as already pointed out, that alienation may not be binding on the actual reversioner. The theory is, therefore, only applicable when the alienation is of the whole widow's estate. This is in accord with the language used by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* (5): "It may be accepted that, according to Hindu Law, a widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate."

The *third* theory is that which finds favour in Bombay, and the leading case is *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (6). It has the sanction of the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (7) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (8).

Now, when the Privy Council reviewed all the Indian decisions in *Bajrangi's* case (2), it is unfortunate, as pointed out by Mookerji, J., in *Debi Prosad Chowdhry* v. *Golap Bhagat* (9), that their judgment did not distinguish between the different theories or fictions on which the High Courts had proceeded. It is true that the Allahabad doctrine was rejected, but the only rule enunciated was in the following general terms:—"Ordinarily, the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

The general rule is, however, in accordance with the two principles that survive from the Indian cases. It may be expanded as follows:

(*i*) Where the whole widow's estate is alienated with the consent of the whole of the next reversion, the alienation is valid, as the reversioners transfer as heirs—the estate having been accelerated by the

(1) 6 A. 116; A. W. N. (1883) 243

(2) 30 A. 1; 35 I. A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 17 M. L. J. 605

(3) 10 C. 1102.

(4) 17 C. 896.

(5) 19 C. 236; 19 I. A. 30; 6 Sar. P C. J. 88.

(6) 25 B. 129; 2 Bom. L. R. 820.

(7) 8 M. I. A. 529; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 474; 1 Sar. P. C. J. 820 19 E. R 631.

(8) 13 M. I. A. 209; 12 W. R. (P. C.) 47; 3 B. L. R. (P. C.) 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529.

(9) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

widow's disclaimer. It is valid irrespective of any consideration of necessity.

(*ii*) In all other cases, *i. e.*, where the widow transfers part of the estate with the consent of some or all of the next reversion, or the whole estate with the consent of some and not of all of the next reversion, the consent raises a presumption of the propriety of the alienation. To raise this presumption the consent of the whole of the next reversion is ordinarily necessary, but there may be special cases in which the consent of a part of the next reversion will suffice.

A previous case of this Court, *Jiwan Mal* v. *Nihalchand Hiranand* (10), which was cited in argument, falls under this second rule, for it was there held that the consent of the only next reversioner was sufficient evidence of the propriety of the alienation; and as an instance of the exception, where the consent of a part of the next reversion is sufficient, reference may be made to the case of *Abhesang Tirabhai* v. *Raisang Fatesang* (11).

The present case falls under the first rule, for the whole widow's estate was transferred with the consent of the only next reversioner. The alienation is, therefore, valid and binding on the plaintiff, irrespective of any consideration of necessity. The widow's estate being relinquished, the alienation becomes an alienation by plaintiff's father of property inherited from a brother. It was not, therefore, ancestral property in which plaintiff had an interest.

We accordingly confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(10) 1 S. L. R. 196.
(11) 16 Ind. Cas. 561; 14 Bom. L. R. 602.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 379 OF 1914.
June 6, 1916.
Present:—Mr. Justice Piggott and
Mr. Justice Lindsay.

KANHAYA LAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

KISHORI LAL AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Compromise decree against widow, effect of—Alienation—Reversioners, if bound—Test—Family settlement, doctrine of.

A decree obtained by compromise against a Hindu widow representing the estate of her late husband, effecting an alienation of a part of her estate, binds the reversioners if it be shown to have been made for such purposes as would justify a sale by a Hindu widow. [p. 686, col. 2.]

The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding upon them, is whether the alienee derives title from the holder of the limited interest or life-tenant. [p. 686, col. 2.]

The doctrine of family settlement cannot and ought not to be extended to suits in which the parties to the litigation are not members of the same family. [p. 687, col. 1.]

First appeal from the decision of the Subordinate Judge, Aligarh, dated the 10th July 1914.

Mr. *Pannalal* (with him Dr. *Tej Bahadur Sapru* and Mr. *Agarwalla*), for the Appellants.

Mr. *Gokul Prasad* (with him Mr. *O'Conor*), for the Respondents.

JUDGMENT.—This is a litigation in respect of two shops in the town of Hathras. There were three sets of defendants originally impleaded, but we are really concerned only with the case as between the plaintiffs and the first set of defendants, namely, Kanhaiya Lal and two members of his family. The suit related to two adjoining shops which may conveniently be spoken of as shop No. 1 and shop No. 2. The plaintiffs admitted that the defendants of the first party were in actual occupation of the shops, but alleged them to be in occupation of both shops as tenants. With regard to shop No 1 these defendants admitted the plaintiffs' title. They pleaded that they had as a matter of fact paid the rent due from them to date and so denied the plaintiffs' right to any relief in respect of this particular shop. We are

concerned, so far as the appeal before us goes, only with the question at issue between the parties about shop No. 2. The title of the plaintiffs in respect of this shop is simple. They are the reversioners of one Bohra Dwarka Das, who died in or about the year 1854 A. D. leaving him surviving two widows. One of those widows, *Musammat* Lachcho, survived the other and continued to represent the estate of her husband up to the time of her death in 1904. The title of Kanhaiya Lal and his co-defendants in respect of the shop in question may be set forth in this way. Harmukh Rai father of Kanhaiya Lal purchased this shop at auction on the 24th of July 1901. The sale was held on a decree dated 29th November 1900 in a suit brought by one Kundan Lal against Kunj Lal and Duli Chand. These persons had made a mortgage of this shop in favour of Kundan Lal on the 7th of October 1895. There can be no doubt that Harmukh Rai as auction-purchaser thereby acquired the right, title and interest of Kunj Lal and Duli Chand in this shop No. 2. The question really in issue is what that title was.

The Court below has found in favour of the plaintiffs on the question of title and has overruled all the objections taken by the contesting defendants, except with regard to the alleged payment of rent on account of shop No. 1. The appeal of Kanhaiya Lal and his co-defendants is against the decree of the Court below awarding to the plaintiffs possession of shop No. 2 with mesne profits. There are seven paragraphs in the memorandum of appeal to this Court. The 1st and the 7th of these are argumentative and general. The points taken in the remaining paragraphs are substantially four. (1) It is contended that the plaintiffs have failed to prove their title as owners of the shop in question. (2) It is pleaded that there is some bar of limitation against the plaintiffs' suit. (3) It is contended that the ownership of the shop in question had passed to Kunj Lal and Duli Chand, through whom the plaintiffs derived their title, by reason of valid transfers under circumstances to be presently considered. (4) It is pleaded that the position of the defendants-appellants is that of *bona fide* purchasers for value, and that in any case they are entitled to be compensated for expenditure incurred by them upon improvements. We may take up these points in order.

The plea with regard to the plaintiffs' title was not considered in the Court below precisely in the form in which it has been argued before us. It requires to be taken apart from the remaining issues. The plaintiffs claim as reversioners, deriving title from Bohra Dwarka Das after a long interval, during which that gentleman's estate was in the hands of his widow. It was undoubtedly incumbent upon them to prove that Dwarka Das was at the time of his death owner of the shop in question. As was to be expected, in a matter of this sort no document of title is forthcoming. The nearest thing to a document of title which plaintiffs possess is a list of the houses in the town of Hathras prepared by public authority sometime in the years 1860-1861 A. D. giving the names of the proprietors and of the persons occupying these houses. This list shows two shops presumably adjoining shops, to which are assigned consecutive serial numbers, as the property of Dwarka Das. Dwarka Das, as we know, had died four years previously; but there is nothing surprising in his name being mentioned as the owner of any shop which had previously belonged to him. The occupiers of one of these two shops are the predecessors of Kunj Lal and Duli Chand. As to the identity of the shop in question, the plaintiffs have been in a position to prove a number of admissions against the defendants. We shall have to refer presently to a compromise decree under which Kunj Lal and Duli Chand derived their title. With reference to the particular point now in question, it is sufficient to say that that compromise admits in clear terms that the shop then in dispute, which is certainly identical with shop No. 2 now in question, was the property of *Musammat* Lachcho, widow of Dwarka Das. In the boundaries given in that compromise the house immediately to the west of the shop then in question is described as the property of *Musammat* Lachcho jointly with one Chunni Lal who was then claiming to be the adopted son of Dwarka Das. Now the defendant-appellant Kanhaiya Lal is admittedly the tenant of shop No. 1 and he has signed a *kerayanama*

in respect of this latter shop. In this document the shop immediately to the east is described as the property of *Musammat* Lachcho and of Chunni Lal. The plaintiffs have also produced certain account books which require to be considered along with the evidence of the plaintiffs' witness Kadhir Mal, printed at page 1 R of the records before us. The whole of this evidence taken together seems to be quite sufficient to prove that Dwarka Das was the owner of shop No. 2 and to justify the inference that he continued to be the owner of the same up to the time of his death and was succeeded by his widow, *Musammat* Lachcho.

2. This, of course, is subject to a finding in favour of the plaintiffs on the question of limitation. The learned Subordinate Judge laid on the plaintiffs the burden of proving that either they or *Musammat* Lachcho had been in proprietary possession of this shop No. 2 within 12 years of the institution of the suit. He found in their favour on this point, clearly on the strength of the evidence of Kadhir Mal and of the account books. We cannot regard the question of limitation from precisely the same point of view. The suit must be regarded as one brought under Article 141 of the Schedule to the Indian Limitation Act. If the shop in question belonged to Dwarka Das at the time of his death, the plaintiffs as reversioners of Dwarka Das were entitled to sue for recovery of possession over this shop at any time within 12 years from the death of *Musammat* Lachcho. The only possible alternative would be for the contesting defendants to prove that either they or their predecessors-in-title had been in proprietary and adverse possession as against Dwarka Das before and up to the time of his death. It is enough to say that there is no real evidence in favour of the defendants on this point. We, therefore, find that the plaintiffs have proved their title, and we are satisfied that they have brought their suit within limitation.

3. We now come to consider the most important issue in the case, namely, the question whether Kunj Lal and Duli Chand had acquired a good title to this shop under a certain compromise decree dated 9th April 1895. We have already referred incidentally to the fact that one Chunni Lal claimed the estate of Dwarka Das as his adopted son. There was prolonged and complicated litigation before the claim of Chunni Lal was disposed of, and this question was definitely decided against Chunni Lal by their Lordships of the Privy Council on December 15th, 1908, when they disposed of certain consolidated appeals then pending before them arising out of previous litigation in this country. There is no question of the rights of Chunni Lal arising in the suit now before us. The matter is referred to us only to explain the previous array of Chunni Lal as a co-plaintiff with *Musammat* Lachcho in a litigation which we are called to consider. It would seem that during the year 1893, there was friction between *Musammat* Lachcho and Kunj Lal and Duli Chand, who were then occupiers of this shop No. 2. *Musammat* Lachcho brought a suit in her own name to recover certain money as arrears of rent for this shop. This suit was decreed by the Court of first instance on November 15th, 1893; but was dismissed on June 7th, 1894, by the Court of first appeal. We find from documentary evidence on this record that this dismissal had nothing to do with any claim of Chunni Lal, or with any doubt as to the proprietary title of *Musammat* Lachcho. The claim for rent was dismissed simply on the finding that *Musammat* Lachcho had failed to prove the rent agreement on which she was suing. It was, however, presumably in consequence of this dismissal that on 22nd November 1894 a second suit was filed by *Musammat* Lachcho and Chunni Lal jointly against Kunj Lal and Duli Chand, to establish their title to this shop and to recover possession. This suit ended in a compromise which was made the basis of a decree passed on 9th April 1895. The compromise is printed at page 26 R of the record before us. The parties in question agreed that a decree for proprietary possession be passed in favour of the then plaintiffs, Chunni Lal and *Musammat* Lachcho; but this decree is subject to a condition. It is provided that, if the defendants Kunj Lal and Duli Chand pay into Court for the benefit of the plaintiff within 6 months Rs. 1,500 with interest, they shall then be considered to be in proprietary possession of the shop in question from the date on which such payment is made. We know that it was in order to raise money for the payment of this sum of Rs. 1,500 as

well as in return for a certain further advance, that Kunj Lal and Duli Chand proceeded to mortgage this shop in favour of Kundan Lal, and it has already been explained how the latter was eventually compelled to bring a suit upon his mortgage, and how the title of the contesting defendants is derived from their auction-purchase on Kundan Lal's decree. The question is, whether by this compromise decree Kunj Lal and Duli Chand did or did not obtain full proprietary title to the shop in question, that is to say, a title binding upon the reversioners. According to the case for the plaintiffs-respondents they acquired nothing more than *Musammat* Lachcho was competent to transfer, namely, that lady's life-interest. If this contention is sound, then Harmukh Rai as auction-purchaser also acquired a proprietary title terminable with *Musammat* Lachcho's death and he had no valid title to plead against the present plaintiffs. The case laid on the question of the effect of a compromise decree obtained against a Hindu female in possession of limited interest or estate may be said to go back to the decision of their Lordships of the Privy Council in *Imrit Konwur* v. *Roop Narain Singh* (1). The question directly in issue in that suit was in regard to the validity of an adoption. At page 81 of the report certain general remarks are made as to the effect of litigation against a Hindu widow, when such litigation results in a compromise decree. That case has been considered and the principles believed to be laid down therein have been followed in subsequent decisions of various High Courts in this country. We may refer to *Musammat Raj Kunwar* v. *Musammat Indirjit Kunwar* (2), *Rajlakshmi Dasee* v. *Katyayani Dasee* (3), *Gobind Krishna Narain* v. *Khunni Lal* (4) and *Mahadei* v. *Baldeo* (5). Following broadly the principles derivable from these cases the correct view would seem to be that the compromise decree of April 9, 1895, which we are now considering, was in effect nothing more than an alienation on the part of *Musammat* Lachcho of a shop which had formed part of the estate of her late husband. Such alienation could only bind the reversioners if it were shown to have been made for such purposes as would justify a sale by a Hindu widow. No question of this sort is raised in the case now before us. It is, however, contended that the general principle that a decree obtained by compromise against a Hindu widow representing the estate of her late husband will not bind the reversioners, is subject to certain qualifications. It has been pointed out to us that the decision of this Court in *Gobinda Krishna Narain* v. *Khunni Lal* (4) was actually reversed by their Lordships of the Privy Council, *Vide Khunni Lal* v. *Gobinda Krishna Narain* (6) and we have also been referred to another case, *Behari Lal* v. *Daud Husain* (7). In both these cases the litigation was between members of the same family, and their Lordships took the view that the compromise decree was of the nature of a family settlement They laid down, however, a test which appears to tell very strongly against the appellants in the case now before us. They said that the "true test to apply to a transaction which is challenged by the reversioners as an alienation not binding upon them, is whether the alienee derives title from the holder of the limited interest or life-tenant." Now on the terms of the compromise decree which we are now considering and which have already been set forth, it is obvious that the alienees, namely, Kunj Lal and Duli Chand, derived their title from the holder of a limited interest, namely, from *Musammat* Lachcho. We disregard, of course, the position of Chunni Lal as a co-plaintiff because the question of his alleged adoption has been finally determined in the negative. The decree itself recognises the right of the plaintiff *Musammat* Lachcho, who along with Chunni Lal had sued to recover possession of the property. It contains what is virtually a covenant to transfer the shop in favour of

(1) 6 C. L. R. 76.
(2) 5 B. L. R. 585; 13 W. R. 52.
(3) 12 Ind. Cas. 464; 38 C. 539.
(4) 29 A. 487; 4 A. L. J. 365, A. W. N. (1907) 151.
(5) 30 A. 75; 5 A. L. J. 43; A. W. N. (1908) 16.
(6) 10 Ind. Cas. 477; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 21 M. L. J. 645; 33 A. 356; (1911) 2 M. W. N. 432; 10 M. L. T. 25; 38 I. A. 87.
(7) 18 Ind. Cas. 721; 35 A. 240; 11 A. L. J. 352.

the defendants on payment of Rs. 1,500 to be made within the specified time. We do not think that the doctrine of family settlement can or ought to be extended to suits in which the parties to the litigation were undoubtedly not members of the same family. It seems to us that the general principle laid down by this Court in *Mahadei* v. *Baldeo* (5) applies to the facts now before us. The contention of the appellants, therefore, that Kunj Lal and Duli Chand had a valid title under the compromise decree of 9th April 1895, in our opinion, fails.

4. The only other point taken is that the appellants should be treated as *bona fide* purchasers for value. We do not think that the doctrine embodied in section 41 of the Transfer of Property Act, IV of 1882, has any possible application to the facts now before us. The plaintiffs in the present case are reversioners suing to recover their own property by avoidance of alienation made by a Hindu widow. They cannot be said to have done anything to put forward that widow as holding an estate longer than that actually possessed by her. The contesting defendants must suffer by reason of the defective title of the original mortgagee from whom they, as auction-purchasers, derive their own.

There has been a cross-objection filed on behalf of the plaintiffs, contesting the dismissal of their claim for rent in respect of shop No. 1 and also with regard to part of the plaintiffs' claim on account of shop No. 2. On this point, we think it sufficient to say that there is nothing in the evidence to lead us to differ from the conclusion arrived at by the learned Subordinate Judge.

The result is that the appeal and cross-objection both fail, and we dismiss them both with costs. The said costs will include fees on the higher scale.

Appeal and cross-objection both dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 399 OF 1914.

August 7, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

ADIT NARAYAN SINGH—DEFENDANT—APPELLANT

versus

MAHABIR PROSAD TEWARI—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Succession—Bandhus—*Mother's sister's son's son and mother's paternal aunt's son—Preferential heir*—Sapinda—*Ejectment, suit for—Proof.*

Under the Mitakshara Law of succession the mother's paternal aunt's son is a nearer *sapinda* than the mother's sister's son's son. If they both stand in the same degree of propinquity, preference must be given to the mother's paternal aunt's son on account of his capacity to make offerings to ancestors of the deceased. [p. 692, cols. 1 & 2.]

Ramchandra Martand Waikar v. *Vinayak Venkatesh Kothekar*, 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573 (P. C.); 41 I. A. 290; *Girdhari Lal Roy* v. *Bengal Government*, 12 M. I. A. 448; 10 W. R. 31 (P. C.); 1 B. L. R. 44 (P. C.); 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408; *Muthusamy Mudaliyar* v. *Simamhedu Muthukumara Swami Mudaliyar*, 19 M. 405; 23 I. A. 83; 6 M. L. J. 113; 7 Sar. P. C. J. 45; *Bai Vijli* v. *Bai Prabhalakshmi*, 9 Bom. L. R. 1129; *Chamanlal* v. *Ganesh Motichand*, 28 B. 453; 6 Bom. L. R. 460; *Krishna Ayyangar* v. *Venkatarama Ayyanger*, 29 M. 115; *Buddha Singh* v. *Laltu Singh*, 30 Ind. Cas. 529; 20 C. W. N. 1; 29 M. L. J. 534; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481 (P. C.); (1915) M. W. N. 772; 37 A. 604; 42 I. A. 208; *Bhyah Ram Singh* v. *Bhyah Ugar Singh*, 13 M. I. A. 373; 14 W. R. 1 (P. C.); 5 B. L. R. (P. C.) 293; 2 Suth. P. C. J. 330; 2 Sar. P. C. J. 566; 20 E. R. 591, referred to.

A plaintiff suing in ejectment must, in order to succeed, strictly prove his title. [p. 488, col. 2.]

First appeal from the decision of the Subordinate Judge, Patna, dated the 29th May 1914.

Mr. *Pugh*, Rai *Purnendu Narain Singh* Bahadur and Mr. *Siva Nandan Roy*, for the Appellant.

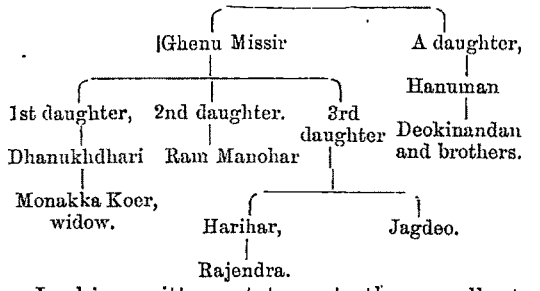
Messrs. *Manuk* and *Ganesh Dutt Singh*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This appeal arises out of a suit brought by the respondent for possession of a village, called Bariarpur in the district of Patna, which was formerly the property of one Dhanukhdhari Misir. On the latter's death the village passed into the possession of his widow Monakka Kuer. She died in September 1902. At that time the appellant was in

ADIT NARAYAN SINGH *v.* MAHABIR PROSAD TEWARI.

possession of the village under a *zar-i-peshgi ticca patta* which, he alleged, had been executed in his favour by Monakka Kuer. The Government appear to have been under the impression that there were no relatives of Dhanukhdhari Misir alive and capable of inheriting his property. Accordingly a suit was brought in the name of the Secretary of State for India for possession of the village against the present respondent, who claimed to be entitled thereto under a Will executed in his favour by Monakka Kuer. It was clear, and it is now admitted, that the respondent was not entitled to the village under that Will, for Monakka Kuer had held the village as a Hindu widow. In that suit the respondent set up the title of one Gopal Missir, who was said to be one of the agnate relatives of Dhanukhdhari. Thereupon Gopal Missir was made a defendant to the suit. The Subordinate Judge decreed the claim of the Secretary of State but on appeal the High Court dismissed the suit, holding that it was proved that there were heirs of Dhanukhdhari capable of inheriting the property. They declined to consider whether Gopal Missir had proved his agnatic relationship with the deceased. The Judges of the High Court in the course of their judgment suggested that Deokinandan might have a title to the estate as a *bandhu* of Dhanukhdhari. The respondent then purchased the rights of Gopal Missir and of Deokinandun and his brothers and brought the present suit. He alleged that the *ticca patta*, under which the appellant held the village, was not a genuine document and that the appellant was, therefore, a trespasser. It is now conceded, however, that the *ticca patta* was genuine and that the appellant was entitled to retain possession of the village until payment of the *zar-i-peshgi*. The Court below has found that the respondent is not entitled to the village as purchaser of the rights of Gopal Missir, as he has failed to shew that Gopal Missir is an agnate of Dhanukhdhari Missir. But it has found that the respondent is entitled to the village as purchaser of the rights of Deokinandan and his brothers. The following table exhibits the relationship between Dhanukhdhari and Deokinandun and his brothers and also between Dhanukhdhari and other persons who will be referred to in this judgment:—



In his written statement the appellant put the respondent to proof of his right to possession of the village as purchaser of the rights of the heir of Dhanukhdhari (see paragraphs 5, 7, 8, 11, 15 and 23 of the written statement). He did not definitely set up the rights of any person not a party to the suit, but nearly three years later he put in a petition in which he said that he had come to know that the heir of Dhanukhdhari was one Raghunandan, the son of a sister of Dhanukhdhari. No issue was struck by the Subordinate Judge with reference to that petition, and the petition may be disregarded inasmuch as it is conceded on behalf of the appellant that he has failed to prove the alleged right of Raghunandan. Mr. Manuk on behalf of the respondent has contended that in view of the fact that the respondent's name is entered in the *khewat* as proprietor of the village, while the appellant's name is entered in another part of the *khewat* as *ticcadar* of the village, the respondent is entitled to a decree for possession as against the appellant without proving that he is the person best entitled to the property, *i.e.*, that he is the purchaser of the rights of the next heir of Dhanukhdhari. I cannot accept this contention. A respondent suing in ejectment must in order to succeed strictly prove his title. He must prove that he has purchased the rights of the next heir of Dhanukhdhari. As regards his purchase of the rights of Gopal Missir, I have nothing to add to the remarks made by the Court below. It appears to me that the respondent signally failed to prove that Gopal Missir is an agnate of Dhanukhdhari.

ADIT NARAYAN SINGH *v.* MAHABIR PROSAD TEWARI.

The question whether the respondent is entitled to succeed in virtue of his purchase of the rights of Deokinandan and his brothers requires more detailed examination. It is now common ground that Hanuman the father of Deokinandan survived Monakka Kuer. Hanuman is dead but his rights have devolved upon his sons. By cross-examination of the witnesses produced by the respondent and also by evidence produced on his own behalf the appellant has endeavoured to prove that Ram Manohar, Harihar, and Jagdeo shewn in the above pedigree survived Monakka Kuer. The Subordinate Judge disposed of this question in a few lines. He said: "The next point to be considered is whether Hanuman Tewari, father of Deokinandan and his brothers, was heir of Dhanukhdhari when Monakka Kuer died . . . . . There can be no doubt that Hanuman was a *bandhu* of Dhanukhdhari Missir; the learned Vakil for the defendant No. 1 did not deny that Hanuman was a *bandhu* but maintained that some nearer *bandhus* (*i e.*, daughters' sons of Ghinu) were alive when Monakka died; there is no positive proof to shew that any nearer *bandhu* was alive when Monakka died." The evidence that Ram Manohar, Harihar, and Jagdeo survived Monakka Kuer, is of the most meagre description. The respondent said: "Ghinu had three daughters, one was married to Dhanukhdhari's father, another to Raj Dewal Tewari whose son was Ram Manohar. Ram Manohar is dead but I cannot say if he died before or after Monakka. The sons of the third daughter are Harihar and Jagdeo. I cannot say if they are alive on this day or not. I cannot say if Jagdeo is alive. I have not seen Harihar Pande". Deokinandun, P. W. No. 3, said that Ram Manohar had died four or five years before 1914, that he did not remember if Jagdeo was a relative of Ghinu, and that he had seen no other *nati* of Ghinu except Ram Manohar. The 4th witness Fenangi Lal, a *patwari*, said that the respondent performed the *shrad* ceremony of Monakka and that Ram Manohar and Harihar were invited as relatives of Dhanukhdhari and that Harihar had no brother. He did not go on to say that either Ram Manohar or Harihar attended the ceremony, and he said that he had not seen Ram Manohar for 15 or 16 years. The 8th witness Dhanukhdhari Singh said that Ram Manohar, Ghinu's daughter's son, died 13 or 14 years ago. He (the witness) had never seen Harihar but had heard that he died 20 years ago. The 9th witness Chanchal Missir said that Ram Manohar was a *nati* of Ghinu's and died 14 or 15 years ago and that Harihar, another *nati* of Ghinu's, died 21 or 22 years ago. The 12th witness Lalji said only that Ram Manohar and Harihar were *natis* of Ghinu. The 13th witness Ram Dhari said that Ram Manohar died "8, 10, or 12 years ago" and he could not say how long ago Harihar had died. The appellant's witness Kokil Singh said: "Manohar, Harihar, and Jagdeo were *natis* of Ghinu Missir. Manohar and Harihar are dead. Jagdeo and Rajendra the son of Harihar are alive. Manohar died five or six years ago and Harihar seven or eight years ago." A *wasil-baki*, produced by the appellant himself for a totally different purpose, discloses the fact that Ram Manohar must have died in or before July 1901, for there is the following entry: "*Sawan* 1308 *Fasli*. Spent for cremation of Ram Manohar Missir Rs. 21". This shews that the appellant when *ticcadar* of the village advanced Monakka Kuer Rs. 21 on the occasion of the funeral ceremonies upon the death of Ram Manohar. The oral evidence quoted above shews clearly that Harihar died several years before Ram Manohar and that Jagdeo also died before Ram Manohar. The statement of a witness for the appellant that Jagdeo is alive is an obvious falsehood, for if he was alive he would have been produced. It is thus clear that the Subordinate Judge was right in finding that the appellant had failed to prove that another *bandhu* of Dhanukhdhari nearer in degree than Hanuman survived Monakka Kuer.

Both sides say, however, that Rajendra the son of Harihar is now alive. In fact both sides asked us to admit in evidence certain fresh documents, one of which was a copy of a plaint in a suit brought in 1914 for possession of this very village by a person claiming to be the purchaser of the rights of Rajendra. In that suit Rajendra was impleaded as a defendant. Rajendra and Hanuman are both five or, according to Hindu lawyers, six degrees

removed from Dhanukhdhari and, therefore, the question is whether, upon the death of Monakka Kuer, Rajendra had a better claim to succeed to the property of Dhanukhdhari than Hanuman had. The above pedigree shews that Rajendra is the mother's sister's son's son of Dhanukhdhari while Hanuman is the mother's paternal aunt's son of Dhanukhdhari. Both are *bhinna-gotra sapindas or bandhus* of the deceased.

The order of succession among the more distant *bandhus* has been the subject of much controversy. According to the text of Manu, which is the foundation of all rules of inheritance in the Hindu Law, "the property of a near *sapinda* shall be that of a near *sapinda*." The author of the Mitakshara after giving the rules for the succession of *gotraja sapindas* says:—"on failure of *gotrajas* the *bandhus* are heirs". *Bandhus* are of three kinds—those related to the person himself, those related to his father, and those related to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own *bandhus*. The sons of his father's paternal aunt, the sons of his father's maternal aunt must be deemed his father's *bandhus*. The sons of his mother's paternal aunt, of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned his mother's *bandhus*.' Here by reason of near affinity the *bandhus* of the deceased himself are his successors in the first instance, on failure of them his father's *bandhus* or if there be none, his mother's *bandhus*. This must be understood to be the order of succession here intended." It has been held by the Privy Council that the word *bandhu* in this passage means a relation belonging to a different family but united by *sapinda* relationship, and that the passage was not intended to be an exhaustive enumeration of all *bandhus* capable of inheriting but to illustrate the author's proposition that there are three kinds or classes of *bandhus*, *viz.*, the *atma-bandhus*, the *pitri-bandhus*, and the *matri-bandhus* [see *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1)].

(1) 25 Ind. Cas. 290; 42 C. 384; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573 (P. C.); 41 I. A. 290.

Messrs. West and Buhler in their work on the Hindu Law, 3rd Edition, page 491, say: "Regarding the order in which the *bhinna-gotra sapindas* succeed each other it is difficult to speak with certainty. It would seem, however, that the nine *bandhus* mentioned ought to be placed first, if effect is to be given to the principle of the Mayukha that incidental persons are placed last." The author of the Smriti Chandrika seems to suggest the same view. (See Krishnasawmy Iyer's Translation, page 197.) If this view is correct Hanuman must be taken to exclude Rajendra in the present case, as Hanuman being the deceased's mother's paternal aunt's son is expressly mentioned while the mother's sister's son's son is not. Dr. Jolly in the Tagore Law Lectures for 1883 at page 215 points out that this view has the effect of excluding the maternal uncle who is obviously a nearer *bandhu* than his son who is expressly mentioned.

Messrs. West and Buhler in another passage say that as it is finally settled that the mention of the *bandhus* in the Mitakshara is not exhaustive, the rule does not give precedence to any one enumerated over others nearer to the *propositus* in the same line of connection. The decision of the Privy Council in *Gridhari Lall Roy* v. *Bengal Government* (2) and *Muthusami Mudaliyar* v. *Simamhedu Muthukumaraswamy Mudaliyar* (3) affirms the correctness of this. This view does not assist Rajendra, for he is not nearer to the *propositus* in the same line of connection than any one expressly mentioned but is one degree further off.

Pandit Raj Kumar Sarvadhikari takes the *bandhus* specially named in the Mitakshara as indicating the three principal classes of *bandhus* and not as embracing only the nine *bandhus* specially named. He discusses at length the position of the mother's paternal aunt's son and decides that he should be preferred to the mother's sister's son's son and others both because he is nearer in degree and because he is the deceased's own *bandhu*.

(2) 12 M. I. A. 448; 10 W. R. 31 (P. C.); 1 B. L. R. 44 (P. C.); 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408

(3) 19 M. 405; 23 I. A. 83; 6 M. L. J. 113; 7 Sar. P. C. J. 45.

Dr. Jogendra Nath Bhattacharya (page 460) also prefers the mother's paternal aunt's son to the mother's sister's son's son. Mr. Trevelyan (pages 390 and 393) prefers the mother's sister's son's son to the mother's paternal aunt's son. He regards the former as an *atma-bandhu* and the latter as a *pitri-bandhu*. He cites the case of *Bai Vijli* v. *Bai Prabhalakshmi* (4), in which a mother's sister's son's son was preferred to the paternal grandfather's sister's son's daughter. The decision in that case appears to have no bearing upon the question which we have to decide, except that the Court held that the mother's sister's son's son was an *atma-bandhu*. The decision avowedly rests upon the decision in the case of *Chamanlal* v. *Ganesh Moti Chand* (5) where, however, the question for decision was different, namely, whether a mother's sister's son being an *atma-bandhu* named in the Mitakshahra had a better claim than the father's father's sister's son who is named as a *pitri-bandhu*.

In *Krishna Ayyangar* v. *Venkatarama Ayyanager* (6) a father's sister's daughter's son was held to be an *atma-bandhu* and as such entitled to succeed in preference to the paternal grandfather's sister's son who was a *pitri-bandhu*. The Madras High Court seem to have held in this and some other cases that the descendants of *atma-bandhus* named in the Mitakshara are also *atma-bandhus* and that the descendants of a father or mother should be preferred to the descendants of a grandfather or grandmother, on the principle of the nearer line excluding the more remote.

There is thus an extraordinary diversity of judicial and other opinion on the meaning and application of the text of the Mitakshara quoted above.

After giving the matter my best consideration, I have come to the conclusion that as the enumeration of the *bandhus* in the text is illustrative only and not exhaustive, the text should be read in such a way as to give effect to the guiding principle of the Hindu Law of succession that the inheritance belongs to the nearest *sapinda*, and there seems to me to be no difficulty in doing so. If each of the *bandhus* expressly mentioned in the text is held to include his descendants, or (which is much the same thing) the descendants of an *atma-bandhu* expressly mentioned are held to be themselves *atma-bandhus* and are entitled to succeed in preference to all the *pitri* or *matri-bandhus* expressly mentioned, it may easily happen that an obviously more remote *sapinda* will exclude a nearer *sapinda*.

In the recent case of *Buddha Singh* v. *Laltu Singh* (7), their Lordships said: "As pointed out in the case of *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (1), the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the Mitakshara, the *sapinda*-relationship arises between two people through their being connected by particles of one body, *viz.*, that of the common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of community in the offering of religious oblations. But as will be shown later on, the Mitakshara, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood". "Now it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations." "In the case of *Bhyah Ram Singh* v. *Bhyah Ugar Singh* (8) the Board affirmed this rule in the following words: 'when a question of preference arises, as preference is founded on

(4) 9 Bom. L. R. 1129.
(5) 28 B. 453; 6 Bom. L. R. 460.
(6) 29 M. 115.

(7) 30 Ind. Cas. 529; 20 C. W. N. 1; 29 M. L. J. 534; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 22 C. L. J. 481 (P. C.); (1915) M. W. N. 772; 37 A. 604; 42 I. A. 208.

(8) 13 M. I. A. 373; 14 W. R. (P. C.) 1; 5 B. L. R. (P. C.) 293; 2 Suth. P. C. J. 330; 2 Sar. P. C. J. 566; 20 E. R. 591.

superior efficacy of oblation, that principle must be applied to the solution of the difficulty.' "

These remarks were made in the case of a dispute between agnates but they seem to apply as well to the case of *bandhus*.

As regards connection by particles of the body of the common ancestor, Hanuman was nearer to the common ancestor of the deceased and himself than Rajendra is to the common ancestor of the deceased and himself, while as regards the benefit to be conferred upon the deceased by offerings made by Hanuman and Rajendra respectively, it will be seen that Hanuman made offerings to the maternal great-grandfather and maternal great-great-grandfather of the deceased while Rajendra cannot make offerings to any ancestors of the deceased.

It appears to me that Hanuman was according to the Hindu Law a nearer *sapinda* of the deceased Dhanukhdhari than Rajendra is, and that if they both stand in the same degree of propinquity preference must be given to Hanuman on account of his capacity to make offerings to ancestors of the deceased.

I would hold that the respondent by virtue of his purchase from Deokinandan and his brothers acquired the rights of Hanuman, who was the person entitled to the property on the death of Monakka Kuer. I would, therefore, dismiss the appeal with costs.

JWALA PRASAD, J.—I entirely agree with the learned Chief Justice. It has not been proved that Gopal is an agnate of the deceased Dhanukhdhari or that Ram Manohar, Harihar and Jagdeo survived *Musammat* Monakka Kuer, widow of Dhanukhdhari.

The crucial point in this case is whether Rajendra or Hanuman was the preferential heir of Dhanukhdhari Missir when the *Musammat* died. Rajendra is the mother's sister's son's son of Dhanukhdhari. Hanuman is the mother's paternal aunt's son. Both of them are *bandhus*, who have a right to succeed on failure of *gotraja*.

The Mitakshara gives a list of nine persons as *bandhus* dividing them into three classes, *atma-bandhu*, *pitri-bandhu* and *matri-bandhu*. The mother's paternal aunt's son is mentioned there as a *matri-bandhu*. This will be Hanuman. Mother's sister's son is mentioned as *atma bandhu*. This will be Rajendra's father Harihar. Rajendra is not mentioned. If the list of the heritable *bandhus* in the Mitakshara is exhaustive or if those not mentioned there are to succeed on failure of those expressly mentioned, then the matter would have been very simple as in either case Hanuman, being expressly mentioned, would exclude Rajendra, who is not mentioned in the list. But it is settled now that the list is not exhaustive but only illustrative.

Mr. Pugh contends that Rajendra is a son of an *atma-bandhu* mentioned in the list and must succeed in preference to Hanuman, who is a *matri-bandhu*. No case has been cited before us where the contest was between relations such as those concerned in this case. The matter has to be decided, therefore, upon the principles of succession mentioned in the text and recognised by the case-law on the subject.

Among *bandhus* the right of inheritance is confined to *bhinna-gotra sapindas*. 'Sapinda' has been used in the Mitakshara, verse 3, section 5, in the sense of connection by particles of one body. In the case of succession through females *sapinda*-relationship is confined to five degrees including the *propositus*. Another limitation is that the *propositus* and the claimant must be *sapindas* to each other.

Applying the test of community of particles of the body of the common ancestor, Hanuman is third in descent from the common ancestor of himself and the *propositus*, whereas Rajendra is 4th in descent from the common ancestor of himself and the *propositus*. Hanuman, therefore, has a preferential right to succeed to the property.

Even supposing that Rajendra and Hanuman stood in the same degree of relationship or nearness to the deceased, preference would be given to Hanuman for he would offer religious oblations to two ancestors of the deceased, whereas Rajendra would offer to none, for cakes are offered only to three ascendants of the mother.

I have refrained from discussing in detail the text or the authorities bearing on the subject, as they have been sufficiently dealt with by the learned Chief Justice. Reference may, however, be made to the Privy Council rulings in *Ramchandra Martand Vaikar* v. *Vinayak Venkatesh Kothekar* (1),

Babu Lal v. *Nanku Ram* (9) and *Umaid Bahadur* v. *Udoi Chand* (10).

There can, I think, be no doubt that Hanuman was entitled to succeed to the property in suit after the death of Dhanukhdhari's widow in preference to Rajendra. Deokinandan and others, sons of Hanuman, therefore, succeeded to the property after their father's death. The plaintiff, therefore, acquired a good title to the property by virtue of the *kabala* executed by Deokinandan and his brothers. The plaintiff's suit has been rightly decreed by the first Court and I agree that the present appeal should be dismissed with costs.

Appeal dismissed.

(9) 22 C. 339.
(10) 6 C. 119; 6 C. L. R. 500.

ALLAHABAD HIGH COURT.
CIVIL REVISION NO. 154 OF 1915.
June 12, 1916.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.
BHAIRON PRASAD—DECREE-HOLDER—APPELLANT
versus
Musammat AMINA BEGAM—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Execution — Step-in-aid of execution—Application by decree-holder for extension of time to find out judgment-debtor's whereabouts, if saves limitation.

An application by a decree-holder, during the course of execution proceedings, to extend the time for service of process on defendant to enable him to make further enquiries as to his whereabouts is a step-in-aid of execution of his decree and saves limitation, unless it is shown to be *mala fide*. [p. 694, cols. 1 & 2.]

Civil revision against the order of the Judge, Small Cause Court, Cawnpore, dated the 12th June 1915.

FACTS material for the report are as follows:—

The decree-holder obtained his decree on the 11th of February 1909 and made his first application for execution on the 9th of February 1912. Upon that application notice was issued to the judgment-debtor, but it was returned unserved on the 3rd of April 1912. An application was made for time to apply for service on the judgment-debtor. The Court granted the application and fixed the 19th of April. On that date as the decree-holder took no steps, the application for execution was struck off. The present application was filed on the 1st of April 1915. The Court of Small Causes at Cawnpore dismissed the application as barred by time, holding that the application of the 3rd of April 1912 was not *bona fide*. The decree-holder applied in revision to the High Court. The case came up before Banerji, J., who differing from the case reported as *Pitam Singh* v. *Tota Singh* (1) referred it to a Bench of two Judges. The case then came up for hearing before Piggott and Walsh, JJ.

Mr. *Sheo Dihal Singh*, for the Appellant.—The case is governed by *Pitam Singh* v. *Tota Singh* (1). The application was made for time to enable the decree-holder to discover the address of the judgment-debtor. Such an application is to further the execution and, therefore, saves time. The lower Court's opinion that the application was not *bona fide* is not justified. The affidavit filed fully explains the matter.

Mr. *Ibn Ahmad*, for the Respondent.—The application was not to take some step-in-aid of execution. Such an application cannot save time: *Kartick Nath Pandey* v. *Juggernath Ram Marwari* (2), *Umed Ali* v. *Abdul Karim Chaprashi* (3).

It is clear that the application was not *bona fide*, as the decree-holder did not appear after the 3rd of April and let the application go in default.

The High Court should not interfere in this case, as a wrong decision on a question of limitation is no ground for interference: *Sarman Lal* v. *Khuban* (4), *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (5).

Mr. *Sheo Dihal Singh* was not called upon to reply.

JUDGMENT.

PIGGOTT, J.—This is an application against a decision on the execution side of the learned Judge of the Court of Small Causes

(1) 29 A. 301; 4 A. L. J. 184; A. W. N. (1907) 74.
(2) 27 C. 285.
(3) 35 C. 1060; 8 C. L. J. 193.
(4) 17 A. 422; A. W. N. (1895) 112.
(5) 15 Ind. Cas. 547; 39 C. 473.

at Cawnpore. The question before the Court below was whether a certain application for execution was within time. It was within time, if a previous application by the decree-holder made on the 3rd of April 1912 was an application to the proper Court to take a step-in-aid of execution. The application of 3rd April 1912 has been read to us. It is to the effect that the decree-holder is doing his best to discover the address of the judgment-debtors, a *pardanashin* lady and her son, and as he has hitherto failed to do so he asks the Court for time to enable him to prosecute his enquiries further. He was given time to the 19th of April 1912, but as he had taken no steps in this interval, and failed to appear before the Court on the 19th of April 1912, his application was struck off. The attention of the learned Judge of the Court below was duly called to the decision of this Court in *Pitam Singh* v. *Tota Singh* (1). He appears to have fully realised that he was bound to follow that decision. He distinguished against it on the ground that the present decree-holder's application of the 3rd of April 1912 was not in his opinion made in good faith. He gives no reason for this opinion, and we were unable to discover any such reason on examining the record. We eventually decided to give parties time to file affidavits explaining their position. An affidavit has to-day been filed on behalf of the decree-holder. He stated that he was incapacitated by illness shortly after his application of the 3rd of April 1912 was granted, and was consequently unable to take any steps, or to attend the Court on the date fixed. After that he continued to make enquiries as to the whereabouts of the judgment-debtors, and presented his further application for execution as soon as he had been able to discover their correct address. This affidavit is not contradicted. I think under the circumstances the decision of the Court below did not proceed on a pure question of law. It was arrived at by gratuitously assuming a question of fact against the decree-holder. On this ground I would allow this application, set aside the order of the Court below, and remand the case to that Court with directions to re-admit the application for execution to its pending file, and to proceed with it according to law.

WALSH, J.—I agree, but I want to say one word on the decided cases. I think it is impossible to hold that an honest application to extend time, that is, to prevent limitation running against you is not a step-in-aid of execution. What conceivable object any decree-holder can have in an application for time, unless it is to assist himself in execution of his decree, passes my understanding. Mr. Justice Banerji thought that there was a conflict between the decisions of the Calcutta High Court and this Court on this question. It is extremely difficult to ascertain with certainty from the reports whether this is so or not. The view attributed to the Calcutta Court has its origin in a case where the point was not necessary for the decision and where there would have been good reason for holding, if it were necessary, that the application for time was neither necessary nor *bona fide*, and was rightly rejected. And if the view taken in the Calcutta decision really is, and there is nothing in the report inconsistent with it, that an application for time, if it is shown by subsequent events not to have been a genuine application at all, may properly be held not to have been a step-in-aid of execution, I should agree with it; but the decision in this Court, which my brother Piggott, J., has already referred to, puts the thing on clear and, I think, absolutely unassailable grounds. If it is *bona fide*, it is clearly in aid of execution. The result is that *prima facie* such an application is in aid of execution until it is shown to be *mala fide*. I do not think there is really any conflict between these cases.

BY THE COURT.—The application is allowed, the order of the Court below set side, and the case remanded to that Court with directions to re-admit the application for execution to its pending file and to proceed with it according to law. The decree-holder is entitled to his costs.

Application allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 569 OF 1914.

June 22, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

NAWAB BAHADUR OF MURSHIDABAD —DEFENDANT No. 1—APPELLANT

versus

AHMAD HUSSAIN AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 105, 105A, 109, 111A—Applicability and scope of ss. 109 and 111A—Assessment of fair rent under s. 105—Subsequent declaratory suit by tenant, when barred—Res judicata, *constructive.*

The proviso to section 111A of the Bengal Tenancy Act applies only to a case where the Record of Rights was framed in pursuance of an order made under section 101, sub-section (2), clause (*d*), that is, to a case where a settlement of land revenue is being or is about to be made, but not to a case where the Record of Rights was prepared at the instance of the landlord under section 101, sub-section (2), clause (4). [p. 696, col. 1.]

After the assessment of fair rent under section 105, Bengal Tenancy Act, a subsequent suit by the tenants for a declaration that the proceedings under Chapter X of the Bengal Tenancy Act were vitiated by fraud, and that they are *maurasi mokarari raiyats* and not tenure-holders and that the lands held by them constitute not one tenure but distinct *raiyati* holdings, is not barred by the operation of section 109, but in respect of the plaintiffs' prayer for a declaration that the landlord is not entitled to realise the rent assessed under section 105, the suit is barred by section 109. [p. 697, col. 1.]

The introduction of section 105A into the Bengal Tenancy Act has not altered the law that to attract the operation of section 109 it is essential to establish that the Civil Court has for its subject a matter which has already formed the subject of an application under section 105. [p. 697, col. 1.]

The jurisdiction of a Civil Court is not constructively excluded by the operation of section 109 in regard to a point which, though it might and should have been raised in a proceeding under section 105 read with section 105A, has neither been raised nor decided in the proceeding under that section. [p. 696, col. 2.]

Pandab Dowari Das v. *Ananda Kisun Chakraverti*, 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897; *Shashi Bhusan Hazrah* v. *Sheikh Esabar*, 29 Ind. Cas. 122; 19 C. W. N. 636; and *Sashi Bhusan Hazra* v. *Aswini Comar Samanta*, 28 Ind. Cas. 981; 19 C. W. N. 637*n*, referred to.

Appeal against the order of the District Judge, Murshidabad, dated the 20th August 1914, reversing that of the Sub-Judge, Murshidabad, dated the 25th February 1914.

FACTS of the case appear from the judgment.

Babu *Hemendra Nath Sen*, (with him Babus *Sajani Kanta Sinha* and *Mohesh Chandra Banerjee*), for the Appellant.—The suit was not maintainable under section 109 of the Bengal Tenancy Act, as the matters now in controversy formed the subject of investigation under section 105 of the Bengal Tenancy Act. Even if it be assumed that the Revenue Officer did not actually decide the incidents of the tenancy, it is submitted that as those objections might have been raised by the plaintiffs tenants-respondents and might have been decided under section 105A, Bengal Tenancy Act, the present suit was not maintainable if a wider meaning be given to section 109, Bengal Tenancy Act, on the analogy of the doctrine of constructive *res judicata*. Lastly, it is submitted that as regards the prayer for a declaration that the defendant-appellant was not entitled to realise the rent from the plaintiffs as was found fair and equitable under section 105, Bengal Tenancy Act, the suit was clearly barred by section 109, Bengal Tenancy Act. Refers to *Sheodhani Pandey* v. *Moharani Beni Pershad Koeri* (1). If that be so, it will be of no use to the plaintiffs even if they succeed in getting a declaration in their favour.

Babu *Panchanan Ghose* and Mr. *M. A. S. M. Akram*, for the Respondents.—If the plaintiffs-respondents succeed in getting a declaration that they are *raiyats* and not tenure-holders and that the lands formed distinct *raiyati* holdings and not one tenure, they will be able to meet the appellants-landlords, in a suit for rent brought by the latter against the former on the basis of the determination under section 105, Bengal Tenancy Act, by the plea that the rent as determined under section 105, Bengal Tenancy Act, related to a hypothetical holding and not to the holding that actually belonged to the plaintiffs-respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for a twofold declaration, *viz.*, *first*, that proceedings under Chapter X of the Bengal Tenancy Act, commenced at his instance, were fraudulent, *ultra vires* and void; and *secondly*, that, if the proceedings were not vitiated by fraud, the plaintiffs were *maurasi mokarari raiyats* in respect of the disputed lands (and not tenure-holders as entered in the Record of Rights)

(1) 16 Ind. Cas. 935; 16 C. L. J. 67.

that the lands formed distinct *raiyati* tenancies (and not one tenure) and that the defendant-landlord was not entitled to realise Rs. 84, which has been assessed by the Settlement Officer as fair rent under section 105 of the Bengal Tenancy Act. The suit was defended on the ground, amongst others, that it was barred under section 109. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the District Judge has reversed that decision and has remanded the suit for trial on the merits. The present appeal is directed against this order of remand, and raises the question whether the suit is maintainable notwithstanding the provisions of section 109.

Section 109 provides that, subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken under sections 105 to 108, both inclusive. Before we determine the scope of section 109 and its effect when applied to the present suit, we may point out that the proviso to section 111A is of no assistance to the plaintiffs. That proviso applies only to a case where the Record of Rights has been framed in pursuance of an order made under section 101, sub-section (2), clause (*d*); that is, to a case where a settlement of land revenue is being or is about to be made; but in the case before us, the Record of Rights was prepared at the instance of the landlord under the provisions of section 1 1, sub-section (2), clause (4). Consequently, we have to determine how the suit is maintainable notwithstanding the provisions of section 109.

It is plain that in so far as the plaintiffs ask for a declaration that the proceedings under Chapter X were vitiated by fraud, section 109 does not present an effective bar. No question of fraud was the subject of the application under section 105; consequently the suit, treated as a suit for relief on the ground of fraud, is maintainable; with regard to the alternative declaration, the appellants contend that as the questions for determination might have been made the subject of controversy in the proceedings under section 105, they cannot be investigated in the present suit. In our opinion, there is no force in th s contention. Section 105A, no doubt, authorises the Settlement Officer, in the course of proceedings under section 105, for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But in the case before us no such question was raised or investigated in the proceeding under section 105. The reason assigned by the plaintiffs is that they were not apprised of the proceedings under Chapter X and, consequently, did not appear before the Settlement Officer. Whether the tenants were or were not aware of the proceedings under Chapter X, the fact remains that the matters now in controversy did not form the subject of investigation under section 105. Consequently, on a plain and literal reading of section 109, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application under section 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11, Code of Civil Procedure, is applicable a question which might and should have been raised is deemed to have been raised and decided, we should hold under section 109 that a matter has been the subject of an application under section 105, whenever it might, if the defendant had so chosen, have been raised and decided under section 105 read with section 105A. We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we cannot hold, on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under section 105, read with section 105A. In this connection, we may observe that sections 105 and 109 were inserted in the Bengal Tenancy Act, III of 1898 B. C. Section 105A was subsequently introduced into the Bengal Tenancy Act, by section 26 of Act I of 1907 B. C. But though the scope of section 105 was thus widened and section 105A was included in section 109, the language of section 109 was left unaltered. If the Legislature had intended to adopt the view put forward by the appellant, the language of section 109 would, no doubt, have been suitably modified,

As pointed out by this Court in a long line of cases, amongst them in *Pandab Dowari Das* v. *Ananda Kishun Chakravarti* (2), *Shashi Bhusan Hazrah* v. *Sheikh Esabar* (3) and *Sashi Bhusan Hazra* v. *Aswini Comar Samanta* (4), to attract the operation of section 109, it is essential to establish that the civil suit has for its subject a matter what has already formed the subject of an application under section 105. These cases were decided before the introduction of section 105A into the Bengal Tenancy Act. But as the introduction of section 105A has not altered for our present purpose the scope of section 109, section 109 must now be construed on the same lines as before the introduction of section 105A. In this view, it is plain that in so far as the plaintiffs seek for a declaration that they are *maurasi mokurari raiyats* and not tenure-holders and that the lands held by them constitute not one tenure but distinct *raiyati* holdings, the suit is clearly maintainable. These matters did not form the subject of determination under section 105, indeed, the Settlement Officer had enquired into the point at an antecedent stage, namely, when the Record of Rights was under preparation. The only matter for investigation in the proceeding under section 105 was the question of fair and equitable rent of the lands shown in the Record of Rights as held by the tenants as tenure-holders under their landlord. But in so far as the plaintiffs seek a declaration that the defendant is not entitled to realise Rs. 84 as rent in respect of the land in suit, the suit is clearly barred by section 109, for this question directly relates to a matter which had formed the subject of the application under section 105. This view is in accordance with that taken by this Court in the case of *Sheodhani Pandey* v. *Moharani Beni Pershad Roeri* (1). It is, consequently, superfluous to determine what the position of the plaintiffs will be, if they succeed in this litigation and obtain the other declaration which they seek. It is conceivable that in such a contingency, if notwithstanding their success the landlords institute a suit for rent against them on the basis of the determination under section 105, they may be met successfully by a plea which need not be elaborated for the purposes of this suit.

The result is that the prayer for a declaration that the defendants are not entitled to get the assessed amount of *jama* of Rs. 84 will be struck out from the plaint. Subject to this alteration, the order for remand made by the District Judge will stand. As the appeal has substantially failed, the appellant must pay the respondents their costs in this Court.

Decree varied.

(2) 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897.
(3) 29 Ind. Cas. 122; 19 C. W. N. 636.
(4) 28 Ind. Cas. 981; 19 C. W. N. 637*n*.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 49 OF 1914.

July 17, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

PONNAMBALA MOOTHAN—PLAINTIFF—PETITIONER—APPELLANT

versus

MAHADEVA PATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 11—Application for amendment of decree—Death of one of respondents pending appeal—Legal representatives not brought on record, effect of—Relief, whether can be granted.

Where a decree is passed against all defendants equally, a partial amendment of it cannot be allowed as against some of the defendants alone. [p. 698, col. 1.]

Where, therefore, during the pendency of an appeal against an order rejecting an application for amendment of a decree, one of the defendants-respondents died and no proper steps were taken to bring his legal representatives on record in time:

Held, (1) that it was not possible to amend the decree without having on record and hearing all the defendants; [p. 698, col. 1.]

(2) that the appeal having abated against the deceased defendant, it must be dismissed as against all, as the relief asked for could not be granted in the absence of one of the parties. [p. 698, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Sankaran Nair, in Civil Revision Petition No. 565 of 1913, presented to the High Court to revise the order of the District Court of South Malabar, in Miscellaneous Petition No. 46 of 1913, in Appeal

Suit No. 718 of 1911, (Original Suit No. 28 of 1910), on the file of the Court of the Subordinate Judge of Palghat.

Mr. *N. A. Krishna Aiyar*, for the Appellant.

Mr. *P. R. Ramakrishna Aiyar*, for the Respondents.

JUDGMENT.—In this case plaintiff applied for amendment of a decree which was against three defendants by increasing the costs and interest awarded to him. He failed in the lower Court, and his application to the High Court was rejected. This is a Letters Patent Appeal against that order. Pending this appeal one of the defendants-respondents died and no proper steps were taken to bring his legal representatives on record in time. The appeal, therefore, has abated as against him under Order XXII, rules 4 and 11 of the Code of Civil Procedure, read together. The preliminary objection is taken by the other respondents that this appeal cannot go on and must be dismissed as the legal representatives of the deceased respondent are necessary parties to this appeal. The application from which this appeal arises is to amend a decree passed against three defendants as above stated. It is not possible to amend that decree without having on record and hearing all of them on the point. We cannot allow a partial amendment of a decree, which is equally against all the defendants, as against some of the defendants alone. We might thereby interfere with rights of contribution *inter se*. The whole appeal must, therefore, be dismissed on the ground that the relief asked for in the appeal cannot be granted in the absence of one of the parties.

The appeal is dismissed with costs.

Appeal dismissed.

V.R.P.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 115 OF 1915.

June 1, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

GAJADHAR PROSAD—PLAINTIFF—APPELLANT

versus

Musammat LOHIA *alias* LOBHIA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Admission of documents after closing case—Omission to record reason—Illegality—Remand with direction that case be re-heard by another Judge.

It is illegal for a Court of Appeal to admit documents adduced by one party in evidence after the case has been closed, arguments heard and judgment reserved, without giving the opposite party an opportunity of rebutting them and without recording reasons for such admission. [p. 700, col. 2.]

When a case is remanded under such circumstances for being re-heard, the proper course is that the order of remand should be accompanied by a direction that the case be re-heard by some other Judge, as the Judge who originally heard the appeal may not be free from the impression formed at the first hearing. [p. 700, col. 2; p. 701, col. 1.]

Appeal against the decree of Mr. Justice Walmsley, dated the 2nd July 1915, in Appeal from Appellate Decree No. 3854 of 1913.

FACTS.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of the plaintiff's title to a certain jack-tree situate within the estate of the plaintiff and standing on the homestead of the defendant, on the allegation that the plaintiff was entitled to half of the produce (fruits) of the jack-tree in accordance with the local custom of the country. The defendant denied this right of the plaintiff as well as the existence of any such local custom. The first Court gave the plaintiff a decree, holding that the alleged custom having been proved the plaintiff was entitled to one-half of the produce of the tree. An appeal was preferred against this decision of the Munsif and the learned Subordinate Judge on appeal allowed the defendant to put in certain documents, *viz.*, village notes, etc., after the arguments were finished, and he ordered them to be marked as an exhibit, in spite of the strong protests of the Pleader for the plaintiff. Then the lower Appellate Court, relying mainly on the additional evidence thus adduced, reversed the decision

of the first Court. Thereupon there was a second appeal to the High Court in which the judgment of the lower Appellate Court was upheld. The learned High Court Judge did not take into consideration the contention that the lower Appellate Court had acted illegally in allowing the defendant to produce additional evidence in the Appellate Court and without giving the plaintiff any opportunity of rebutting the evidence so adduced, and hence an appeal under the Letters Patent.

Babu *Biraj Mohan Mozumdar* (with him Babu *Monmotha Nath Mukerji*), for the Appellant.—My principal grievance is that the lower Appellate Court ought not to have allowed this further evidence to be given in violation of the provisions of Order XLI, rule 27, of the Civil Procedure Code and reversed the decision of the 1st Court on the basis of such evidence.

[MOOKERJEE, J.—Why was the additional evidence allowed to be produced?]

The additional evidence can be produced only under Order XLI, rule 27. Order XLI, rule 27, provides that the reasons for admission of additional evidence in appeal should be recorded by the Appellate Court. But the learned Sub-Judge has assigned no reason whatsoever for allowing the additional evidence given on appeal. He should have done so under Order XLI, rule 27. The lower Appellate Court has acted with material irregularity in allowing the additional evidence to be put in after the arguments were heard and in spite of the strong objection of the plaintiff's Pleader. The plaintiff was not allowed an opportunity of rebutting the evidence adduced by the defendant in appeal. The learned Judge in second appeal ought to have considered that the additional evidence on which the judgment of the lower Appellate Court was mainly based was admitted in violation of the provisions of Order XLI, rule 27, of the Civil Procedure Code. He should have reversed the decision of the lower Appellate Court or at least ought to have sent back the case for re-hearing.

Babu *Satis Chandra Mukherjee*, for the Respondents.—The lower Appellate Court was quite right in reversing the decision of the 1st Court, as it found that the plaintiff having failed to prove the alleged local custom was not entitled to any right to a share in the fruits of the jack-tree. The Judge's decision was not very much influenced by the additional evidence adduced. The judgment of the lower Appellate Court was based on other evidence on the record.

The lower Appellate Court, which is the final Court of fact, has held that the plaintiff has failed to prove the custom for reasons laid down in its judgment and the finding is conclusive in second appeal.

[MOOKERJEE, J.—The Judge allowed the documents to be produced and ordered them to be marked as an exhibit without assigning any reason for so doing. He has also made reference to them in deciding the case.]

JUDGMENT.

SANDERSON, C. J.—In this case the suit was brought by the plaintiff, alleging that by custom the plaintiff was entitled to half the fruits of a certain tree which was upon his estate, but within the homestead of the defendant who was a tenant of the plaintiff. The custom was alleged to exist with regard to this tree, inasmuch as it was upon land in respect of which the tenant paid no money-rent but had to give half its fruits, and it was alleged that the landlord was entitled to receive half the fruits of this particular tree.

We are told that this is a test case which may govern other cases than the one now in question.

The Munsif who tried the case in the first Court decided in favour of the plaintiff, and held, as I read his judgment, that there was the custom.

Then the appeal went to the learned Subordinate Judge in the first Appellate Court, and it seems that on the 21st of August the appeal was heard and arguments addressed to the learned Judge; and after that he reserved judgment. Then having reserved judgment, as I understand, at a subsequent stage, in the absence of the plaintiff, although the plaintiff's Pleader was there, the learned Judge allowed the defendant's Pleader to put in certain documents, inspite of the protest of the plaintiff's Pleader. Those documents are described by the learned Judge as "certain papers along with lists," and it appears from a subsequent note that those papers included a "certified copy of survey village

notes," which was marked Exhibit B under the direction of the learned Judge; but the learned Judge has not recorded any reason for admitting that evidence. On the other hand, the plaintiff has alleged that if the evidence was to be admitted at all, he ought to have been given an opportunity of rebutting that evidence; and the importance of that argument is made clear by the judgment of the learned Judge himself, because in giving his judgment, after referring to the village note which was put in on behalf of the defendant, he goes on to say, when dealing with the plaintiff's evidence: "The plaintiff has, in my opinion, failed to prove that the defendant ever divided the fruits with the plaintiff or his predecessor-in-title. It is admitted by the plaintiff's witness that the previous owner made over to him the village papers. These would have been the best evidence to show the division of the fruits but they have been withheld." It is stated in the plaintiff's affidavit that if the plaintiff had been given an opportunity of rebutting the evidence contained in the notes which were put in on behalf of the defendant, he would have been able to put in those papers. Whether they would assist his case or not, I cannot tell. Personally I think, quite apart from the rules of the Code to which I intend to make reference directly, that is not the way in which an appeal ought to be heard. I do not think it was fair to the plaintiff that these notes should have been admitted by the learned Judge after the arguments were finished, when apparently the plaintiff's Pleader had no opportunity of arguing the effect of them; certainly, the plaintiff had no opportunity of rebutting the evidence contained in those papers.

But the case may be looked at from a different point of view. That is the point of view under the rules of the Civil Procedure Code, the material one being Order XLI, rule 27, which runs as follows:—"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if.....the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined. Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission." In this case the learned Judge has not recorded any reason for the admission of the evidence and I think myself that that alone would be sufficient for us to allow this appeal. I do not wish to rest my judgment upon that alone, because I think the merits of the case are in favour of the plaintiff. The learned Judge of the High Court, Mr. Justice Walmsley, in giving his judgment seems to have been satisfied that the learned Subordinate Judge was not influenced by the evidence contained in the papers which were put in on behalf of the defendant after the case had been argued and judgment was reserved. With greatest respect to him, I think, that is not a legitimate conclusion to arrive at, because, if we look at Exhibit B, there is a material statement in it—a statement which has been marked with red pencil—and we cannot help noting that that must have been marked by him because it was in his opinion a material piece of evidence in the case. How much it may have affected his mind, we are unable to say; but in my opinion, it is impossible for us to say that it did not affect his mind at all. Therefore, on the ground, *first* of all, that the learned Judge has not recorded his reason for admitting the evidence; and, *secondly*, on the ground that the evidence ought not to have been admitted in the circumstances after the case was argued, and *thirdly*, on the ground that we cannot say that the evidence did not affect his mind, I think this appeal ought to be allowed.

Then the question arises what course ought to be adopted. In my judgment, the case should go back to the first Appellate Court for the purpose of being re-heard, and we give direction that if the learned Judge who hears the case thinks it right to hear further evidence under the circumstances of this case, then, of course, it will be in his discretion to allow it; but if he does allow it, he must give an opportunity to both parties to produce such evidence as they think fit. Further, I think that we ought to say that this case ought not to be tried by the same Subordinate Judge who has

already heard it. I do not wish to make any reflection on the Subordinate Judge, in any shape or form; but I think it may be difficult for him, when he hears the case on the second occasion, to have an impartial mind free from his former impression. Therefore, I think the case should go back to the District Judge, so that if he does not hear it himself, he will direct it to be tried by another Subordinate Judge competent to try it.

The plaintiff will have the costs of this appeal, the appeal before Mr. Justice Walmsley and in the first Appellate Court.

MOOKERJEE, J.—I agree.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 4 OF 1915.

March 24, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, Mr. Justice Tudball and Mr. Justice Rafique.

Musammat JAGRANI MISRAIN—PLAINTIFF—APPELLANT

versus

BISHESHAR DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Mutation proceedings—Compromise, admissibility of, in evidence—Family settlement—Civil Procedure Code (Act V of 1908), O. XVIII, r. 11—Objection as to admissibility—Procedure.

In a mutation case the plaintiff filed a compromise giving up her rights in the property in dispute and the Revenue Court ordered "mutation according to the compromise." The compromise not having been acted upon by the defendant, and being unregistered the plaintiff brought a suit for possession of the property in dispute:

Held, (1) that the interest of the plaintiff had not been transferred and she was entitled to possession; [p. 702, col. 2; p. 704, col. 2; p. 706, col. 2.]

(2) that the mutation proceedings were not judicial proceedings nor was there any decree which could have the effect of transferring the interest of the plaintiff, inasmuch as all that the mutation officer had to do or had jurisdiction to do was to order whose name should be recorded; [p. 702, col. 2; p. 704, cols. 1 & 2; p. 706, col. 1.]

(3) that the transaction was not a family arrangement. [p. 703, col. 1; p. 704, col. 2; p. 706, col 2.]

Per *Richards, C. J.*—A document which discloses "family arrangements" and which at the same time "purports or operates" to create, declare, assign, limit or extinguish a right to, or interest in, immoveable property of the value of Rs. 100 or upwards must be registered. [p. 703, col. 1.]

A document which cannot be objected to for want of registration is admissible, provided it is relevant to some issue in the case and unobjectionable on any other valid ground. [p. 703, col. 1.]

A document cannot be received in evidence on the ground that it does not "purport or operate" as an assignment or relinquishment of rights in property and then be used by the Court for the very purpose of showing that the right was relinquished or assigned. [p. 703, col. 1.]

No definite rule can be laid down as to the admissibility of applications and orders in mutation proceedings. Each case must be dealt with according to law. [p. 703, col. 1.]

The proper time to object to the admissibility of a document in evidence is when the document is tendered, and not for the first time in appeal. [p. 703, cols. 1 & 2.]

When a document tendered as evidence, or a question to a witness, is objected to as inadmissible, it is the duty of the Judge to rule on the objection, and if he admits the document or allows the question to be asked notwithstanding the objection, the Judge should note that the objection has been made. [p. 703, col. 2.]

Per *Tudball, J.*—(*obiter*)—If the document in dispute was one which purported or operated to extinguish the plaintiff's title, registration thereof would be compulsory. [p. 704, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Banerji, dated the 9th November 1914, reported as 26 Ind. Cas. 791, in Second Appeal No. 1140 of 1912.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Jang Bahadur Lal*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit for possession of immoveable property brought by one *Musammat* Jagrani Misrain. The Court of first instance dismissed the plaintiff's suit. The Court of first appeal confirmed this decree and a learned Judge of this Court dismissed the second appeal.

Nirban Dube had three sons, Gulab Dube, Chandrika Dube and Ramphal Dube. Chandrika Dube left him surviving his widow and his daughter (the present plaintiff). On the death of Chandrika Dube the name of the widow was recorded and continued to be recorded up to the time of her death. Ramphal Dube had a son, Mulai Dube. The defendants are the sons of Mulai Dube. On the death of the widow of Chandrika Dube disputes arose between Jagrani on the one side and Mulai Dube on the other as to whose name should be recorded. Apparently Jagrani was claiming that the sons

of Nirban Dube were separate, that on the death of her father Chandrika Dube his widow was not only recorded but she was entitled to the property, and that upon the death of the widow the plaintiff became entitled to the property for the estate of a Hindu female. Mulai Dube, on the other hand, was apparently claiming that Chandrika Dube and Ramphal Dube were joint and that the name of the widow of Chandrika was recorded merely for consolation. It has been definitely found by the Court below that Chandrika Dube and Ramphal Dube were separate. On this finding it is clear that the plaintiff is entitled to possession of the property, unless the defendants can show that she transferred her interest or that they have some other legal or equitable defence.

I now propose shortly to state what actually happened according to the findings of the Court, apart altogether from legal questions such as the admissibility of evidence. I have mentioned the dispute which occurred on the death of the widow of Chandrika. The dispute was in mutation proceedings. This matter ended by an application filed on behalf of the plaintiff in which she stated that the matter had been compromised, that she gave up her rights to the property and that the name of Mulai might be recorded. The order which the mutation officer made on this petition was, "mutation according to the compromise." The name of Mulai was accordingly recorded. It appears that the full arrangement (which does not appear in the petition) between the parties was that certain debts due by the plaintiff's father and mother should be paid off, including a debt incurred for the marriage expenses of the plaintiff's daughter. Mulai executed two simple money-bonds in favour nominally of a third party but really for the benefit of the plaintiff. Mulai managed to get back these bonds. The plaintiff never got the amount nor did Mulai discharge them. They are long since barred by limitation. The plaintiff alleged that this compromise was brought about by fraud and that she knew nothing about it. The Courts have found that fraud was not proved, that the plaintiff knew what she was doing, although the consideration was inadequate.

The petition to the Revenue Court was not registered. Save this document and the order of the mutation officer the defendants were unable to adduce any evidence showing that the plaintiff had transferred her interest in the property in dispute. The learned District Judge was of opinion that the "mutation proceedings" were "judicial proceedings" and that the mutation officer, by his order "mutation according to compromise", had incorporated the compromise into his decree, and applying the ruling of their Lordships of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (1), the learned Judge held that the interest of the plaintiff had been transferred as the result of the compromise and the decree in mutation proceedings.

It seems to me that this view is wrong. The mutation proceedings were not judicial proceedings nor was there any decree which could possibly have the effect of transferring the interest of the plaintiff. All that the mutation officer had to do or had jurisdiction to do was to order whose name should be recorded. The parties consented that the name of Mulai Dube should be recorded but this conferred no title upon him. In my opinion (if we disregard the petition) the interest of the plaintiff is not proved to have been transferred and on the findings of the Court below she is entitled to possession, subject to paying off the usufructuary mortgages which are mentioned in the judgment of the learned Subordinate Judge. Having regard to the fact that Mulai never paid up the account of the bonds I think that this would meet the justice of the case and I would modify the decree accordingly. This case was referred to a Bench of three Judges on account of the conflict, or supposed conflict, of authorities on the subject of the admissibility of compromise proceedings in the Revenue Court. And many cases have been cited by each side.

Section 17 of the Registration Act provides that certain documents must be registered and amongst others "non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards to or in

(1) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

immoveable property." The words are very wide and comprehensive. Section 49 provides that no document required by section 17 to be registered shall (*a*) affect any immoveable property comprised therein or *****(*c*) shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. It seems to me that if the petition to the Revenue Court in the present case was such a document as is referred to in section 17, it was clearly inadmissible in evidence to prove that the interest of the plaintiff had been transferred. If the petition was not such a document as is referred to in section 17, then it could not, of course, be rejected as inadmissible on this ground and the document was admissible provided it was otherwise relevant to the case. It must be remembered that a document cannot be received in evidence on the ground that it does not "purport or operate" as an assignment or relinquishment of rights in the property and then be used by the Court for the very purpose of showing that the right was relinquished or assigned. It is said that the transaction in the present case was a "family arrangement" and it is urged that documents connected with family arrangements need never be registered. I think that there is no justification for such a proposition. Documents which disclose "family arrangements" and which at the same time "purport or operate" to create, declare, assign, limit, or extinguish, etc., must be registered, just as much as any other documents not connected with "family arrangements." Nor do I think that any of the cases in which their Lordships of the Privy Council have considered "family arrangements" can be used as authorities for the proposition that such documents are exempt from the provisions of the Registration Act. Documents which cannot be objected to for want of registration are, of course, admissible provided they are relevant to some issue in the case and unobjectionable on any other valid ground. It is needless to add that it is quite impossible to lay down any definite rule as to the admissibility of applications and orders in mutation proceedings. Each case must be dealt with according to law. I would like to point out that the proper time to object to the admissibility of a document in evidence is when the document is tendered. It is obviously as a general rule unfair and improper that parties should be allowed to raise objections as to the admissibility of evidence, documentary or otherwise, for the first time in appeal. When a document tendered as evidence, or a question to a witness, is objected to as inadmissible, it is the duty of the Judge to rule on the objection and if he admits the document or allows the question to be asked notwithstanding the objection, the Judge should note that the objection has been made. This elementary rule of procedure is very frequently altogether lost sight of both by the Court and by Pleaders.

TUDBALL, J.—The facts as found may be briefly stated as follows:—A separated Hindu created two usufructuary mortgages on portions of his estate, and then died leaving a widow and a daughter. The widow held possession for her lifetime and created a third usufructuary mortgage. She died. Her daughter laid claim to the estate and applied for entry of her name in the Revenue Records. One Mulai, one of the reversioners, contested her application urging that her father was joint with him and not separate. The parties came to terms, orally. The daughter agreed to give up her claim. Mulai in return agreed to take the estate, pay off the mortgages and to pay a certain sum of money to the daughter (who is the present plaintiff).

They two then filed a joint petition in which it was stated that the parties had come to terms. This statement was followed in the petition by another on behalf of the plaintiff that as she had given up her claim to the estate, she had no objection to mutation being made in favour of Mulai. To this was added a statement by Mulai that as the plaintiff had given up her claim he did not press for costs. The Revenue Court's order was that mutation was to be made according to that compromise. Mulai, to secure to the plaintiff the payment of money he had promised to pay, executed two bonds (simple ones) in favour of the husband of the plaintiff's sister. Instead, however, of paying the money he took back those bonds and made it impossible for any one to sue for them.

The plaintiff has now come, some 11 years after her mother's death, into Court and sues for possession of the estate. Her claim ha been dismissed on the ground that there

was a *bona fide* compromise with consideration and that, therefore, she has lost her rights which she relinquished under the compromise in the Revenue Court. She in her plaint sued to have the mutation order set aside on the ground of fraud. But the Courts have held that though the consideration was very inadequate she had fully understood the transaction and there had been no fraud. It seems to me difficult to hold that the petition filed in the Revenue Court, wherein the parties expressed their willingness to have the name of Mulai recorded in the revenue registers, is a document which purported or operated to extinguish the right, title and interest of the plaintiff. If the parties had executed and registered a document setting forth the terms of the agreement and the plaintiff had therein recorded that she thereby gave up all such right as she might have, even then they would have had to file this same petition before the Revenue Officer. Nowhere in this document did the plaintiff say: "I hereby relinquish all such right, title and interest as I may have in the estate of my father." She merely stated that as she had given up her claim to the estate, she agreed to the entry of Mulai's name. The document does not purport to be a deed of relinquishment. It did not even contain all the terms of the agreement.

It does not appear to be such a document as is contemplated by section 17 of the Registration Act, and required no registration. It is worthy of note that it was let into evidence in the trial Court without objection of any sort and it was too late to object to its admissibility when the case went on appeal to the lower Appellate Court.

Though perhaps it may be only *obiter dictum* to express an opinion on the point, still, as it has been argued before us, I think it well to say that if this document were one which purported or operated to extinguish the plaintiff's title registration thereof would, in my opinion, be compulsory. The Revenue Court is one of very restricted jurisdiction and in the present instance was concerned only with the change of names in the Revenue Records. It had no power to decide the question of title at all as between the parties, or to make any declaration in regard thereto. It could pass no decree embodying a compromise, such that Mulai could have put into execution and thereby obtained possession. As far as it was concerned, it had to do only with so much of the compromise as allowed the name of Mulai to be recorded in the village *khewat*. Over matters outside the scope of its jurisdiction it had no power. As regards the plea that there was a family settlement and the Court ought not to go behind it, it hardly lies in the mouth of the defendants to raise it. Where a family settlement, *bona fide* and free of fraud, is made and acted upon by all the parties, even though a full and proper document be not duly executed and registered, the Courts have refused to go behind it. But in the present case Mulai did not act fully upon it. He took the property and paid off the mortgage, but failed to pay to the plaintiff the amount which he had promised to pay. He dishonestly got back the two bonds he executed and left the plaintiff with nothing. In these circumstances as the plaintiff has not transferred her title by a document duly executed and registered, I think we are entitled to go behind this so-called family settlement (to which by the way the other reversioners were no parties).

I would, therefore, reverse the decisions of the Courts below and decree possession to the plaintiff subject to her making good to the defendants the sums of money, if any, spent in the redemption of the three usufructuary mortgages.

RAFIQUE, J.—This is a Letters Patent Appeal and the point for consideration is, whether an unregistered compromise affecting immoveable property of the value of more than Rs. 100 filed in a Revenue Court, upon the basis of which mutation of names has been effected, is admissible in evidence in a subsequent civil suit between the parties disputing the right to the said property. The case has been referred to a Full Bench because of the alleged conflict of case-law in this Court. The relevant facts of the case are these:—One Chandrika Dube died some years ago possessed of the property in suit and leaving him surviving a widow and a daughter. The latter is the plaintiff-appellant in the present case. On the death of Chandrika his widow, *Musammat* Anurani, entered on possession and the mutation of names was made in her name. She died in 1900. On her death, her daughter applied for mutation of names in her favour and

Mulai, a nephew of Chandrika, objected and claimed to have his name entered. On the 12th February 1901, a petition of compromise was presented to the Assistant Collector in which it was stated on behalf of *Musammat* Jagrani, the daughter, that she withdrew and relinquished her claim to the inheritance in the property of *Musammat* Anurani, her mother, and that the name of Mulai should be entered in the Revenue Records, and on behalf of Mulai the statement was that as *Musammat* Jagrani had relinquished her claim he did not press for costs. The Assistant Collector ordered "Let mutation be made according to compromise." On the 24th of November 1911, *Musammat* Jagrani brought the suit out of which this appeal has arisen, for the recovery of possession of the property which had been in the possession of Mulai and after his death of his sons, the defendants in the present case, by virtue of the compromise of 1901. She challenged the compromise, on the ground that she had not entered into it knowing its full effect and that a fraud had been practised on her and that it was without consideration. She further alleged that her father, Chandrika Dube, was separate from his brothers one of whom was Mulai's father. The claim was resisted on various pleas. The validity of the compromise was set up and it was urged that it was entered into by *Musammat* Jagrani with full knowledge of its contents and of its effect upon her interests and that it was for consideration. It was further alleged that Chandrika was joint with his brothers and their sons and that Mulai had paid off mortgages of Chandrika and his widow *Musammat* Anurani. The Court of first instance found that Chandrika was separate from his brothers and their sons and that the compromise in question was made by *Musammat* Jagrani with full knowledge of its contents and its effect upon her interests and that no fraud had been practised on her. The claim was accordingly dismissed. On appeal the decree of the first Court was affirmed. On second appeal a learned Judge of this Court remanded the case for trial of certain issues, one of which related to consideration. The findings on the remanded issues were against the plaintiff-appellant, except on the question of consideration. It was found that consideration had passed but it was inadequate. The appeal was accordingly dismissed.

On behalf of the plaintiff-appellant the contention before us is that the compromise presented to the Revenue Court on the 12th February 1901 on the basis of which mutation of names was made in favour of Mauli, is inadmissible in evidence and does not operate as the relinquishment of her right in the property in suit by the plaintiff-appellant, because the compromise affected property of the value of more than Rs. 100 and was not registered. For the respondents the reply is twofold. It is contended on their behalf that the petition presented to the Revenue Court on 12th February 1901 was not a compromise but merely a report or information to the Revenue Court of a compromise that had been orally made outside Court; and a compromise need not be in writing or registered. If a compromise has been validly made and acted upon it must be given effect to. In support of this contention reliance is placed on the following cases: *Nur Ali* v. *Imaman* (2), *Pearey Lall* v. *Musammat Kokla Kunwar* (3), *Musammat Kokla* v. *Pearey Lal* (4). The last two cases are really one case. The case of *Musammat Kokla* v. *Pearey Lal*(4) was decided in Letters Patent Appeal from the judgment of a single Judge of this Court between the same parties. The case of *Musammat Kokla* v. *Pearey Lal* (4) is distinguishable from the present case. In that case the compromise was acted upon and on the faith of that compromise third parties had dealt with one of the parties to the compromise by purchasing the property from him. The rights of third parties had to be considered. The case of *Nur Ali* v. *Imaman* (2) is certainly in favour of the respondents. But with due deference to the learned Judges who decided that case I am unable to agree with them. They say that the compromise presented to the Revenue Court in that case was not in its essence "a compromise by deed but a statement in a petition to the Revenue Officer, informing him of the arrangement the parties had agreed upon and praying for mutation of names. And such a petition was clearly not

(2) A. W. N. (1884) 40.
(3) 18 Ind. Cas. 763; 11 A. L. J. 157.
(4) 21 Ind. Cas. 29; 35 A. 502; 11 A. L. J. 765.

such an instrument as is contemplated by section 17 of the Registration Act, but a document informing the Revenue Authority of the fact of such a compromise having been made." If the compromise filed before a Revenue Court is merely an intimation of the fact of a compromise already made and nothing more, then the question of the admissibility of the document is irrelevant. The document is then to be taken not as a compromise or an agreement between the parties that has settled their respective rights in the property in dispute, and the real compromise is that which was made before the presentation of the petition to the Revenue Officer. And if the real compromise was something else, other than the document presented to the Revenue Court, then the compromise, if relating to immoveable property of the value of more than Rs. 100, must be registered or it would not affect the property. In the present case the property is admittedly worth more than Rs. 100, and if the document of 12th February 1901 was not the compromise but an intimation of one that had already been entered into, the latter should have been in writing and registered. It is not pretended that any such document was executed by *Musammat* Jagrani and Mulai. I need hardly say that a compromise, oral or written, made in a civil suit which is embodied in the decree, stands on a different footing. The rights of the parties are determined in that case by the Civil Court decree. An order by a Revenue Court in the mutation proceedings has no such effect. The jurisdiction of a Revenue Court is limited and the Court decides in a mutation case summarily the question as to which of the two contending parties should be brought on the revenue papers for revenue purposes.

The *second* contention for the respondents is that the compromise, the mention of which is made in the document of 12th February 1901, was a family arrangement, and such a document did not require registration, for a family arrangement does not necessarily imply alienation of property. It simply recognises the antecedent title of one or of both the parties. I would *first* observe that the plea of family arrangement was not taken in the written statement. In the latter it was distinctly stated that *Musammat* Jagrani had relinquished her claim to and right in the property in dispute (*vide* paragraph 10 of the written statement). *Secondly*, all the members of the family, on the plea in defence that Chandrika died joint with his brothers and their issue, were not parties to the arrangement. *Thirdly*, part of the consideration agreed upon was to be paid to *Musammat* Jagrani which was never paid. *Fourthly*, in the present case the arrangement did have the effect of alienation, in the sense that *Musammat* Jagrani relinquished her right to the property in favour of Mulai. The learned Counsel for the respondents has relied on the case of *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (5), but that case is no authority for the proposition that a document evidencing a family settlement does not require registration. I am, therefore, of opinion that the petition of compromise dated 12th February 1901 is inadmissible in evidence for want of registration for the purpose of proving the relinquishment of her right to the property in suit by the plaintiff-appellant.

I would allow the appeal subject to the payment of usufructuary mortgages of Chandrika and *Musammat* Anurani, which have been found to have been paid off by the respondents or their father.

BY THE COURT.—The order of the Court is that the plaintiff will have a decree for possession conditional upon her paying the sum of Rs. 157-5-3, being the amount of the usufructuary mortgages dated 8th *Sawan Sudi* 1307, 1st *Jeth Sudi* 1303 and 10th *Asadh Sudi* 1297. This amount must be paid within six months from this date. If the amount is not paid the suit will be dismissed with costs in all Courts. If the amount is paid within the time the plaintiff will have her costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(5) 10 Ind. Cas. 477 (P. C.); 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 28; 21 M. L. J. 645; (1911) 1 M. W. N. 432.

BAIJ NATH RAI *v.* DHARAM DEO TEWARI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 160 OF 1915.

February 25, 1916.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

BAIJ NATH RAI—DEFENDANT—APPELLANT

versus

DHARAM DEO TEWARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 456, 578—Guardian ad litem of minor defendants, appointment of—Consent of person appointed not obtained—Interest adverse to minors—Fit and proper person—Irregularity—Mortgage by Hindu father—Suit by mortgagee against father and minor sons—Father appointed guardian ad litem—Minors, whether properly represented.

In a suit on a mortgage executed by a father, his minor sons were also impleaded as defendants, and the father was, without his consent being taken, appointed guardian *ad litem* of the minors. He entered no appearance and an *ex parte* decree was passed, in execution of which the mortgaged property was sold. On attaining majority, the minors brought a suit for possession of their share of the property, on the allegations, among others, that the consideration for the mortgage was an immoral debt, that their father was a man of bad character, that having an interest adverse to his minor sons he was not a proper person to be appointed their guardian *ad litem*, and that they had not been properly represented in the previous suit:

Held, that there was a serious irregularity about the appointment of the father to act as guardian for his minor sons, and *qua* the question sought to be put in issue in the suit, he was not a fit and proper person to be appointed as guardian. [p. 708, col. 2.]

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512; *Chandar Sekhar Tewari* v. *Balakdhari Dubey*, 15 Ind. Cas. 611; 10 A. L. J. 149; *Collector of Meerut* v. *Umrao Singh*, 29 Ind. Cas. 220; 13 A. L. J. 437; *Daulat Singh* v. *Raghubir Singh*, A. W. N. (1894) 141, distinguished.

First appeal from an order of the District Judge, Ghazipur.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Uma Shankar Bajpai*), for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is an appeal by the principal defendant in a suit against an order passed by the District Judge of Ghazipur, under the provisions of Order XLI, rule 23, of the Code of Civil Procedure. It arises out of the following facts and circumstances. In the year 1886, one Bhondu joined with his brother in the execution of a mortgage-deed hypothecating certain immoveable property. Bhondu was the head and manager of a joint Hindu family consisting of himself and his sons. In the year 1898, a suit was brought on this mortgage in which not only the original mortgagors were impleaded, but also the three sons of Bhondu. Of these three sons, one Raj Narain was major at the time, while the other two were minors. On the 30th of July 1898, an application was made to the Court to appoint Bhondu guardian *ad litem* for his two minor sons. Notice was issued to Bhondu, but no reply was received from him, nor did he put in any appearance in the suit. The Court, however, on the 30th August 1898 passed an order formally appointing Bhondu guardian *ad litem* for his two minor sons, and on the 9th of September 1898 decreed the suit *ex parte* so far as Bhondu and his sons were concerned. Eventually the property covered by the decree was brought to sale on the 22nd of September 1903, and was purchased by the successor in-interest of the original decree-holder. The present suit is brought by the two sons of Bhondu, who were minors during the litigation of 1898 and have now attained their majority. They impleaded as defendant No. 1 the successor-in-interest of the original decree-holder, who is also in possession as auction-purchaser of the property in question. They also impleaded their elder brother Raj Narain. It may be remarked that Bhondu himself has died in the interval. The plaintiffs claim to recover possession of their own shares in the property sold under the decree of the 9th September 1898, upon a finding that the decree itself and the auction-sale which followed thereon are not binding on them. The suit was resisted only by the first defendant, and on the pleas taken by him a number of issues were framed. The learned Subordinate Judge, however, decided only two of these issues, the first and the fourth. The question covered by these issues was, whether the present suit was or was not barred by the principle of *res judicata* as laid down in section 11 of the Code of Civil Procedure, along with the connected question whether the minor defendants in the suit of 1898

had been legally and effectively represented by Bhondu as their guardian *ad litem* so as to make the proceedings in that suit binding upon them. The learned Subordinate Judge found on these issues in favour of the contesting defendant, and accordingly dismissed the suit without going into the merits of the plaintiffs' case. On appeal the learned District Judge has reversed the findings of the first Court on these points and has remanded the case for trial on the merits. The first defendant appeals to this Court against this order of remand.

The learned District Judge has pointed out that, at the time of the litigation of 1898, there was in force a rule of this Court (rule 128) passed under the authority conferred on this Court by section 652 of the former Code of Civil Procedure (Act XIV of 1882), according to which the consent of Bhondu should have been first obtained before he was appointed guardian *ad litem* for his minor sons. The record shows that this rule was overlooked and was in fact contravened by the Court which tried the suit of 1898. Notice was issued to Bhondu, but when he failed to put in an appearance his consent would seem to have been presumed from the fact of his having made no objection, and he was thereupon appointed in his absence. It has already been pointed out that he made no defence to the suit, which was in fact decreed *ex parte* ten days after the order appointing Bhondu guardian *ad litem*. It is contended before us in appeal that the District Judge should not have dealt with the matter as if the mere fact of Bhondu's appointment being in contravention of rule 128 aforesaid was decisive of the whole question. Reading the judgment of the lower Appellate Court as a whole, it would not seem that the learned District Judge was himself of this opinion. He says that the question whether the minor defendants in the suit of 1898 were or were not prejudiced by the appointment of Bhondu, is a question which still remains to be tried. Nevertheless it might perhaps be contended that the effect of his order as it stands is to determine once for all in favour of the present plaintiffs the fact that they are not bound by the decree of the 9th of September 1898, and this is substantially the point taken before us. We have been referred to a good deal of case-law on the subject; probably the case most of all in point is that of *Walian* v. *Banke Behari Pershad Singh* (1). It would seem that in that case there had been a serious irregularity in the proceedings of the Court, in that no formal order appointing a guardian *ad litem* for certain minor defendants had been passed at all. There, however, the Court had the advantage, which has been denied to us to-day by the course which the present proceedings took in the Court of first instance, namely, the advantage of having before it complete findings on all the questions of fact involved. It was, therefore, in a position to hold that the minors had been effectively and adequately represented in the course of the proceedings which it was sought to challenge. Upon this it was held that the defect pointed out amounted to no more than an irregularity and was not sufficient reason for holding that the proceedings were null and void as against the minor defendants and the decree not binding upon them. We have been referred to other cases, such as *Chandar Sekhar Tewari* v. *Balakdhari Dubey* (2), *Collector of Meerut* v. *Umrao Singh* (3) and *Daulat Singh* v. *Raghubir Singh* (4). All of these cases are distinguishable from the present one on one broad ground, namely, that the guardian *ad litem* had in each case been duly appointed for the minor litigant or litigants concerned, and the person so appointed was the proper person to act as guardian. In the case now before us there was, to put it at the lowest, a serious irregularity about the appointment of Bhondu to act as guardian for his minor son, and it would seem also that, *qua* the question sought to be put in issue in the present litigation, Bhondu was not a fit and proper person to be appointed as guardian of his minor sons. The present plaintiffs are seeking to challenge the alienation of the joint family property effected by the sale of the 22nd of September 1903 on a decree which, as against their father and their elder brother at any rate, was duly obtained according to law. They claim to challenge

(1) 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512.
(2) 15 Ind. Cas. 611; 10 A. L. J. 149.
(3) 29 Ind. Cas. 220; 13 A. L. J. 437.
(4) A. W. N. (1894) 141.

this alienation on the ground that the decree, as against Bhondu, either did not represent a real debt due from Bhondu at all, or arose out of a debt tainted with immorality. Now these were pleas which Bhondu himself could not have been reasonably expected to raise. It is, therefore, practically impossible to say whether or not the minor defendants, in the litigation of 1898, were prejudiced by the appointment of Bhondu to act as their guardian *ad litem*, until we know whether a good defence on the lines above suggested was or was not open to the said defendants and could have been set up on their behalf by a properly appointed guardian, that is to say, the procedure adopted by the learned Subordinate Judge in seeking to dispose of the case before him upon what he conceived to be a preliminary issue of law, without going into the facts of the case, is practically an impossibility. To this extent the learned District Judge is right, namely, that the suit requires to be tried out on the merits. It has to be determined whether the present plaintiffs are or are not in a position to impeach the alienation of the joint family property effected by means of the decree passed against Bhondu and Raj Narain. In order to ascertain this fact it has necessarily to be considered whether the plaintiffs would have had a good defence against the suit of 1898 on the lines suggested by these pleadings. Subject to these remarks it seems to me that the decision of the learned District Judge—if that decision be properly understood—is not fairly open to objection. I would, therefore, dismiss this appeal while leaving costs of the parties here and hitherto to be costs in the suit.

WALSH, J.—I concur.

BY THE COURT.—The appeal is dismissed. Costs of the parties here and hitherto will be costs in the suit.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 3 OF 1902-03.

October 9, 1904.

Present:—Sir Lewis Tupper, Financial Commissioner.

HARJAS AND ANOTHER—MORTGAGEES—APPELLANTS

versus

HARDITTA AND OTHERS—MORTGAGORS—OTHER-SIDE.

Punjab Alienation of Land Act (XIII of 1900), *ss.* 9, 19, 23—*Mortgage by way of conditional sale made before the Act—Agreement to strike out sale conditions—Mutation—Punjab Land Revenue Act (XVII of* 1887), *s.* 37 (b).

The period of a mortgage by way of conditional sale made before the Punjab Alienation of Land Act and subsisting after the Act came into force should not be altered, if the mortgagee agrees that the sale condition shall be excised. [p. 710, col. 2.]

Where, therefore, the parties to a mortgage by way of conditional sale agreed that the mortgagees (who were non-agriculturists) should come into possession and the mortgagors should occupy the land as tenants subject to the payment of rent, and on this understanding applied for mutation of names:

Held, that mutation could not be allowed as the position of the parties was not in accordance with the Punjab Alienation of Land Act, which aimed at the excision of conditions intended to operate by way of conditional sale when they came to notice in the usual course of business; [p. 710, col. 1]

(2) that inasmuch as the parties being put to their election agreed that the conditions intended to operate by way of conditional sale should be struck out, mutation should be effected under section 37 (*b*) of the Land Revenue Act. [p. 710, cols. 1 & 2.]

Petition for revision against the order of the Collector, Jullundur, dated the 16th October 1902, affirming that of the Naib-Tahsildar, Assistant Collector, 2nd Grade, Phillour, dated the 9th September 1902.

JUDGMENT.—On March 6th, 1899, Harditta and Indar, *Jats*, mortgaged certain land and houses to Harjas and Labhu, *Khatris*, for Rs. 898. The mortgage was a collateral one and contained provisions intended to operate by way of a conditional sale and enforceable if the principal of the debt was not repaid within two years. The principal has not yet been paid and no steps have been taken to enforce the conditional sale, but by the agreement of the parties the mortgagees have come into the possession of the land and Indar and Harnam, acting apparently on behalf of his father, have taken the land on lease from them as their tenants, subject to payment of rent

for one year, which has expired. Before me the parties agree to continue this arrangement.

In consequence of the transfer of possession above referred to, parties applied for mutation of names.

The Naib-Tahsildar on the 9th September 1902 refused mutation on the grounds that the mortgagees do not belong to an agricultural tribe, that possession was taken after Act XIII of 1900 came into force, and no fresh sanction of the Deputy Commissioner has been obtained.

The Naib-Tahsildar probably did not quite understand the Act. A Deputy Commissioner cannot sanction a mortgage at variance with the Act; but if a mortgage is made by a member of an agricultural tribe at a date subsequent to the commencement of the Act in any manner or form not permitted by the Act the Deputy Commissioner under section 9 (1) can revise the term of the mortgage so as to bring it into accord with a permitted form.

The Deputy Commissioner, apparently holding that the exchange of possession above described in substance amounted to a fresh mortgage in form not permitted by the Act, upheld the order of the Naib-Tahsildar refusing sanction to the mutation.

Under the whole circumstances, I think it was proper to refuse mutation, though not for any of the reasons given above. I do not think there was any fresh mortgage but the case was such that the position of the parties was not in accordance with the policy of the Act; which, on behalf of members of agricultural tribes, aims at the excision of conditions intended to operate by way of conditional sale when they come to notice in the usual course of business.

Sections 9, 19 and 23 of the Act give me all powers necessary to deal with the case.

I have put the mortgagees to their election under section 9 (2); and they elect for the conditions intended to operate by way of a conditional sale being struck out of their mortgage-deed.

So far as relates to the land comprised in the deed which is 'land' as defined in the Alienation of Land Act, I order that the mortgage-deed be read without such conditions; in other respects it remains the record of a subsisting mortgage unaffected by these proceedings.

The parties having agreed that the mortgagees shall remain in possession and that the mortgagors shall continue to be their tenants of the land, mutation of names should now be effected accordingly under section 37 (*b*) of the Land Revenue Act.

It will be observed that the situation has now been regularized, so that there is nothing inconsistent with the policy of the Act in the relations now established between the parties. The period of a mortgage by a conditional sale made before the Act came into force and still subsisting, is not to be altered if the mortgagee agrees that the sale condition should be excised.

The Deputy Commissioner himself might have dealt with this case precisely as I have dealt with it, if it had occurred to him to do so. As the Act is still new, I have recorded my reasons fully for the guidance of other Deputy Commissioners.

Revision disposed of.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 29 OF 1915.

July 8, 1915.

Present:—Mr. Justice Twomey.

MA YON AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAUNG KYA GAING AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 18, 22—Arbitration—Award, how far bars subsequent suit for same reliefs—Specific Relief Act (I of 1877), s. 21.

A valid award will be a bar to a suit based on any of the claims embraced in the submission and covered by the award. It is, however, open to a party to impugn the validity of the award or to show that some part of the claim was not covered by it and if he succeeds in the latter such part should be dealt with on its merits. [p. 711, col. 1.]

Bhajahari Saha Banikya v. *Behary Lal Basak*, 33 C. 881; 4 C. L. J. 162; *Muhammad Newaz Khan* v. *Alam Khan*, 18 C. 414; 18 I. A. 73; 6 Sar. P. C. J. 26, referred to.

Mr. *Naidu*, for the Appellants.

Mr. *Halkar*, for the Respondents.

JUDGMENT.—This case has been needlessly complicated and protracted by reason of the failure of the lower Courts to apply

the correct law. They have proceeded on the assumption that section 21 of the Specific Relief Act governed the case, having overlooked the provisions of clause 22 of the Second Schedule to the Civil Procedure Code of 1908. Since that Code came into force the law governing such cases has been contained in clause 18 of that Schedule, and all previous decisions, in so far as they proceeded on section 21 of the Specific Relief Act, have become inapplicable.

In this case the first and second appellants and the respondent agreed on 11th March 1914 to refer to arbitration the matters in dispute in this suit. On 4th June the respondents filed the suit. There was considerable delay in serving the defendants, who did not appear till 22nd August. Meanwhile on 19th July an award had been made, and in their written statement filed on 27th August, the defendants, besides raising a defence on the merits, produced this award and claimed that its existence was a bar to the suit. Subsequently on 16th September, plaintiffs amended their plaint, and on 22nd September defendants filed an amended written statement. The amendments, however, do not affect the aspect of the case with which we are concerned.

The only issue framed was whether section 21 of the Specific Relief Act barred the suit. In view of the written statement, the issue should have been whether the award barred the suit. If the award is a valid award, it will bar a suit based on all claims embraced in the submission and covered by the award: see *Bhajahari Saha Banikya* v. *Behary Lal Basak* (1) and the Privy Council case of *Muhammad Newaz Khan* v. *Alam Khan* (2). It will, however, be open to the plaintiffs to impugn the validity of the award, or to show that some part of their claim was not covered by it, and if they succeed in the latter, such part as the award leaves undetermined can be dealt with on its merits. Though, therefore, I disagree with the grounds on which the Divisional Court acted, I consider the actual order of remand was right, and I dismiss this appeal but make no order as to costs.

Appeal dismissed.

(1) 33 C. 881; 4 C. L. J. 162.
(2) 18 C. 414; 18 I. A. 73; 6 Sar. P. C. J. 26.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 9 OF 1916.

May 3, 1916.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

RADHIKA PRASAD BAPULI—APPLICANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 4—Assignee from legal representative of deceased person, right of, to succession certificate—Question to be decided.

An assignee of a debt from the legal representative of a deceased person to whom the debt was due, is entitled to a succession certificate in respect of the debt assigned. [p. 712, col. 2.]

On an application for a succession certificate by an assignee of a debt, the only question which a Court has to decide is whether the applicant is the representative of the person to whom the debt is alleged to have been due, and not whether the assignor of the applicant had a valid title or not, or whether the assignment conveyed any title to the applicant or whether the debt secured was recoverable or not. [p. 712, col. 2.]

First appeal from an order of the District Judge, Benares, dated the 7th October 1915.

FACTS material for the report are as follows:—

This appeal arose out of an order of the District Judge of Benares, rejecting an application for a succession certificate in respect of a Government promissory note No. 307 of the value of over Rs. 8,000. The debt is known as the Tanjore debt. The promissory note was issued originally in the name of one Madho Sahay.

Madho Sahay was living jointly with his brother Beni Sahay. Madho Sahay died in 1862 and Beni Sahay in 1879.

Sital son of Madho Sahay died in 1884. Madho Sahay had four daughters. Three were issueless. One of them Subhadra had two sons, one Gulab Das who died issueless and the other Madhuri Das, who died in 1906 leaving a son Makund Lal. The note in question bore the endorsement "pay to Girdhari Lal" signed by Madho Sahay. Jiban Lal, a descendant of Girdhari Lal, tried to realise the amount unsuccessfully. Makund Lal thereafter sold the note in question to the applicant, who applied under Act VII of 1889 for a

succession certificate. The District Judge refused the application on the ground that the note bore an endorsement of transfer to Girdhari Lal by Madho Sahay and hence an assignee of Makund Lal had no right.

Dr. *Surendra Nath Sen*, for the Appellant.—The applicant is entitled to the succession certificate as it has reference to the estate of a deceased person.

[BANERJI, J.—An assignee cannot apply for a succession certificate.]

The present applicant does not happen to be the assignee of the original holder. Madho Sahay held the note. After his death Beni Sahay was entitled to it. No certificate was required for him. After Beni Sahay's death Sital Sahay, a member of the joint family, was entitled to it. In no case a succession certificate was required. He referred to *Karuppusami* v. *Pichu* (1), *Mancharam Pranjivan* v. *Bai Mahali* (2), *Allahdad Khan* v. *Sant Ram* (3) and *Rung Lal* v. *Annu Lal* (4).

[BANERJI, J.—The question is whether you can maintain this application. The endorsement on the note is signed by Madho Sahay.]

The endorsement has not been proved. The successors of Girdhari tried to realise the money but they could not prove their claim.

[BANERJI, J.—The endorsement is more than 30 years old.]

It is so, but the document does not come from proper custody. Moreover we have got a relinquishment in our favour from the heirs of Girdhari Lal.

The fact that the debt is barred is no ground to refuse succession certificate. The respondent can take this plea if we sue for the amount.

Mr. *A. E. Ryves*, for the respondent, was heard in reply.

JUDGMENT.—The appellant filed an application in the Court below for a succession certificate under Act VII of 1889 in respect of a Government promissory note described as a part of what is called the Tanjore debt. The promissory note was in favour of one Madho Sahay. He and his brother Beni Sahay are said to have formed a joint family. Madho Sahay died long ago and one of his daughters left two sons, one of whom Madhuri Das died in 1906 leaving a son Makund Lal. Makund Lal has assigned the note to the present applicant under a deed of assignment, and he as such assignee has applied for a succession certificate. The Court below refused to grant his application, on the ground that it had not been established to the satisfaction of the Court that the applicant's assignor had a subsisting title at the date of the assignment. In our opinion this was not a question which the Court ought to have gone into in the present case. Whether the assignor of the applicant had a valid title or not, or whether the assignment conveyed any title to the applicant, or whether the debt secured by the promissory note was recoverable or not, were not matters which the Court had to determine upon an application for a certificate. The only question which the Court had to decide was, whether the applicant was the representative of the person to whom the debt was alleged to have been due. In this case the debt is alleged to have been due to Madho Sahay deceased and there is no doubt, according to the finding of the Court below, that Makund Lal was the legal representative of Madho Sahay and the applicant is an assignee from him. Therefore the representative title of the applicant was established and in fact the learned Judge granted him a certificate as such assignee in respect of another promissory note. Under these circumstances the applicant was entitled to a certificate in respect of the promissory note No. 307. We allow the appeal and varying the order of the Court below, direct that a certificate be issued under the Succession Certificate Act in respect of the promissory note in question, No. 307. Having regard to the circumstances we make no order as to costs.

Appeal allowed.

(1) 15 M. 419; 2 M. L. J. 116.
(2) 18 B. 315.
(3) 17 Ind. Cas. 486; 10 A. L. J. 506; 35 A. 74
(4) 22 Ind. Cas. 349; 1[illegible] A. L. J. 968; 36 A. 21.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 79 OF 1913.

August 31, 1915.

Present:—Mr. Stuart, A. J. C., and Mr. Muhammad Ali, A. J. C

RAMMAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM GOPAL, MINOR, UNDER THE GUARDIANSHIP OF *Musammat* JANAKA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 2 (6)—"Immoveable property", meaning of—"Standing timber" and "standing trees", distinction between—Mortgage of grove—Finding questioning admitted fact—Court, duty of.

The term "standing timber" means trees the wood of which can be used for building or repairing houses or for other industrial purposes, and implies an intention, sooner or later, to sever the trees from the soil. The term "standing trees", however, does not imply any such severance or use. [p. 716, cols. 1 & 2.]

Where a mortgagee took a usufructuary mortgage of a tenant's rights in a grove, consisting mostly of fruit-bearing trees, and the parties to the mortgage did not contemplate the prospect of severance of the trees and use of their wood for industrial purposes:

Held, that the trees of the grove could not be considered to be "standing timber" and that, therefore, the mortgage of the grove-holder's rights was a transfer of "immoveable property" within the meaning of the Registration Act. [p. 716, col. 2.]

Mangal Sen v. *Musammat Naoli*, 9 Ind. Cas. 478, dissented from.

Ram Ghulam v. *Manohar Das*, A. W. N. (1887) 53, explained.

Ali Bakhsh v. *Ghurai*, 28 Ind. Cas. 180; 2 O. L. J. 97; 18 O. C. 122 and *Mirza Muhammad Ahmad Shah* v. *Saiyed Muhammad Taqi*, 30 Ind. Cas. 281; 2 O. L. J. 285, followed.

A Court cannot arrive at a finding so as to question a fact not disputed by the parties in their pleadings. [p. 715, col 1.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 21st April 1913.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This was a suit brought on the foot of a registered deed of mortgage, dated the 11th October 1905, executed by Ram Narain in favour of Ramman Lal and Narain Prasad. The deed was for a consideration of Rs. 12,500, which was made up in the following manner:—

	Rs.	a.	p.
On account of the amount due for principal on a previous mortgage-deed dated 12th March 1902 ...	3,000	0	0
On account of the amount to be paid by the mortgagees to Banwari Lal in satisfaction of a decree dated 30th November 1904 held by him against the mortgagor ...	5,000	0	0
On account of the amount due for previous debts recorded in the books of the mortgagees and the amount due for interest on the deed of 12th March 1902 to which reference has been made ...	4,002	8	3
On account of cash paid at the time of registration ...	497	7	9
TOTAL ...	12,500	0	0

The deed secured and hypothecated the mortgagor's rights in the villages of Sikandarpur and Ratnapur situated in the Farrukhabad district, and the rights possessed by the mortgagor as mortgagee of a grove of 4 *biswas* situated in Chak Bambiari, in Tahsil Shahabad, Hardoi District, under a deed of usufructuary mortgage, dated the 2nd of October 1905, executed by Girdhari, groveholder, in favour of Ram Narain for a consideration of Rs. 50. The mortgage provided for the payment of compound interest on the principal amount at the rate of six per cent. calculated half-yearly. The amount of principal and interest due was payable within five years, and, if the terms of the deed were not satisfied within five years, there was a provision that the mortgagees should be entitled to take possession of the mortgaged property and enjoy its usufruct in lieu of the interest then due.

The suit was instituted on the 1st March 1912 by Ramman Lal and Mangla

Din, son of Narain Prasad, Narain Prasad having died since the execution of the deed. Ram Narain had also died since the execution of the deed, and the defendants impleaded were Ram Gopal, minor son of Narain, and *Musammat* Anna Purna, the widow of Banwari Lal, the deceased son of Ram Narain. The suit was for possession of the mortgaged property under the terms of the deed. Ram Gopal alone defended the suit. *Musammat* Anna Purna was absent and unrepresented. The contesting defendant admitted the execution of the deed, but alleged that it had been executed without consideration, that its execution had been obtained by the exercise of fraud and undue influence on Ram Narain, that, inasmuch as registration of the deed had taken place in the Hardoi District, the terms of the deed were unenforceable as against the Farrukhabad property, because the mortgagee's rights held by the mortgagor in the Hardoi district, which were transferred under the terms of the deed, were not rights to immoveable property within the meaning of the Registration Act, that the property situated in the Farrukhabad district was the ancestral property of Ram Narain which had passed to Ram Gopal, and that the terms of the deed were not binding on Ram Gopal, as his father had no power to alienate his ancestral property and as he had not benefited under the terms of the deed.

The learned Subordinate Judge framed the following issues: —

1. Whether Ram Narain failed to receive consideration of the bond in suit.

2. Whether the deed has been obtained by fraud and undue influence.

3. (*a*) Whether the grove in Shahabad mortgaged in the deed in suit falls under the category of moveable or immoveable property,

(*b*) and whether the registration of the deed was, therefore, obtained by fraud,

(*c*) if so, how does it affect the suit ?

4. (*a*) Whether Bhajan Lal and his son Ram Narain had separated,

(*b*) whether Ram Narain had purchased the property in suit with his separate funds, and

(*c*) is the property in suit, therefore, ancestral, or self-acquired?

5. Whether Ram Gopal defendant No. 1 has been benefited by the loan. If so, is he bound by it?

6. Whether the condition to put the plaintiffs in possession of the property mortgaged is not enforceable against the defendant?

His findings on these issues were as follows:—

He arrived at no finding on the first issue, as he was of opinion that, inasmuch as the suit was one for possession, the question as to the correct amount of consideration paid and received was premature, and must be left open to be determined in a suit for redemption. On the second issue he found that no fraud or undue influence had been exercised upon Ram Narain. On the third issue he found (*a*) that the mortgagee's rights in the grove in the Hardoi District did not constitute immoveable property, (*b*) that the registration of the deed had been obtained by fraud, and (*c*) that, as the deed as against the Farrukhabad property had not been properly registered, the suit must fail as against the Farrukhabad property. His decision on the fourth issue was (*a*) that Bhajan Lal had not separated from Ram Narain, nor were they separated from the rest of the family, (*b*) that Ram Narain had not purchased the property from his separate funds, and (*c*) that the property in suit was joint and ancestral property of Khushal in the hands of Ram Narain. He considered it unnecessary to decide the fifth and the sixth issues and decreed the plaintiffs' claim to possession over the mortgagee's rights in the grove land in Hardoi and dismissed the remainder of the claim.

The appeal is filed by the plaintiffs against the dismissal of the remainder of the claim. The learned Counsel for the appellants has pointed out that according to the pleadings there was no contest between the parties with regard to one point which was decided by the learned Subordinate Judge against the agreement of the parties to the suit. Bhajan Lal was the son of Khushal.

Khushal had three sons Bhajan Lal, Khayali Ram and Lachhmi Narain. Ram Gopal, the contesting defendant, never suggested that he was a member of a joint Hindu family consisting of himself and the descendants of Khayali Ram and Lachhmi Narain. He asserted, on the contrary, in the fifteenth paragraph of his written statement that the villages of Sikandarpur and Ratnapur had formerly been the ancestral and joint property of a joint Hindu family and that he had become the absolute owner of those villages by the right of survivorship. His case was that the joint family consisted of his father Ram Narain, his half-brother Banwari Lal, and himself. Banwari Lal had in the lifetime of Ram Narain brought a suit for partition of his share, which had been settled by a decree based on an amicable arrangement by which he was allowed a sum of Rs. 5,000 in lieu of his rights. Banwari Lal being thus removed from the family, the family would have consisted of Ram Narain and Ram Gopal alone according to Ram Gopal's suggestion. The plaintiffs' case was that Ram Narain had separated from his father Bhajan Lal and that the two villages in Farrukhabad were his self-acquired property. The contesting defendant denied that Ram Narain had separated from his father Bhajan Lal, but no suggestion was ever made to the effect that Bhajan Lal was other than separate from his brothers Khayali Ram and Lachhmi Narain. Thus the parties were absolutely agreed as to the fact that there had been a separation between Bhajan Lal and his brothers. This is clear from the pleadings. Nevertheless the learned Subordinate Judge has found, against their agreement, that Bhajan Lal and Ram Narain had not separated from the rest of the family. He further found that the property was joint and ancestral property of Khushal, the father of Bhajan Lal. These findings cannot be supported in view of the pleadings of the parties to the suit. With regard, however, to the suggestion that the Farrukhabad property was self-acquired property on the part of Ram Narain and was not property acquired from the funds of the joint family of which Ram Narain, Banwari Lal and Ram Gopal were members, we find that the decision to the effect that they were not purchased from the separate funds of Ram Narain is correct. We, therefore, modify the learned Subordinate Judge's finding upon this point by noting that the Farrukhabad property was acquired out of joint family funds possessed by the family of which Bhajan Lal and Ram Narain were members and in which Banwari Lal and Ram Gopal obtained rights as co-parceners upon their birth.

We have next to consider the question of registration. The learned Subordinate Judge has relied upon a decision of a single Judge of the Allahabad High Court, reported as *Mangal Sen* v. *Musammat Naoli* (1), as support of the proposition that the mortgagee's rights possessed by Ram Narain in the grove situated in the Hardoi district were not immoveable property. The words used by the learned Judge who decided that case were, "standing timber has been excluded from section 3 of the Registration Act also and, therefore, it is evident that a grove, apart from the land on which it stands, is not immoveable property for the purposes of registration." The learned Subordinate Judge was under the impression that this decision upheld upon this point the view taken by a Bench of the Allahabad High Court in a previous case, *Ram Ghulam* v. *Manohar Das* (2). The learned Subordinate Judge is in error upon this point, for that previous decision has no reference to the question whether a grove can be considered to be "standing timber" within the meaning of the Registration Act. That decision of the Bench was solely upon the point as to whether standing trees could be considered to be immoveable property within the meaning of Article 132 of the Limitation Act. No special reference was made to the interpretation of the words "standing timber" in the Registration Act, although the members of the Bench said, "It is quite true that in other Acts, and for other purposes, definitions of immoveable property are given, which would exclude standing trees." There is nothing, however, to show that the learned Judges had in their mind the meaning of the words "standing timber" in the Registration Act. The

(1) 9 Ind. Cas. 478.
(2) A. W. N. (1887) 59.

learned Subordinate Judge, while laying stress upon the decision in *Mangal Sen* v. *Musammat Naoli* (1), remarked that no authority laying down a contrary proposition had been brought to his notice. At the time that he wrote his judgment there was no reported authority of this Court dealing with this point There have, however, been two decisions in the last few months deciding this very question. The first of these is the case of *Ali Bakhsh* v. *Ghurai* (3), where the Judicial Commissioner expressly dissented from the decision in *Mangal Sen* v. *Musammat Naoli* (1) and held that the determination of the question as to whether a transfer of interests in a grove was or was not a transfer of immoveable property within the meaning of the Registration Act ought to be decided on a consideration of the circumstances of the transfer and the intention of the parties. The point again came before the Judicial Commissioner in a case which he decided in last April, *Mirza Muhammad Ahmad Shah* v. *Saiyed Muhammad Taqi* (4), where following the same principle that he had already enunciated he decided that, where a *nim* tree had been mortgaged without any intention of its being severed from the land and used as timber as a result of the mortgage, the tree is immoveable, and not moveable property as defined by the Registration Act. We concur entirely with the interpretation of the law that has commended itself to the learned Judicial Commissioner. The word "timber" is used in the English Law to denote trees the wood of which can be used in the building and repairing of houses according to the custom of the locality in which the trees are situated, and there is no evidence worth the name to show that the wood of all the trees in the grove in question was wood that could be used for the building and repairing of houses according to the custom of the locality in which the grove is situated. But apart from that point the transfer of timber involves an intention to sever the trees from the ground in order that the wood may be used for industrial purposes. When a party purchases timber he must be impliedly considered to purchase wood for industrial uses. If that wood has already been severed from the ground the timber would be felled timber. If he purchases the trees with the intention of retaining them until they have arrived at greater maturity, he would be said to purchase standing timber. But in the latter case the factum which would distinguish the purchase of timber from the purchase of trees would be the intention sooner or later to sever the trees from the soil and to use their wood for industrial purposes. Otherwise the terms "standing timber" and "standing trees" would be convertible. Here the mortgagee took a usufructuary mortgage of the tenant's rights in a grove. As a usufructuary mortgagee he had no right to sever the trees from the ground. He would ordinarily depend for the security of his money upon the value of the trees as standing trees and would obtain his interest from their produce. The evidence shows that most of the trees in question were fruit trees. There is nothing to show that either the grove-holder or Ram Narain contemplated the prospect of the severance of the trees from the soil and the use of their wood (even if it could be so used) for industrial purposes, and thus taking the widest possible meaning of the word "timber" the trees themselves cannot be considered to be "standing timber," and it is impossible to hold that the transfer of the grove-holder's rights to the mortgagee was a transfer of moveable property, and it necessarily follows that the transfer of the mortgagee's rights was also not a transfer of moveable property. The main contention upon which the learned Subordinate Judge's decision upon this point is based fails. The transfer of the mortgagee's rights in the grove was a transfer of immoveable property, and thus the mortgage-deed was legally registered in the Hardoi district.

We now come to the consideration of that portion of the judgment which refers to the alleged fraud involved in this registration. The suggestion which found favour with the learned Subordinate Judge was that Ramman Lal and Narain Prasad had acted fraudulently and collusively with Ram Narain in having this deed registered in the Hardoi district. It is to be noted that

(3) 28 Ind. Cas. 180; 2 O. L. J. 97; 18 O. C. 122.
(4) 30 Ind. Cas. 281; 2 O. L. J. 285.

he found on the second issue that no fraud or undue influence had been exercised against Ram Narain, and his conclusion is that Ramman Lal, Narain Prasad and Ram Narain were parties to a joint fraud. Against whom was this fraud perpetrated? There is no suggestion that it was perpetrated against the minor son of Ram Narain. The confused story, which has been told by the witnesses upon this point, is that some uncle of Ram Narain was about to institute a suit against him for a share in the Farrukhabad villages, and that Ram Narain considered that, in order to defeat this claim, he should execute a fictitious transfer of his property and endeavoured to keep the fact that he had executed such a transfer from the knowledge of his uncle. This is the story which is told, and, if it were true, the person whom it was proposed to defraud would be the uncle who intended to bring a suit. The transfer would then be voidable at the instance of the uncle. We do not see what bearing this incident, even if true, would have upon the question of the validity of the registration in this particular case. The transaction would not be voidable at the instance of Ram Gopal, and under the law a fraud would make the transaction voidable rather than void. Thus we are unable to understand why the learned Subordinate Judge attached so much importance to the point of the collusive nature of the mortgage with reference to the question of registration. Apart from that fact, we consider that the evidence does not support the truth of the allegation. It is not clear how Ram Narain could have gained anything as against his uncle by making such a fictitious transfer. If the uncle wished to institute a suit it would have been either for a declaration that he was entitled to a share in the Farrukhabad villages as a member of the joint Hindu family, or for a partition. In either case his claims could not have been defeated by a fictitious transfer made by Ram Narain shortly before the suit was instituted, and there was no object, even if such a fictitious transfer were made, in having the registration effected in the Hardoi District with the intention of keeping the fact from the knowledge of this uncle, for, when registration of a document is made affecting property involved in one district, it is the duty of the registering officer to forward a copy of the deed registered to the registering officers in the other district or districts in which portions of the registered property are situated. Thus in any circumstances the knowledge of the registration of the deed in the Hardoi District must have come to Farrukhabad District. Further we find that no uncle instituted a suit against Ram Narain, and we believe that the whole suggestion is false. We have read the evidence supporting this story and we are not impressed with the veracity of the witnesses upon this point. We find that this story is not proved to be true and that there is no foundation for the suggestion that registration took place in the Hardoi District out of fraudulent intention. The reason why a small transaction was entered into in Hardoi in order to enable registration to take place at Shahabad instead of in the Farrukhabad District would appear to be very simple. It was probably more convenient for the parties to have the deed registered at Shahabad. They lost nothing by the execution of this small mortgage.

Rs. 50 were paid in consideration of the mortgage, and the property secured was property well worth the money. Thus without any loss they saved the expenses of their journey to another district. There is no reason to impute any sinister motive to them in respect of this transaction. It is a very common thing for people to obtain registration in the place most convenient to them and sometimes they are ready to pay something as a price of the convenience secured. Here they apparently had to pay nothing. We thus find that the deed was duly registered with regard to the property situated in the Farrukhabad District and this decision carries us to a point where at present we can go no further. We have found that the property has been duly transferred by the deed of mortgage, and that the property is ancestral property and joint family property in which Ram Gopal obtained an interest as a co-parcener on his birth. We cannot, however, upon this finding award possession to the appellants over the whole of the property, for a further point remains. If Ram Gopal has been in any way benefited by the execution of this

deed of mortgage or if he is in any way liable under this deed of mortgage, the appellants will be entitled to possession and then the extent of the liability of Ram Gopal under the deed of mortgage can be considered, should he choose to bring a suit for redemption. But so far we have no materials upon which we can decide whether Ram Gopal has been benefited by the execution of the deed or is liable in other ways by its execution. The learned Subordinate Judge has not decided the first, fifth and the sixth issues. Their decision is, however, necessary for the determination of the suit. As the learned Subordinate Judge has disposed of the suit upon certain preliminary points, and his decree on these points is set aside by us on appeal, we remand the case and direct that the first, fifth and sixth issues be now tried in the case so remanded, and that the suit be decided according to our decision in this appeal and the determination of those issues. We, therefore, send a copy of our judgment and order to the learned Subordinate Judge with directions to re-admit the suit under its original number in the register of civil suits and proceed to determine it under the provisions of Order XLI, rule 23, of the Code of Civil Procedure. Costs will follow the result.

Case remanded.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 18 OF 1916.
May 9, 1916.
Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.
PORNA KOER AND ANOTHER—APPLICANTS
versus
CHUNNI LAL AND ANOTHER—OPPOSITE PARTIES.

Succession certificate, application for—Security demanded not furnished—Dismissal of application—Second application, if maintainable.

The mere fact that a previous grant of succession certificate was subject to a condition which the applicants were unable to comply with, is no ground for refusing a second application.

First appeal from an order of the District Judge, Agra.

Mr. *Saila Nath Mukerji* (with him Mr. *S. K. Dar*), for the Appellants.

JUDGMENT.—We are of opinion that this case must go back for the District Judge to deal with it on the merits. The mere fact that a previous grant was subject to a condition which the applicants were unable to comply with, is no ground for refusing a second application. The learned Judge should consider this application on the merits, and unless he is of opinion that it is not made *bona fide*, he should accept the security offered, or be satisfied with a modest security and grant the application. It should be borne in mind that the object of the application is to enable a debt due to the deceased's estate to be collected by the persons beneficially entitled to it, and it may very well be that persons who are perfectly honest, and who are applying *bona fide*, are not able to file the security which the Court considers appropriate. It is difficult to see why any but a purely nominal security is required here at all. It is not as though there were substantial assets, and the applicant were a person whom it was desirable to put upon terms against the risk of his wasting the assets, or defeating the claims of creditors. The applicants are the persons beneficially entitled to the estate. It is only against loss to themselves that they are being required to give security. Practically the whole assets consist of the debt which they are seeking to recover, and to recover which they require the grant. Unless they can be put in a position to recover the debt there will be nothing to waste, and the debtor will escape payment. It is the business of the Court to endeavour as far as possible to assist such persons rather than to put obstacles in their way. The appeal is allowed and the case remanded to the District Judge to be disposed of on the merits.

Appeal allowed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 21 OF 1914.
April 3, 1916.
Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.
Nawab Bahadur MUHAMMAD RUSTAM ALI KHAN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Nawab MUHAMMAD MUSHTAQ HUSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Waqf—*Appointment of* co-mutawalli *by subsequent* trusteenamah—*Registration Act* (*XVI of* 1908), s. 17—*Civil Procedure Code* (*Act V of* 1908), *O. XXXIX*,

MUHAMMAD RUSTAM ALI KHAN *v.* MUHAMMAD MUSHTAQ HUSAIN.

r. 1—*Punjab Court of Wards Act (II of* 1903*), ss.* 11, 12, *action by Deputy Commissioner under—Authority to register—Sub-Registrar trustee of beneficiary, effect of—Validity of injunction to restrain alienation and registration of document—U. P. Registration Rules, r.* 174—Hajr—*Injunction - Direction as to payment of debts—Bequest to poor—Construction of* waqf—Waqif, *if can be* mutawalli.

One *R* created a *waqf* of a portion of his property on the 25th of August 1908. He appointed himself the first *mutawalli* and remained in possession till his death. The M. A. O. College, Aligarh, was one of the beneficiaries. The deed was registered by a Sub-Registrar, who happened to be a trustee of the said College. Prior to the execution of the deed, the legal heirs of *R* induced the Deputy Commissioner of Karnal, where a portion of the property was situate, to take action under the provisions of section 11 of the Punjab Court of Wards Act. Possession was taken of the property under section 12, but the Commissioner set aside the proceedings. On the 30th of August 1908, the Deputy Commissioner issued an injunction, restraining *R* from alienating his property pending inquiry under section 11. *R*, however, executed a *trusteenamah* whereby he appointed certain persons to succeed to him as trustees He framed certain rules for the management of the property and appointed one *Q* as *co-mutawalli*. This deed was not registered and on *R*'s death, the defendants took possession of the property. Thereupon the plaintiffs, who had been appointed trustees under the *trusteenamah* brought the present suit:

Held, (1) that the *trusteenamah* was not compulsorily registrable; [p. 723, col. 1.]

(2) that the action of the Deputy Commissioner in restraining *R* from alienating his property was *ultra vires*; [p. 726, col. 2.]

(3) that section 492 of the old Code of Civil Procedure, Order XXXIX, rule 1, of Act V of 1908, did not apply, as there was no proceeding in which the property was liable to be wasted or alienated; [p. 724, col. 2.]

(4) that rule 174 of the Registration Rules did not make the registration of the deed invalid simply because the Sub-Registrar was a trustee of the Aligarh College; [p. 726, col. 1.]

(5) that the rule of *hajr* was inapplicable to the facts of the case. [p. 726, col. 2.]

(6) that a *waqf* subject to a mortgage was valid and a condition as to the payment of the mortgage did not amount to a suspension of the *waqf* for an indefinite time; [p. 727, col. 1.]

(7) that the *waqf* did not fail by the fact of the non-establishment of the Islamia School but it continued for the benefit of the poor and that the doctrine of *cy-pres* was applicable; [p. 727, col. 2; p. 728, col. 1.]

(8) that a *waqif* could appoint himself a *mutawalli* of the *waqf* property. [p. 729, col. 1.]

First appeal from the decision of the Additional Subordinate Judge, Meerut, dated the 23rd December 1913.

Sir *Rash Behari Ghosh* (with him Messrs. *B. E. O'Conor*, *Sundar Lal* and *Motti Lal Nehru*), for the Appellants.

Dr. *Tej Bahadur Sapru* (with him Messrs. *Boys*, *Abdulla* and *Katju*), for the Respondents.

JUDGMENT.—This is the defendants' appeal in a suit for possession of immoveable property, which has been decreed to the plaintiffs by the Court below.

The plaintiffs are five Muhammadan gentlemen and their case is as follows:—That Nawab Rukn-ud-Daula Muhammad Azmat Ali Khan was the owner of a large estate lying partly in the Punjab and partly in the Muzaffarnagar District of these Provinces, including the properties claimed; that the Nawab created a *waqf* of the aforesaid properties under a deed dated 25th August 1908 and registered on 1st September 1908: that he appointed himself the first *mutawalli* and remained in possession as such up to the date of his death on 26th December 1908; that in his lifetime on 9th November 1908, he executed a document, designated therein a "trusteenamah," framing rules for the management of the trust property and nominating six gentlemen to succeed him as trustees on his death; that four of these are among the plaintiffs; that one of them has died and the second plaintiff has been appointed in his place under the rules framed by the Nawab; and another has resigned and so far no one has been appointed in his place; that on the death of the Nawab the two defendants, denying the *waqf*, took possession of the *waqf* property and certain cash (the proceeds of the said property) and all papers connected therewith. The plaintiffs, therefore, ask for possession of the *waqf* property as *mutawallis*, possession of the papers connected therewith (account-books, etc.), Rs. 4,715-6-11, the cash alleged to have been appropriated by the defendants, and mesne profits, past and future.

The defendants have contested the claim on various grounds to which we deem it unnecessary to refer at present, as most of them have been repeated in the appeal before us.

The Court below has decreed the plaintiffs' claim for possession together with Rs. 57,564 mesne profits *plus* Rs. 1,227-4-0 cash. The rest of the claim was dismissed. Costs in proportion to success and failure were awarded to the parties. The

defendants alone have appealed. Of the pleas contained in the memorandum of appeal, the seventh relates to mesne profits and challenges the lower Courts' finding in regard to it, but this ground has not been pressed before us and not a word has been addressed to us thereon in the course of the arguments.

The case for the appellants as to the actual facts is put before us as follows:— That Nawab Azmat Ali Khan was an old man of from 75 to 80 years age in 1908, enfeebled both mentally and physically by reason of old age and illness; that he was consumed with a hatred of his heirs, the defendants, so intense and bitter as to overstep the border line of sanity; that he was completely in the hands of his servants, chief of whom was Qazi Muhammad Yakub; that the latter completely dominated his master's mind and used his power for his own benefit and gain; that early in August 1908 Major Buck, the Deputy Commissioner of Karnal, having learnt that the Nawab was being looted and ruined by his servants, paid a visit to him and broached the subject of his estate being taken over by the Court of Wards; that this alarmed Qazi Muhammad Yakub and his satellites and they instilled into the Nawab's mind that his estates were about to be taken from him and he himself would be dishonoured and disgraced in his old age and that some steps should be taken to prevent the estate falling into the hands of the Court of Wards and of the defendants on his death; that with this object they consulted lawyers and on August 21st, 1908, they carried off the old Nawab from Karnal in the Punjab to Jarauda in the Muzaffarnagar District in these Provinces in order to get him out of the reach of Major Buck; that the latter took action on August 24th, 1908, under sections 11 and 12 of the Punjab Court of Wards Act, commencing his enquiry, and for the protection of the estate took possession of it; that in obedience to the orders of his Commissioner he gave up possession of the estate on August 26th but continued his enquiry; that on August 30th he issued an injunction to the Nawab restraining him from executing or registering any deed of alienation of his property until the further orders of the Deputy Commissioner; that this injunction was served at Jarauda on August 31st; that Qazi Muhammad Yakub on some date after August 25th (most probably on August 30th or 31st but certainly not on August 25th) having had the deed of *waqf* drawn up either obtained the Nawab's signature and seal to it without his knowing or understanding what he was doing, or placed his seal on it and forged his signature to it, and having secured the attendance of the Sub-Registrar at Jarauda, ostensibly for the registration of a lease, caused the Nawab to present the deed of *waqf* for registration and to acknowledge its due execution and had it registered; that the deed of 9th November 1908, the so-called *trusteenamah*, was caused to be fabricated by the Qazi who impressed on it the Nawab's seal without his knowledge or consent.

To put it briefly, their case is that the *waqf* was all a bogus transaction, that there was never any desire or intention on the part of the Nawab to create a *waqf* and that the *waqf* deed was a sham carried through to enable the Qazi to keep some, if not all, of the estate in his hands and out of the hands of the Court of Wards, and to defeat the defendants.

If these allegations were true we should, of course, have to find in favour of the appellants and dismiss the suit, apart from the points of law which have been raised for decision. The case may for convenience be divided into two heads, namely,

(1) The actual facts;

(2) The points of law.

Eight main questions of fact and law arise for our decision, some of which have subdivisions.

They are as follows: —

(1) Was the deed of *waqf* in point of fact executed by the Nawab?

(2) Had he sound disposing mind?

(3) Was it freely and willingly executed by him or under the undue influence of Qazi Muhammad Yakub?

(4) Was it a mere paper transaction or a real *bona fide* act to which effect was given?

(5) Was the "trusteenamah" executed by him or fabricated? If the former, then was it executed by him while of sound mind willingly and of his own free-will?

(6) Did the "trusteenamah" require registration?

(7) What was the legal effect of the action taken by the Deputy Commissioner of Karnal under the Punjab Court of Wards Act?

(8) Is the *waqf* deed invalid under any rule of Muhammadan Law or Statute Law?

We will consider the above points in the order in which they have been stated.

The present defendants are the step-brothers of the late Nawab and the relations that existed between them and him, have considerable bearing on the facts of this case. There can be no doubt that they were bitterly hostile. The cause of the hostility goes back to litigation which commenced so far back as 1874 and terminated in a decision of their Lordships of the Privy Council in the year 1881, reported as *Mohammad Azmat Ali Khan* v. *Musammat Lalli Begum* (1) (the two present defendants were then the "minor" sons of *Musammat* Lalli). Ahmad Ali Khan, the former Nawab of Karnal, left three sons, Muhammad Azmat Ali Khan, by his lawful wife, and the two defendants by *Musammat* Lalli. *Musammat* Lalli on his death sued Azmat Ali Khan on her own behalf as widow and as guardian on behalf of her two minor sons for shares in the estate. He defended the suit, contending that *Musammat* Lalli was not the lawfully wedded wife of his father and that her sons were not legitimate.

The first Court dismissed the claim after a remand by the Chief Court of the Punjab, holding on all points in favour of Azmat Ali Khan. *Musammat* Lalli did not appeal, but her sons did and their claim was decreed by the Chief Court. Azmat Ali Khan appealed to the Privy Council, where the decree was upheld on the ground of "recognition." Their Lordships of the Privy Council did not decide the question as to whether or not there had in fact been a lawful marriage though they remarked that from the state of the evidence, if it stood alone, it would be difficult to affirm that a marriage had been established.

The result, however, was that $\frac{2}{3}$rds of the estate of his father passed out of the hands of Muhammad Azamt Ali Khan into those of his two step-brothers whom he, at least, deemed to be illegitimate. It can be easily understood that he had no friendly feelings towards them. And that these hostile feelings on the Nawab's part continued, is evident from the evidence of Major Buck, Deputy Commissioner of Karnal, and Khurshed Husain (defendants' witness) which shows that early in August 1908 (August 3rd) the Deputy Commissioner paid a visit to the old Nawab and in a tactless manner, after losing his temper, suggested that the estate should be either managed by himself or be made over to the two appellants. The old Nawab, on hearing the names of the two appellants, lost control of himself and poured out his opinion of them in somewhat abusive language. If, therefore, he had any religious motive to induce him to create a *waqf*, he also had, it is urged, another incentive (*i e.*, his dislike of his heirs) to carry out this idea, for he would thereby deprive them of some at least of his property.

But there is very good and practically unchallenged evidence on the record, which shows that the creation of a *waqf* was no new idea arising for the first time in the year 1908.

Khan Bahadur Khwaja Tasadduk Husain, the Judge of the Small Cause Court at Delhi, was examined as a witness for the plaintiffs on commission at Delhi. With the papers sent to Delhi for this purpose, a draft *waqf* deed in English, bearing date 8th May 1904, was forwarded to the Court at Delhi to be proved by the evidence of this witness. That document was either lost or stolen while in the possession of the Delhi Court and before the witness could be examined. The record of the Court below distinctly shows this.

The witness proves that in the year 1904 he met the Nawab at Lahore, and had a talk with him about his intention of creating a *waqf*. He accompanied Qazi Mohammad Yaqub, the manager, to consult a Barrister, Mr. Parker. A draft *waqf* deed was then in existence. He again visited the Nawab in 1908 and talked over the matter and the Nawab evinced a keen desire to carry out the *waqf* and complained that the desire which he had cherished in his heart for years had remained unsatisfied owing to

(1) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310.

the supineness of the Qazi, and remarked that his step-brothers were fortunate as it looked as if they would also get all his property as well as the $\frac{2}{3}$rds they had already obtained.

If this witness is to be believed, and no good reason has been shown to us why an independent gentleman of his position should not be believed, the intention of creating a *waqf* was firmly fixed in the Nawab's mind as early as 1904 and probably earlier, for a draft deed was clearly then in existence. One such draft, dated 8th May 1904, was filed by the plaintiffs and we have mentioned above the suspicious manner in which it vanished. We note also that this witness was not cross-examined and the refusal to cross-examine was based on very petty grounds. The Counsel for the plaintiffs after examining the witness claimed the right to put three more questions to him on the lost deed being found. They could not be put until the document was before the Court. Objection was taken to this for the defendants, whose legal representative refused to cross-examine until the examination-in-chief had been completed.

The lower Court's *Rubkar* No. 8650 of the 26th June 1903 and connected papers show that the lower Court again in that month offered the defence an opportunity of cross-examining the witness and that finally on 8th August 1913, the Counsel for the defence stated clearly that he would not cross-examine *unless the lost draft was found*. It has never been found and the witness's evidence stands unchallenged. It is corroborated by the testimony of Qazi Mohammad Yaqub [*vide* R. 24 (*d*)], who says that the idea was 15 or 16 years old and mentions the preparation of a draft in 1904 by Mr. Parker. This Barrister is no longer in India. This witness, no doubt, has been sharply criticised and portions of his evidence on other points may be difficult to accept, but on this point we do not hesitate to accept his statement.

The witness Mohammad Ibrahim (for the plaintiffs) produced the draft deed (in English) when he gave his evidence on 3rd March 1913.

It is, we think, beyond doubt that Nawab Azmat Ali Khan had for a long period prior to August 1908 cherished the desire to create a *waqf* and had had at least one draft, if not more, drawn up. We now come to the evidence as to the actual execution of the deed of August 25th, 1908.

[After discussing the evidence at length their Lordships held that it had been fully established that the Nawab executed the *waqfnama* on the 25th August 1915, having a sound disposing mind and fully understanding what he was doing and the effect thereof; that the execution of the *waqfnamah* was not procured by the manager by the exercise of undue influence over the Nawab; that the *waqf* was a genuine transaction; that all steps were taken to put it in force at once; that the Nawab executed the *trusteenamah*, affixing his private seal to it in lieu of his signature; and then continued:—]

The next question for decision is, whether this document is of such a nature that its registration is compulsory under section 17 of the Registration Act. It does not fall under clauses (*a*), (*c*) and (*d*) of that section; clause (*b*) covers other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100 and upwards to, or in, immoveable property. We have carefully examined the document. We fail to see that it comes within any of the clauses of section 17 of the Act.

The Nawab under the deed of *waqf* had appointed himself as the first *mutawalli*. In this document he declares his intention of continuing in that office. He then selects certain persons to succeed him in case of his death or incapacity. He reserves to himself the power of giving up the post and handing over his powers to the persons thus selected during his lifetime, of removing those of them found unfit or dying and of appointing others in their place. He lays down that they have power to appoint a secretary. He sets forth the duties of the secretary. He then mentions certain powers to be exercised by the body of trustees and gives certain directions as to their course of conduct and he appoints Qazi Mohammad

Yakub to be his *co-mutawalli* on a salary of Rs. 100 per mensem. He directs the manner in which the 2/16th share in the *waqf* income, which under the deed of *waqf* was reserved to himself for salary as *mutawalli*, was to be applied "after his death" to the objects of the trust and also the manner in which the 4/16th share of the income dedicated to the Jama Masjid at Karnal was to be applied.

It is urged that though in Muhammadan Law the Deity may be recognised as the owner of property on earth, the law only recognises the "trustee" as the owner and that there has been a transfer to other trustees. The document does not purport to transfer the property to other persons. The Nawab merely nominated certain persons who might succeed him in the post of *mutawalli*, in case of his death or his becoming incapable of managing the *waqf*, and he appoints the Qazi to assist him as a *co-mutawalli*. We do not think that any portions of this document in any way modify the terms of the deed of *waqf*. In our opinion the registration of this document is not compulsory under section 17 of the Act.

The seventh question relates to the legal effect of the action taken by the Deputy Commissioner of Karnal under the Punjab Court of Wards Act. We set out in chronological order the various steps that he took. They are to be found in the evidence given by Major Buck and the Court of Wards file. Major Buck had recently come to the district of Karnal in 1908. He acted on information supplied to him mainly by Rustam Ali Khan, one of the defendants-appellants, as is evident from his own statement.

On August 24th, 1908, he wired to the District Judge of Meerut, who is also the District Registrar, asking him to order the Sub-Registrar to delay registration of any deeds which might be presented by the Nawab as Government was considering the question of the Court of Wards. He had apparently written to the Commissioner of the Division proposing to take action under sections 11 and 12 of the Punjab Court of Wards Act, though that letter is not before us.

The District Registrar of Meerut refused to pass any such orders (*vide* his letter of August 25th to the Deputy Commissioner). The latter appears, however, to have also addressed the Sub-Registrar direct and his communication was received by the latter on August 27th (*vide* his letter of that date asking the District Registrar for orders as to what action he was to take). The District Registrar ordered him to do his duty and to register all documents.

On 26th August 1908 the Commissioner wired to the Deputy Commissioner sanctioning the latter's proposal to make inquiry under section 11 of the Act. On the back of that telegram Major Buck noted "place on file, am taking action at once." He started the inquiry that same day and took possession *only of so much of the estate as was in the Karnal District*, under section 12 of the Act.

On August 27th in compliance with the order of his Commissioner he dropped all proceedings under section 12 of the Act and gave up possession of the estate. He continued the inquiry under section 11.

On August 30th he issued a temporary injunction to the Nawab restraining him from executing or registering any deed of alienation until his further orders. This was sent by special messenger to the Civil Court at Muzaffarnagar.

On August 31st a Civil Court peon took it for service to the Nawab at Jarauda. The latter refused to take it on the ground that it was in English and he had no one who could translate it or understand it. The peon took it back to the Civil Court but on the order of the Munsif returned the same day to Jarauda, tendered it again and on a second refusal attached it to the door of the Nawab's house and reported.

Next day, September 1st, the *waqf* deed was registered. The Deputy Commissioner continued his inquiry under section 11 of the Act and reported to the Local Government. The estate had, however, not been taken over by the Court of Wards when the Nawab died on 26th December and the proceedings then appear to have come to an end. It may be noted that on August 30th a copy of the injunction issued was sent by post to the Sub-Registrar of Muzaffarnagar. He acted, however, on the order of the District Registrar and accepted the deed of *waqf* on September 1st for registration.

He "*subsequently*" received a direction from his District Registrar advising him not to

register documents even though the Deputy Commissioner's action appeared to be *ultra vires*. This, however, was too late.

The questions for decision are (1) whether the Deputy Commissioner had any power in law to issue the injunction and (2) if he had such power, whether the registration of the deed in violation thereof was of no force and the deed, therefore, null and void, or only voidable; and if only voidable, whether it is voidable at the option of the defendants-appellants.

The only proceeding or case pending in the Court of the Deputy Commissioner on August 30th, 1908, was an inquiry under section 11 of the Punjab Act II of 1903.

The action originally taken under section 12 of the Act on August 26th was dropped on August 27th in obedience to the Commissioner's second telegram of August 26th, wherein he forbade the taking of possession of the estate. Section 11, Act II of 1903 (Punjab Local Act), lays down that for the purpose of satisfying himself as to whether in respect of any landholder the Local Government should be moved to make an order under sub-section (2) of section 5, the Deputy Commissioner may make such *inquiry* into the *circumstances* of such land holder as he may deem necessary and *pending the taking of such action* may issue such order for the temporary custody and *protection* of the property of such land holder as he thinks fit.

Clause 2 of section 12 lays down that he may, for the purpose of protecting the property pending such inquiry, take possession subject to the direction and control of the Court of Wards and appoint a manager.

In the present case the Deputy Commissioner started the inquiry under section 11 on August 26th and on the same date took possession of the Karnal property and issued certain orders in respect thereto. He, however, gave up the possession and cancelled these orders in obedience to his Commissioner's order received by wire which conveyed the Financial Commissioner's order that the estate was not to be touched but only an inquiry made. Clause (2) of section 11 enables the Deputy Commissioner to issue certain *directions* where the landholder is a minor. We are, therefore, not concerned with this.

Section 12, clause (1), lays down that for the purpose of every inquiry to be made or direction to be given in pursuance of any of the provisions of the Act, the Deputy Commissioner may exercise all or any of the powers of a Civil Court under the Code of Civil Procedure. Order XXIX, rule 1, gives a Civil Court power, where in any suit it is proved by affidavit or otherwise that any property *in dispute* in a suit is in danger of being wasted, damaged or alienated by any party to the suit, to grant a temporary injunction to restrain such act.

The temporary injunction in the present case purports to have been issued by the Deputy Commissioner in exercise of the powers granted to him under section 12 (1) of the Court of Wards Act. Section 12 of the Act and section 492 of the old Code of Civil Procedure are quoted in the injunction. The old and the new Law of Procedure are the same so far as we are concerned with it here.

It is clear that in the proceeding pending before the Deputy Commissioner there was no property "*in dispute*" at all. The inquiry was one into the circumstances of the Nawab, as to whether owing to any physical or mental defect or infirmity or his having entered upon a course of wasteful extravagance likely to dissipate his property, he was incapable of managing or unfitted to manage his affairs and the inquiry was being made with a view, if found necessary, of moving the Local Government to take action under section 5 (2) of the Act.

Furthermore, so far as the evidence has been placed before us, it was not proved by affidavit or otherwise before the Deputy Commissioner that the Nawab was about to alienate his property. Evidence apparently on the point there was none before him. Be this as it may, it is clear that section 492 of the Civil Procedure Code of 1882 did not apply and could not be utilised for the purpose of restraining the Nawab from alienating his own property.

This difficulty was perceived by the learned Counsel for the appellants and he urged that even though inapplicable sections were quoted in the order, still the Deputy Commissioner had power to issue such an order under the latter part of clause (1)

of section 11 of the Punjab Act, which runs as follows:—"and pending the taking of any such action (*i.e.*, by the Local Government under section 5) may issue such orders for the temporary custody and protection of the person or property, or both, of such landholder, as he thinks fit." We cannot agree with this contention. The temporary injunction was not an order for the temporary custody "*and*" protection of the property. The conjunction "*and*" cannot be read as meaning "*or*."

Moreover, the Deputy Commissioner had already taken possession once and passed certain orders in respect to the Karnal property on August 26th, but these he had cancelled as the Financial Commissioner had ordered him not to take possession (*vide* the Commissioner's second telegram of August 26th).

We do not think that the latter portion of clause (1) of section 11 ever contemplated the issue of an injunction such as is now before us, nor did the Deputy Commissioner purport to act under that section. It was a restriction placed by the Deputy Commissioner on the Nawab's exercise of his lawful right and power as an owner, and unless the law in clear and unambiguous terms gave the former such powers of restriction we refuse to read them into section 11 of the Act. As the Commissioner's 2nd telegram of August 26th, 1908, shows, the Court of Wards, *i. e.*, the Financial Commissioner deemed it undesirable to interfere with the Nawab's possession of the estate until inquiry had been made and the Nawab's objections fully considered. It is urged that if the Deputy Commissioner had no power to issue such an injunction in such circumstances as these, the landholder could easily defeat the object of the Act by alienating all his property before the Local Government could consider the case. This may be so, but we must take the law as it is. We would point out that this very difficulty was perceived and considered by our own local Legislature. Section 9 of the U. P. Act IV of 1912 shows for what purposes the Collector may exercise the powers of a Civil Court and the Collector has to notify the date of his inquiry in the Gazette, and clause (3) of section 9 directs that from the date of publication the prohibitions contained in clause (*a*) of section 37 of the Act shall apply to the proprietor as long as the inquiry is proceeding. Clause (*a*), section 37, prohibits, among other things, the alienation by the proprietor of his property. This clause (3) of section 9 was specially enacted in the U. P. Act IV of 1912. There was no such provision in the former Court of Wards Act. It will be noted that it is not left to the option of the District Officer to make the inquiry under section 9. The Local Government alone can direct the inquiry. The legislative body in the Punjab may amend the law; we cannot, and must take it as we find it.

In our opinion the issue of the injunction of August 30th, 1908, by the Deputy Commissioner of Karnal was "*ultra vires*" and of no effect.

It is unnecessary to decide whether if it were *intra vires*, the execution and registration of the deed by the Nawab were void or voidable and if the latter, whether the appellants could avoid it, seeing that they do not claim under the Court of Wards but as heirs to the Nawab. We have considerable doubt that they could avoid it, if voidable. We have equally great doubt that the registration for such a reason could be held "void." It is unnecessary, however, to go into these points. It is equally unnecessary to decide the question whether the Deputy Commissioner could take action in this way in respect to property lying in another Province where the Punjab Court of Wards Act does not apply, though there is a great deal to be said on the point in favour of the respondents. We decide the issue in favour of the latter.

The last question for decision and one that has been very much argued is, whether the deed of *waqf* is invalid under any rule of Muhammadan Law or Statute Law.

In so far as Statute Law is concerned only one point is taken, *viz.*, that the Sub-Registrar who registered the deed of *waqf* on September 1st, 1908, was a trustee of the Aligarh College, one of the institutions which is benefited by the *waqf*, that he was, therefore, interested in the document and under rule 74 of the rules

made by the Inspector General of Registration (which under section 69 of the Registration Act have the force of law) he was prohibited from registering the document. Its registration is, therefore, invalid.

The rule in question prohibits Sub-Registrars from registering documents "in which they are personally or otherwise connected or interested." The Aligarh College is an educational institution with a very large body of trustees, and the Sub-Registrar admits that he was one of the trustees. Under the deed of *waqf*, the *mutawalli* is directed to devote 1/16th of the income of the *waqf* property to the Aligarh College and the question is, whether the word "interested" in the rule was intended to cover and include such an interest as the Sub-Registrar *qua* a trustee of the College may be said to have had in the deed of *waqf*. The word "interested", no doubt, is wide enough to include even any person interested in education generally and even every Mohamedan, whether a trustee of the Aligarh College or not, who takes an interest in that institution; but we do not think that the rule was ever intended to have so wide a meaning as this or that it was intended to include such an interest as the Sub-Registrar can be said to have had in the present case. The rule, morever, is the first rule in Chapter XI of the rules and is headed "Procedure", and section 87 of the Act lays down that nothing done in good faith pursuant to the Act by any registering officer shall be deemed invalid merely by reason of any defect in his procedure. There is nothing to show that the Sub-Registrar acted otherwise than in good faith. He had referred to his District Registrar and received an order to register all documents presented to him. We, therefore, hold that the registration was not invalid by reason of rule 174.

We assume that this rule was duly published under section 69 (2) in the official Gazette after approval by Government, though this has not been shown to us and the Registration Manual does not indicate that there has been any such publication since 1886, after which year there have been many alterations of the rules.

The points taken under Muhammadan Law are the following:—

(1) That the rule of *hajr* or prohibition operated to prevent the Nawab from making a *waqf*.

(2) That the *waqf* is bad in that the Nawab did not appoint some other person *mutawalli* and make over possession to him but appointed himself *mutawalli*.

(3) That the *waqf* was bad in that its operation was suspended indefinitely, because in the deed of *waqf* the Nawab directed that the income should first be devoted to clearing off the mortgage-debt upon the property.

(4) That the *waqf* failed in that one of the institutions to be benefited by it (*i. e.*, the school at Karnal attached to the mosque which the Nawab was building) was not in existence at the date of the *waqf* and is even yet not in existence.

(5) That the *waqf* was bad in that it was made not from religious motives but to spite the heirs to the estate and defeat the Deputy Commissioner of Karnal.

(1) In regard to the rule of *hajr* or prohibition there is one effectual reply. Assuming that this bit of archaic law is applicable, at least the prohibitory order must be one of a competent authority. In the present case the plea is based on the injunction issued by the Deputy Commissioner of Karnal. We have held that that was *ultra vires* and not *intra vires*, and assuming that the Deputy Commissioner might be deemed to be a Qazi he could only act within his jurisdiction. We see no force whatsoever in this plea.

5 We take next the fifth ground, namely, that the *waqf* was bad in that it was made to spite the heirs and not from religious motives. That the Nawab did not love his heirs is patent, but it is equally clear that he had for many years contemplated making a *waqf*. The action of the Deputy Commissioner no doubt precipitated matters. The facts do not, in our opinion, suffice to prove that the *waqf* was made primarily to spite the heirs and not from religious motives. It is extremely difficult, if not impossible, to accurately weigh the motives which operate on a man's mind and drive him to a certain course of action, specially when there are several which may or may not be operating at the same time. In the deed

the Nawab set forth that it was the religious motive that operated on his mind and we know that he had long been contemplating this action. Moreover, the fact that he did not create a *waqf* of the whole of his property as he might easily have done, if he had wished to totally defeat his heirs thereby, is not without its significance. As far as we are able to judge, we consider that the *waqf* was made from religious motives and that it is not established that its main object was to spite the heirs and defeat the Deputy Commissioner.

(3) The third point taken is that the *waqf* is bad in that its operation had been suspended, because the Nawab directed that the income of the estate should be devoted in the first instance to paying off the mortgage-debt which is a burden on it. It is pleaded that the direction of the Nawab is really a suspension of the operation of the *waqf*, because he clearly directs that the income must be devoted in the first instance to the repayment of the burden on the property.

We note that all the *waqf* property is not burdened with the mortgage. Part of it is entirely free from all burdens. We cannot agree that the direction is tantamount to a suspension of the *waqf* for an indefinite time.

There is ample authority for holding that a *waqf* of property subject to a mortgage, even where the latter is usufructuary, is valid. They are to be found at page 203 of Volume I of Ameer Ali's work on Muhammadan Law, 4th Edition. It is hardly necessary to repeat them here for no authority to the contrary has been quoted before us. The same point is noted in section 497 of Tayabji's Principles of Muhammadan Law. One quotation from the *Fatawa-i-Alamgiri* will suffice. "In like manner if a man were to mortgage his land and then dedicate it before redeeming it, the *waqf* would take effect but the land would not in the same way be withdrawn from the mortgage and if it should remain for years in the hand of the mortgagee and then be redeemed, it would revert to the uses for which it was made *waqf*." We would also refer to the ruling of *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (2). We cannot hold that the Nawab by his direction intended to suspend the operation of the *waqf*. A *waqf* of mortgaged property is valid. The mortgagee was entitled to demand payment of his money out of the mortgaged property and a *mutawalli* who carried out such a direction would clearly be merely doing his duty as a superintendent of the *waqf*. The *waqf* itself came into being at the moment of dedication and delivery to the *mutawalli* and there has been no suspension of it. In our opinion there is no force in this plea.

(4) The fourth plea is that the Islamia School located in the Jama Masjid at Karnal, the second of the various objects on which the income of the *waqf* property was to be spent, was not in existence on the date of the *waqf* and is not even now in existence, that the *waqf* must, therefore, fail in respect thereto and the heirs of the Nawab have a right to retain possession of the property, the trustees merely having a right to recover a share of the income from them for application to the other objects of the trust, for which there would be a charge upon the property.

The facts appear from the evidence and the *waqf* deed itself to be that the mosque at Karnal was not completed at the date of the deed. It was apparently the Nawab's intention to found the Islamia School in connection with the mosque, as is so frequently done by Mussalmans. His intention in this respect had not been carried out when he died. After enumerating the objects of the *waqf* the deed of *waqf* goes on to say: "If any of the things specified above on which the income of the *waqf* property has been proposed by me to be spent by way of charity ceases to exist, it shall be spent on similar charitable objects." It then goes on to lay down that if none of the objects remains in existence, the income shall be spent on the 'poor' in general. The document clearly discloses a general charitable purpose.

Mr. Ameer Ali in his treatise on Muhammadan Law, Volume I, page. 277, 4th Edition, says that where no express reservation for the poor in general has been made, the Muhammadan Law supplies the deficiency and declares that on failure of the primary object of the *waqf* it will continue for the benefit

(2) 12 W. R. 498; 4 B. L. R. A. C. 86.

of the poor. The *waqf* can under no circumstance fail.

In dealing with public and semi-public *waqfs* and the failure of the *waqf*, at page 412 of the same volume, he lays it down that the failure or non-existence of the initial or primary object of a *waqf* does not, under the Hanafi Law, affect the operative character or validity of the *waqf* or avoid it. He quotes authorities and instances, one of which is the non-existence of a school. On page 414 he says, in pointing out that a certain English ruling in a trust case was not applicable to Mahomedan *waqfs*:—"For the cy-pres doctrine is carried to the utmost limit in the Muslim system and the failure of the original purpose does not in any case cause the failure of the *waqf*."

In the present case, however, there is a very clear and unmistakeable indication in the deed of *waqf* of an ultimate reservation in favour of the poor in general, *i. e*, of a general charitable intention and the document clearly directs the application of the principle of cy-pres, though it does not actually use these words.

Tyabji in his Principles of Muhammadan Law also states the law to be as laid down by Imam Abu Yusuf (*vide* page 380 to 383). At page 360 he gives in tabular form the difference in the views on the law of *waqf* of three great lawyers, Abu Hanifa, Abu Yusuf and Imam Mohammad. Abu Yusuf according to this ruled that if the object of the *waqf* failed it would always result in favour of the poor. The other two held that the *waqf* would be void if the object failed "and" there was no reservation over in favour of the poor clearly stated in the *waqf*. Baillie, in his Digest at page 566, says that the *ultimate* object must be one that cannot fail and that Imam Mohammad and Abu Hanifa lay down that unless the *ultimate* object is one that cannot be cut off or fail and unless such be mentioned in the *waqf*, it is not valid if the primary object fail. The only commentary on the subject to which our attention has been called on behalf of the appellants (besides Tyabji's) is the Kashf-ul Qinaa, from which a sentence has been quoted which has been translated thus: "And a *waqf* on what has no existence is null and void". We are informed that this is a book which according to the title page was written by one Allama Sheikh Mansur son of Idris Al-Hanbali, but that nothing is known as to who he was and when he lived and wrote. We need not give much attention to him.

In the present case, the Islamia School in question no doubt did not exist and if the *waqf* deed had gone no further the *waqf* might have been void or not void according to the school of law preferred, but the ultimate object of this *waqf*, as set out in the deed if any of the immediate objects failed, was "the poor and indigent", and the *waqf* also distinctly lays down that the doctrine of cy-pres should be applied in case of the failure of any one object. In these circumstances, we do not think the *waqf* can be held to be void under any of the Schools of Muhammadan Law applicable to Sunnis which have been mentioned.

(2) The second point, which we have taken last of all, is that the *waqf* is bad in that the *waqif* appointed himself *mutawalli* and failed to appoint a third person and deliver possession to him.

The argument is as follows:—In these Provinces the opinion of Imam Mohammad is the law on the point and is binding on Mussalmans and Imam Mohammad clearly laid it down that to constitute a valid *waqf* and make it operative it is necessary for the *waqif* to deliver possession to "another" person appointed as *mutawalli*. The Nawab constituted himself the first *mutawalli* and, therefore, failed to deliver possession to another person. The *waqf* is, therefore, not operative or binding. Reliance is placed, *in primis*, on a decision of this Court in *Muhammad Aziz-ud-din Ahmad Khan* v. *Legal Remembrancer* (3).

The facts of that case were as follows:—

A Mussalman executed a deed of *waqf* appointing therein his two sons as *mutawallis*. He registered the deed, took it home and then apparently destroyed it. He did not make over possession to his sons in any capacity, but continued in possession himself and enjoyed the estate as his own and did not apply the income to the purposes of the *waqf*.

The Judges who heard the appeal quoted from the Tagore Law Lecture of 1894 the summary of the author, wherein he pointed

(3) 15 A. 32; A. W. N. (1893) 109.

out the differences in the views of Abu Hanifa, Abu Yusuf and Imam Mohammad. They then quoted the decision in *Bikani Mia* v. *Shuk Lal Poddar* (4), as an authority for holding that on questions of Muhammadan Law among Sunnis the comparative authority of Abu Yusuf is to be postponed to that of Mohammad (it was not a unanimous decision) and as the latter's exposition supported the appellant's case, they held that there was no valid *waqf*.

It will be noted that the point which is now before us was not before the Court in the above-mentioned case. In that case the sons had been appointed *mutawallis* but the estate had not been made over to them. In the present case the *waqif* appointed himself *mutawalli* and announced to the world in every manner possible that he held the property as *mutawalli*, and we have clearly held that he did so hold it.

It is difficult to understand how the learned Judges who decided the above noted case considered that the decision in *Bikani Mia's* case (4) was an authority for holding that the comparative authority of Imam Abu Yusuf is to be postponed to that of Imam Mohammad.

We have carefully considered the ruling and fail to see that the decision of the majority was any such authority as was held by the Bench of this Court [in *Muhammad Aziz-ud-din Ahmad Khan* v. *Legal Remembrancer* (3)]. Moreover, that Bench apparently had not before it the expression of opinion to be found in the Full Bench decision in *Abdul Kadir* v. *Salima* (5). The judgment therein was written by Mahmood, J., but it was adopted by the Full Bench. At page 102 of the report Mahmood, J., pointed out the reason why the *dicta* of Abu Yusuf commanded such high respect in the interpretation of Muhammadan Law.

Tyabji in his Principles of Muhammadan Law (page 360 note) says that the Hanafi authorities are equally divided on the question as to when the *waqf* becomes irrevocable, though Malik, Shafie and Ibn Hanbal agree with Abu Yusuf. On behalf of the appellants a number of quotations from various books have been translated and printed in pamphlet-form and presented to us. The name of the translator or the person who has selected these quotations has not been disclosed. Many quotations go to show that the authors of these books considered that the rule of Imam Mohammad should prevail over that of Abu Yusuf. As Petheram, C. J., pointed out in *Bikani Mia's* case (4), such quotations can be cited on both sides and Tyabji has pointed out that Hanafi authorities are equally divided. We do not think it necessary to incumber our judgment with them.

In the Tagore Law Lectures of 1874, pages 114 and 115, Shama Charan Sarcar makes quotations from both the *Fatawa-i-Alamgiri* (which says that the opinion of the learned seem to be nearly balanced between the two authorities Abu Yusuf and Mohammad) and from the *Hidayah* (which gives the greater weight to Mohammad). He then expresses his own opinion that decisions appear to be both ways but "preference seems to be given to Mohammad." Mr. Ameer Ali in his treatise upholds the rule laid down by Abu Yusuf that delivery of seisin is not necessary in *waqf* as it is in "hiba" and he quotes at length the decision of the Supreme Court of Calcutta in *Doe dem. Jaun Beebee* v. *Abdollah Barber* (6), wherein it was held that the opinion of Abu Yusuf was the better law. It is thus clear that the Muhammadan authorities are much divided as to whether delivery of possession is necessary to make a *waqf* operative or binding. If we adopt the opinion of Abu Yusuf then the appellants' plea clearly has no force. And if we adopt the rule of Imam Mohammad, it seems to us that the appellants' plea must equally fail, for in this case the Nawab appointed himself *mutawalli* and clearly continued to hold as such. On behalf of the appellants it is urged that the rule of Imam Mohammad imports the delivery of possession to another person and that the *waqif* cannot appoint himself a *mutawalli*. Reference is again made to the pamphlet containing extracts (of which mention has already been made), see section E thereof. The preface is the mere expression of the opinion of the unknown author

(4) 20 C. 116 (F. B.).
(5) 8 A. 149 (F. B.); A. W. N. (1885) 53.
(6) (1838) Fulton 345; 1 Ind. Dec. (o. s.) 848.

of the pamphlet and carries no weight. Extracts Nos. 34 to 69 are quoted to show that the authors of the books named all held that Imam Mohammad's rule should prevail that delivery of possession to a *mutawalli* is necessary to complete a *waqf* but only three of them Nos. 51, 63 and 64 at all lay it down that the *waqif* cannot be the *mutawalli*. These are quotations from the *Bahr-ur-Raiq*, *Khulasah* and the *Zakhair-ul-Ashrafiah*.

Shama Charan Sarcar in the Tagore Law Lectures (page 155) lays down the rule that a person may appoint himself a *mutawalli*, quoting from Baillie's Digest a saying of Mohammad son of Alfazl: "It is lawful according to all".

Mr. Ameer Ali in Chapter XIV, Volume I, page 421 (4th Edition), expresses the same opinion and quotes various authorities.

Tyabji in his treatise, in the tabular statement on page 320, says that according to Abu Yusuf the appointment is valid but that according to Mohammad it is invalid. The latter rule, however, he puts into brackets and prefixes a note to the effect that Mohammad's rule is not followed in British India. At page 410, he clearly lays down that the *waqif* may appoint himself *mut.wâlli* and in a foot-note suggests that Imam Mohammad probably held the same view. Baillie's Digest, page 601, is another authority against the appellants' contention. It is a quotation from the *Fatawa-i-Alamgiri*. The point was clearly decided in the case of *Doe dem. Jaun Beebee* v. *Abdollah Barber* (6) mentioned above and it was clearly ruled that the *waqif* could appoint himself the *mutawalli*.

The point was considered by the Bombay High Court in *Abdul Rajak* v. *Bai Jimbabai* (7). At page 300* we find the following: "In British India the validity of *waqfs* under which the appropriator constitutes himself the first *mutawalli* has been repeatedly recognised and where the dominion over the property is with the *mutawalli* at the time of the appropriation, we are not aware that their validity has ever been challenged upon that ground, *where the appropriation has been acted upon*".

Roland Wilson, in his Digest, lays down the same rule.

(7) 14 Ind. Cas. 988; 14 Bom. L. R. 295.

*Page of 14 Bom. L. R.—*Ed.*

The real fact is that the practice of the *waqif* appointing himself the first *mutawalli* is common all over British India. No one has ever thought of questioning the validity thereof since the decision in *Doe dem. Jaun Beebee* v. *Abdollah Barber* (6). The Law Reports abound in cases in which the validity of *waqfs* has been questioned and attacked. In a very large number of these the *waqif* has been appointed by himself the first *mutawalli*, yet no one has dreamt of questioning the validity on the ground which is now taken before us.

The learned and able Counsel for the appellants admit that they are unable to quote a single instance of such an objection being taken to any *waqf*. It is ingeniously pleaded that there is a general ignorance of the law and that the Courts must amend matters. This omits consideration of the fact that consensus of opinion among the people is one of the solid bases of the Muhammadan Law. Our own knowledge and experience is all the one way. Where the *waqf* is a genuine transaction and has been put into force, we can safely say that its validity has never been challenged (at least since 1845) in British India on the ground that the *waqif* had appointed himself the first *mutawalli*. We have no hesitation in overruling the appellants' contention on this point.

We note here that there are certain other points which were raised in the Court below but which have not been pressed in any way before us. It is unnecessary to discuss them, as we have touched on each and every point both of fact and law to which our attention has been called in the able arguments addressed to us on behalf of the appellants. To sum up briefly, we hold that the *waqf* in dispute was a genuine transaction created by the Nawab with good intent and not for the mere purpose of spiting his heirs, that the Nawab had for years desired to create the *waqf* and that the action of the Deputy Commissioner only caused him to act promptly so that he might carry out his desire while still legally able to do so. We hold that he acted of his own free will and accord and not under the undue influence of any body, that he fully understood what he was doing and that he was in full possession of his mental faculties when he, on August 25th,

1908, executed the deed of *waqf* and had it registered on 1st September 1908, that he having appointed himself the *mutawalli* or superintendent at once took steps to secure mutation of names and to proclaim to the world that he held not as owner but as *mutawalli* that he separated the accounts of the *waqf* property and that the income, such as it was prior to his death, was not spent on any improper objects but on the costs of management and the payment of the Government demand, that he duly executed the "*trustee-namah*" of 9th November 1908, of his own free will and accord while in possession of his mental faculties and with a full understanding of what he was doing and of its effect, that he was under no legal disability, that there is no legal flaw in either of the two documents and that the *waqf* is valid and binding on the heirs, the present appellants. In the view that we have taken, the appeal fails and we, therefore, dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL NO. 3 OF 1914.
July 8, 1915.
Present:—Mr. Justice Twomey and Mr. Justice Ormond.
MAUNG SHWE BON AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MAUNG PU *alias* MAUNG THA ZAN—PLAINTIFF.—RESPONDENT.

Buddhist Law, Burmese—Inheritance—Partition on re-marriage of mother—Shares of children by first marriage and second husband in unpartitioned property—Court-fees.

Under Burmese Buddhist Law when children partition with their mother upon her re-marriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion. Of the property that is left unpartitioned the children of the first marriage take three-fourths, and the second husband takes one-fourth.

The plaint must be stamped according to the plaintiff's valuation of his share which he seeks to recover.

Mr. *Sin Hla Aung*, for the Appellants.

Mr. *Po Thit*, for the Respondent.

JUDGMENT.—Maung Pu, the plaintiff, is the son of Maung Bwe and Ma Hmat. Maung Bwe died in 1902, Ma Hmat married in 1904 Maung Shwe Bon, the 1st defendant, Ma Hmat died in 1909. Maung Shwe Bon then married Ma Than, the 2nd defendant. Maung Pu sues for his share of the property left by his mother. The plaintiff states that at his mother's re-marriage there was a partition of property but that a certain house and two gardens were not partitioned. That house and the gardens have been sold by Maung Shwe Bon for Rs. 400. Ma Hmat's share of the partitioned property was Rs. 3,000. According to the *Dhammathats* mentioned in section 213 of the Kin Wun Mingyi's Digest and also section 26 of the Manu Wunnana, it is clear that when children partition with their mother upon her re-marriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion. The text quoted by the District Judge from section 230 of the Digest does not apply to this case, because there were no children of Ma Hmat's second marriage. The property that was left unpartitioned must be divided as if there had been no partition of any property; and under the texts quoted in section 211 of the Digest it is clear that the children of the first marriage take a $\frac{3}{4}$ths share of the property brought by their mother to her second marriage and the step-father takes $\frac{1}{4}$th. This property was brought by the mother to her second marriage. The plaintiff was one of two children of the mother by her former husband; he would, therefore, be entitled to half of $\frac{3}{4}$ths of Rs. 400, *i. e.*, Rs. 150. The decree of the Appellate Court will be set aside and there will be a decree for the plaintiff for Rs. 150 with costs in the Original Court and with costs in the Divisional Court on that amount. The 1st and 2nd defendants who are the appellants will have their costs of this appeal on the amount in respect of which they have succeeded, which is Rs. 11,187-8-0. As regards the Court-fees payable on the plaint, it should be stamped according to the value put by the plaintiff on his share which he sought to recover, which is Rs. 4,336-4-0 as assessed by the Divisional Judge.

Decree set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 103 OF 1914.

December 1, 1915.

Present:—Mr. Stuart, A. J. C.

MUHAMMAD HAMID ULLAH KHAN—PLAINTIFF—APPELLANT

versus

Seth SITA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Waqfnama, *validity of*—"Mutawalli", *word of, not used, effect of.*

Where the terms of a *waqfnama* show that the dedicator appointed himself a *mutawalli* and provided that his successor should be the next *mutawalli*, the *waqfnama* is not invalid merely because the word "*mutawalli*" has not been used in it.

Appeal from the decree of the District Judge, Sitapur, dated the 12th January 1914, reversing the order of the Subordinate Judge, Tahsil Biswan, dated the 30th June 1913.

Mirza *Sami Ullah Beg*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—A certain house was attached in execution of a decree dated 27th January 1912. The judgment-debtor objected that the house in question was not his property but was *wakf* property, and that he was the *mutawalli* of the *waqf* in question. His objection being disallowed, he filed a suit for a declaration to the effect that the house was not liable to attachment. The learned Subordinate Judge decreed the suit. The learned District Judge on appeal found that there was no valid endowment, on the ground that no *mutawalli* had been appointed under the alleged *waqfnama*. I have examined the deed by which the *waqf* is alleged to have been created. It is dated the 30th October 1896. By the provisions of this deed Muhammad Lutf Ullah Khan of Jalalpur dedicated two houses with courtyard and shops to Hazrat Imam Husain and to God and stated that the income derived from the aforesaid houses, shops, and other property should be devoted to the upkeep of an *imambara*, mosque, *sabil*, and *idgah* situated in Jalalpur. The deed continues that the dedicator is to spend the income upon these purposes and for the entertainment of travellers and the support of the poor who may have to stay at the mosque and the *imambara*. Although the dedicator does not use the word *mutawalli*, the terms

of the deed clearly appoint him *mutawalli*, and from those terms it must also be found that the intention of the dedicator was that the office of *mutawalli* should be held by his successor. The learned Subordinate Judge had arrived at a finding of fact to the effect that such an *imambara*, mosque, *sabil*, and *idgah* existed in Jalalpur, and that the income of the houses, shops, *et cetera*, had been devoted to the upkeep of these edifices. This finding of fact was not traversed in appeal before the learned District Judge. It is, therefore, a final finding and cannot now be contested. Upon this conclusion it is clear that the view taken by the learned District Judge cannot be supported. The deed in question is a good and valid *waqfnama*. The property was dedicated to God. The income was to be devoted to religious and charitable purposes and the evidence shows that the income had been so devoted. The dedicator appointed himself as *mutawalli* and provided that his successor should be the next *mutawalli*. In these circumstances I decree this appeal, set aside the decree of the learned District Judge, and restore the order of the learned Subordinate Judge. The respondents will pay their own costs and those of the appellant in all three Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 140 OF 1915.

May 23, 1916.

Present:—Sir Henry Richards KT., Chief Justice, and Mr. Justice Rafique.

UDIT NARAIN MISIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ASHARFI LAL AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Equity of redemption, purchaser of—Partial discharge of prior incumbrance, effect of—Subrogation—Purchaser, if entitled to stand in shoe of prior incumbrancer.

If a purchaser of an equity of redemption discharges a prior incumbrance, he is entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer, inasmuch as by payment of the prior incumbrance the purchaser of the equity of

redemption enhances the security of the puisne incumbrancer and relieves him of the obligation to discharge the prior incumbrance or to be obliged to sell the property subject thereto. [p. 734, col. 1.]

Therefore, a purchaser of an equity of redemption is entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer even partially discharged the liability. [p. 734, cols. 1 & 2.]

Second appeal from a decree of the Subordinate Judge, Gorakhpur, dated the 22nd September 1914.

FACTS material for this report are as follows:—

Asharfi Lal, plaintiff, brought a suit for sale upon a mortgage in his favour, dated 29th June 1904, against the mortgagors and their transferees. Udit Narain Misir and another, who had purchased a part of the mortgaged property by a sale-deed, dated 10th April 1907, set up a defence that, as they had paid out of the sale consideration Rs. 309 to a prior mortgagee which satisfied a part of the mortgage-money due on a bond of 1899, they should have priority to that extent over the plaintiff who was a subsequent mortgagee.

The Courts below decided against this contention of the appellants, on the ground that a part payment of the mortgage-money could not give them a right to hold the prior mortgage as a shield even to the extent the payment had been made. Defendants Udit Narain and another appealed to the High Court.

Mr. *Braj Nath Vyas*, for the Appellants.—By part-payment of a prior mortgage the defendants were subrogated to the rights of the prior mortgagee to that extent. There is no section of the Transfer of Property Act against this contention. The law about the indivisibility of a mortgage is in the interest of the mortgagee and if he agrees to accept a part payment of his mortgage money, no one is prejudiced. The person who pays a part of the prior mortgage gets his security to that extent. It is most inequitable not to allow one who has paid a part of a prior mortgage to be subrogated to that extent, considering that the right of subrogation is an equitable right.

The Hon'ble Dr. *Tej Bahadur Sapru*, for Asharfi Lal, Plaintiff-Respondent.—If the contention of the appellants is to prevail, the result will be a breaking up of the mortgage security and this is against law. Referred to and discussed sections 60, 67 and 74 of the Transfer of Property Act.

There is a case reported as *Gurdeo Singh* v. *Chandrika Singh* (1), which is in my favour. Mookerji, J., has given reasons and has referred to authorities. Referred to Ghosh on Mortgages, Volume I, page 332, and Jones on Mortgages.

There is a paragraph in Fisher on Mortgages which refers to this subject. It is paragraph 1172 but this particular question has not been dealt with there.

[RICHARDS, C. J.—If the purchaser had paid the whole of the prior mortgage he would have been subrogated to the rights of the prior mortgagee; why should the law be different if he pays a part?

Referred to *Wenlock* (*Baroness*) v. *River Dee Company* (2)].

This will lead to enormous trouble and inconvenience. If there are several persons who have paid parts of the mortgage-money, the decree that may have to be passed will be a complicated one and be almost incapable of execution.

[RICHARDS, C. J.—There is no law to prevent a mortgagee from assigning his mortgagee rights to several persons. In such cases then the same difficulty may arise. The Court should not hesitate to pass a decree simply because it will be a complicated one. The rights and equities of the parties can be adjusted and it should be done in a Court of Equity.]

There is no other case on the subject decided by the Courts in India except *Gurdeo Singh* v. *Chandrika Singh* (1), which is in my favour. It is my duty to place before your Lordships a ruling which is against me. It is *Chetwynd* v. *Allen* (3).

Mr. *Ishwar Saran*, for other Respondents, did not argue.

Mr. *Braj Nath Vyas* not called upon to reply.

JUDGMENT.—This appeal arises out of a suit to realise the amount of a mortgage, dated the 29th of June 1904. The point for decision in the present appeal arises under the following stated facts. In the year 1907 the appellants (who are defendants

(1) 1 Ind. Cas. 913; 36 C. 193 at p. 220; 5 C. L. J. 611.

(2) (1887) 19 Q. B. D. 155; 56 L. J. Q. B. 589; 57 L. T. 320; 35 W. R. 822.

(3) (1899) 1 Ch. D. 353; 80 L. T. 110; 68 L. J. Ch. 160; 47 W. R. 200.

to the suit) purchased a 10-pie share of *Mauza* Bakhera. It has been found by the Court below that Rs. 309 went to discharge a prior mortgage of 1899. The defendants had contended that all that was due upon this previous mortgage was Rs. 309, which they paid. The Court below has found that the appellants did in fact pay the Rs. 309, but that they did not discharge the entire amount due on foot of the mortgage of 1899. No claim, however, seems ever to have been made on foot of this mortgage of 1899 and it seems long since to have been barred by limitation. We must, however, for the purpose of the present appeal assume that the Court below rightly decided that the appellant had only discharged the prior mortgage in part. The question is whether, having not entirely discharged the mortgage, they are entitled to be substituted for the prior incumbrancer even to the extent of Rs. 309, which they admittedly paid. The Court below has held that the appellants were not entitled to claim priority in respect of this sum against plaintiff. It seems to us that this decision was wrong.

If a purchaser of the equity of redemption discharges a prior incumbrance, he is under ordinary circumstances admittedly entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer. By payment of the prior incumbrance the purchaser of the equity of redemption enhances the security of the puisne incumbrancer and he has relieved him of the obligation to discharge the prior incumbrance or to be obliged to sell the property subject thereto. The contention is that this right of the purchaser is limited to cases in which he has discharged the prior incumbrance in its entirety. It is difficult to see upon what principle this distinction proceeds. No doubt the prior incumbrancer is entitled to refuse a part payment of his mortgage-debt. If, however, he accepts the part payment and allows the liability upon the property to be discharged in part, the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged, though not to the same extent. His security is enhanced to the extent that the debt has been discharged. There seems to be no reason why the purchaser of the equity of redemption should not be entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer partially discharged the liability. In support, however, of the contention (which found favour in the Court below) the learned Advocate for the respondents has relied on the case of *Gurdeo Singh* v. *Chandrikha Singh* (1). With great respect to the learned Judges who decided that case we are unable to agree with them. They quote a passage from Jones on Mortgages which with every possible respect we think has been misunderstood. In the case of *Chetwynd* v. *Allen* (3) a prior mortgage had been partially paid off and the party so paying was held entitled to stand in the shoes of the prior incumbrancer to the extent of the money advanced. It is true that the particular question which arises in the present case was not discussed, but it would appear that no one ever thought of raising the point. In *Baroness Wenlock* v. *The River Dee Company* (2) the doctrine of subrogation was discussed. In that case a Company had borrowed money beyond its powers. Part of the money lent was paid away by the Company in discharge of certain liabilities of the Company existing at the time the money was lent. A further portion of the money went to discharge liabilities incurred by the Company subsequent to the advance of the money. All sides admitted that the lender was entitled to stand in the shoes of the creditors whose debts existed at the time of the advance. The question was whether the lender was also entitled to stand in the shoes of the creditors whose debts were incurred and discharged subsequent to the loan. The Court of Appeal, consisting of Lord Esher, M. R., Fry and Lopes, L. JJ., held that the lender was entitled to recover his money by being subrogated for the creditors of the Company. By reason of the fact that the appellants in the present case paid off the mortgage in part no further liability was thrown on the puisne incumbrancer or the property. In our opinion, the appellants were entitled to stand in the shoes of the prior incumbrancer to the extent of the further sum of Rs. 309. We accordingly allow the appeal and modify the decree of the Court below by directing that the plaintiff must pay to the appel-

lants a further sum of Rs. 309, that is to say, in all Rs. 434 as a condition precedent to bringing the 10-pie share of *Mauza* Bakhera to sale. The money must be paid within six months from this date. If the money is not paid within that time the suit will stand dismissed as against the appellants in respect of the 10 pies of Bakhera. If the money is paid within the time aforesaid the plaintiffs will be at liberty to add this amount to their own claim against the share and sell the said 10-pie share. The appellant will have his costs of this appeal to be paid by the plaintiff-respondent including in this Court fees on the higher scale.

Appeal decreed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 159 OF 1915.

February 29, 1916.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Twomey.

MOOLLA MAHOMED *bin* MOOLLA MOHAMED—APPELLANT

versus

P. K. EBRAHIM—RESPONDENT.

Landlord and tenant—Transfer of Property Act (IV of 1882), s. 108 (h)—Ejectment—Compensation for buildings or time to remove them after expiry of term—Estoppel.

The erection of buildings by a tenant on leasehold land without any objection by the landlord does not change the tenant's right of tenancy into a perpetual right of occupation, though the landlord may have allowed and even recognised the tenant's right to a free sale of houses erected on the land by him and accepted purchasers of the buildings as his tenants. [p. 737, col. 1.]

Nor is the tenant or a purchaser from him entitled to any compensation for the cost of the buildings on the ground that the landlord in permitting the sale and recognising the purchaser as his tenant has encouraged the expectation on the part of the tenant that he would be entitled to compensation if suddenly ejected. To create an equitable estoppel against the landlord in such a case it is incumbent on the tenant to show that the landlord's conduct amounted by plain implication to a contract to change the right of tenancy into a perpetual right of occupation. [p. 738, cols. 1 & 2.]

Dattatraya Rayaji Pai v. *Shridhar Narayan Pai*, 17 B. 736; P. J. (1892) 348; *Yeshwadabai* v. *Ramchandra Tukaram*, 18 B. 66, disapproved.

The rule established in India in such cases is that of section 108 (*h*) of the Transfer of Property Act, which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth, provided he leaves the property in the state in which he received it. [p. 736, col. 2.]

Semble.—The Court may give the tenant reasonable time after the termination of the lease in which to remove the buildings. [p. 738, col. 2.]

For such further time the landlord is entitled to damages for use and occupation or mesne profits at a fair and reasonable rate. [p. 738, col. 2.]

Beni Ram v. *Kundan Lal*, 21 A. 496; 26 I. A. 58; 3 C. W. N. 502; A. W. N. (1906) 245; *Ismail Khan Mahomed* v. *Jaigun Bibi*, 27 C. 570; 4 C. W. N. 210; *Ramsden* v. *Dyson*, (1865) L. R. 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926; *Ismail Kani Rowthen* v. *Nazarali Sahib*, 27 M. 211; 14 M. L. J. 25; *Angammal* v. *Malik Saeed Aslami Sahib*, 11 Ind. Cas. 745; 10 M. L. T. 193; 21 M. L. J. 891; *Angammal* v. *Malic Mahomed Syed Aslami Sahib*, 21 Ind. Cas. 583; (1913) M. W. N. 974; 14 M. L. T. 418; 38 M. 710; 25 M. L. J. 625; *In the matter of the petition of Thackur Chundra Paramanik*, B. L. R. Sup. Vol. (F. B.) 595; 6 W. R. 228, referred to.

Mr. *J. B. Das*, for the Appellant.

JUDGMENT.

FOX, C. J.—The suit was brought by an owner of land to eject one of his tenants, who occupied two plots of it on which he had two houses. Some years before he had bought the houses on the plots. One of these houses had to be pulled down in consequence of orders from the Municipal Committee. The defendant built a plank house and in it he had a shop. This he valued at Rs. 5,000. The older house he valued at Rs. 1,000. The whole of the plaintiff's land was similarly let out in plots, which had been built upon by the tenants. The plaintiff charged and collected a monthly rent for each plot. The collection of 230 houses on the land formed a *basti* or village. The plaintiff enhanced the rents from time to time, and when the defendant built the superior house his rent was doubled. The defendant refused to pay this large increase, and the plaintiff failed to get it by a suit in the Small Cause Court. He then gave the defendant notice to quit, and brought the present suit claiming ejectment, arrears of rent, and damages for use and occupation at the enhanced rate.

The defendant claims that he had acquired a permanent right of occupancy so long as he paid the rent payable when he bought the houses or the rent immediately prior to the suit, or in the alternative that the

plaintiff was not entitled to a decree for ejectment without paying him compensation for his houses. The learned Judge has held that the plaintiff is entitled to an ejectment decree, but that he must pay the defendant compensation as to which an enquiry was ordered.

The plaintiff appeals against this part of the decree. During the course of the case the plaintiff agreed to allow the defendant two months within which to remove his buildings and property from the plots.

The grounds on which the learned Judge found that the defendant was entitled to compensation were that the land had been let for building purposes, and houses had been transferred by owners to purchasers whom the landlord recognised, and he thereby encouraged expectation on the part of the tenants that they would be entitled to compensation if they were suddenly ejected. He, therefore, considered that the plaintiff was estopped from denying liability to grant compensation. As authority in support of this proposition he referred to *Duttatraya Rayaji Pai* v. *Shridhar Narayan Pai* (1) and *Yeshwadabai* v. *Ramchandra Tukaram* (2). These decisions were prior to that of His Majesty's Privy Council in *Beni Ram* v. *Kundan Lal* (3) and it may be doubted whether after this decision, which is binding on all the Courts in India, they would be followed even in the Courts of the Bombay Presidency. They were not followed in *Ismail Khan Mahomed* v. *Jaigun Bibi* (4) The facts in the case before the Privy Council were that in 1858 the landlords let the land for the term of the current settlement for the construction of a saltpetre factory. This factory was carried on for four or five years only, and since then for many years the tenants had put the land to other uses. Shops had been built on the land for 20 years, and *pucca* shops had been built on it 12 or 14 years previous to the suit. A considerable amount of money had been spent on other structures on the land. The owners of the land at the time saw the buildings and did not prohibit their construction The plaintiffs-landlords put an end to the tenancy and brought the suit for ejectment and asked for a decree for removal of the material of the houses. The Appellate Courts in India affirmed the original Court's dismissal of the suit, on the ground that the original lessor not having objected to the erection of the buildings, and having continued to receive rents after their erection and after the saltpetre factory ceased to exist, was estopped from suing the lessees for ejectment. They adopted a principle stated in the following words:—"If a man permits another to build upon his land, and with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then no doubt equity comes in, and by the rules of equity, which in this respect are the same as the rules of law, he cannot eject that other person." Their Lordships of the Privy Council described this statement as a loose and inadequate statement of the rule of equity, and they proceeded to state what the rule was in the following words:—

"In order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation." Later on they say: "The rule established in India is that of section 108 of the Transfer of Property Act, which provides that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth, provided he leaves the property in the state in which he received it." They adopted the following words of Lord Chancellor Cranworth in *Ramsden* v. *Dyson* (5): "If any tenant builds on

(1) 17 B. 736; P. J. (1892) 348.
(2) 18 B. 66.
(3) 21 A. 496; 26 I. A. 58; 3 C. W. N. 502; A. W. N. (1906) 245
(4) 27 C. 570; 4 C. W. N. 210.

(5) (1865) L. R. 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

land which he holds under me he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money on a title he knew would or might soon come to an end." They pointed out, however, that the maxim in English Law "*quicquid in ædificatum solo, solo cedit*" did not apply. The result of the decision was that the plaintiffs obtained an order for removal of the tenant's houses without compensation. The case does not differ in essential respects from the present case, but no express letting of the plots of the land for building purposes is proved in this case. A reasonable inference from the circumstance is that the tenants took their plots for the purpose of putting up houses on them, and that the plaintiff knew that they were taking them for this purpose. According to the decision, the erection by a tenant of permanent structures on the land let to him to the knowledge of, and without interference by, the lessor will not of itself suffice to raise an equitable right against the lessor preventing him from ejecting the tenant at the end of the tenancy.

As regards the question whether the landlord is bound to compensate the tenant for his buildings or for removal of them, it may be observed that in the Privy Council case Counsel for the tenants did not even suggest that his clients were entitled to compensation of any sort. The rule of equity stated by their Lordships is a rule under which a tenancy for a limited time can under some circumstances be held to have been changed into a perpetual right of occupancy. It has nothing to do with compensation to the tenant for his property on the land.

The effect of the Privy Council decision and the whole question as to the rights of landlord and tenant to buildings erected by the latter has been elaborately discussed in the Madras High Court.

In *Ismail Kani Rowthen* v. *Nazarali Sahib* (6) Bhashyam Aiyangar and Moore, JJ., held that a tenant who erects a building on land let to him can only remove the building, and cannot claim compensation. In that case there was a decree for ejectment but the tenant was allowed one month in which to remove his buildings.

In *Angammal* v. *Malik Saeed Aslami Sahib* (7) the plaintiff sued for a declaration that she was the owner of a house and for possession of it, or in the alternative to be paid compensation for it, or to be allowed to remove the building. She had held the land under a document which created only a monthly tenancy. The house had been built many years previous to the determination of the tenancy. The ground landlord had obtained an ejectment order against her in the Presidency Small Cause Court, and she had not been allowed to raise her claims in that Court, nor had time been given by the decree to remove her buildings which she valued at Rs. 5,000. It had been erected with the knowledge of the ground landlord and without protest from him. Willis, J., in the Original Court held (1) that a tenant has only a right to remove buildings during the continuance of the tenancy, and (2) that a tenant is not entitled to any compensation for his buildings, or to remove them after the determination of the tenancy, the only right of removal recognised being that in clause (*h*) of section 108 of the Transfer of Property Act. He consequently disallowed the plaintiff's claims and dismissed her suit. On appeal Arnold White C. J., agreed with him, but Sankaran Nair, J., after an elaborate examination of the authorities disagreed. His comment on clause (*h*) of section 108 of the Transfer of Property Act was that it was only an enabling provision, and it left untouched rights which the lessee may have otherwise than under that section. He held that under the law prior to the Act the tenant had the right to remove after the expiry of his tenancy superstructures erected by him during it or to claim compensation. His comment on the Privy Council case was

(6) 27 M. 211; 14 M. L. J. 25.

(7) 11 Ind. Cas. 745; 10 M. L. T. 193; 21 M. L. J. 891.

that it did not deal with those questions.

Another appeal in the same case under the names of *Angammal* v. *Malic Mahomed Syed Aslami Sahib* (8) was heard by the same Judges sitting with Miller, J. The Chief Justice adhered to his previous opinions and Miller, J., agreed with him that the plaintiff was not entitled to any of the reliefs she asked for. Miller, J., however, held that according to the customary or common law of the land, the lessor on determination of a lease has the option to take the lessee's buildings on it on paying compensation, but if he is unwilling to pay such compensation he must allow the tenant to remove his buildings. If he elects to allow the tenant to remove the buildings, he must allow a reasonable time after the determination of the tenancy for the tenant to do so. If the tenant has had such reasonable time, and has not done so before he loses possession, he has no further right to time for removal of the buildings. On the question of compensation he held that apart from estoppel or contract the tenant has no right to compensation for his buildings. Sankaran Nair, J., held that if a landlord is not willing to pay the value of the tenant's buildings, the tenant is bound to remove them either before he surrenders possession or within a reasonable time after expiration of the tenancy, but if he does not do so the ownership of the building is not transferred to the landlord. What is open to the latter is to restore the land to its old condition, and to claim damages from the tenant if he incurs any loss. Section 108 of the Transfer of Property Act saves rights derived from contract or local usage from the provisions of the section stating the rights and liabilities of lessor and lessee respectively. Miller, J's statement of the respective rights of lessor and lessee as regards buildings erected by the latter when the tenancy comes to an end was founded on the Full Bench decision in *In the matter of the petition of Thackur Chundra Paramanik* (9), which professed to be a statement of what the law was according to the usages and customs of the country. Generally, such customs can scarcely be said to be referred to in the words "local usage" in the opening words of section 108. It appears to me that the view that the whole law as to the rights and liabilities of lessor and lessee respectively, when no contract or local usage is proved and when the rule of equity stated in *Beni Ram* v. *Kundan Lal* (3) is not applicable, is now embodied in section 108 of the Transfer of Property Act, is the correct view. The section says nothing about the lessor being liable to compensate the lessee for his buildings on the land let, and in view of the Privy Council decision it appears to me clear that the plaintiff is not liable to pay compensation to the defendant either for his buildings or for their removal.

The buildings, however, are his, and at the time the decree was made he had not given up possession of the land. He is bound to give up possession; this involves removing not only himself but all his property from the land. Buildings such as the defendant has on the land cannot possibly be removed instantly, consequently it is necessary to fix a time in the decree within which he must obey it. I would, therefore, alter the main part of the decree to the following wording.

It is ordered and decreed that the defendant do quit, vacate and give up possession to the plaintiff of the plots of land hereinbefore mentioned, and that he do remove all his property including the materials of his buildings thereon, and that he do restore the land as far as possible to its original state before the expiry of two months from the date hereof, and that he do pay to the plaintiff the sum of Rs. 93-9-5, being arrears of rent up to the date of institution of the suit, and damages at the rate of Rs. 18 a month until he vacates the said plots of land, and that he do pay to the plaintiff his costs of the suit as allowed by the Court. It may be doubted whether the plaintiff was entitled to damages for use and occupation or mesne profits at Rs. 18 per mensem in the absence of evidence to show that such rate was fair and reasonable, but the defendant has not appealed or put in a cross-objection against it.

(8) 21 Ind. Cas. 583; (1913) M. W. N. 974; 14 M. L. T. 418; 38 M. 710; 25 M. L. J. 625.

(9) B. L. R. Sup. Vol. (F. B.) 595; 6 W. R. 228.

The defendant must also pay the plaintiff's costs of this appeal.

TWOMEY, J.—I concur.

Decree modified.

ALLAHABAD HIGH COURT.

MISCELLANEOUS REFERENCE No. 62 OF 1916.

May 11, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

In re GANGA PRASAD—DEFENDANT No. 2—PETITIONER

versus

HAR NARAIN—PLAINTIFF—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), ss. 177 (e), 195—Ejectment, suit for—Defendant pleading himself to be tenant of third person—Question of proprietary title—Appeal to District Judge, maintainability of—Jurisdiction.

Where in a suit for ejectment under section 58 of the Agra Tenancy Act the defendant pleads that he is a tenant under a person other than the plaintiff and the Court decrees the claim, an appeal from the decision lies to the District Judge under section 177 (*e*) of the Act. [p. 741, col. 1.]

Reference made by the District Judge, Budaun, as per his letter No. 86/V, dated 7th February 1916, under section 195 of Act II of 1901.

FACTS.—The plaintiff brought a suit under sections 58 and 63 of the Agra Tenancy Act for ejectment of the defendants Ganga Prasad and Inderman from plots Nos. 52/3 and 47/2. The former denied having any concern with the former plot and set up a lease in respect of the latter plot from one Sheo Prasad. The Assistant Collector found that Ganga Prasad's lease was of no force, as the plaintiff in a previous suit had obtained a decree for arrears of rent against Sheo Prasad. Ganga Prasad appealed to the Commissioner, who returned the memorandum of appeal for presentation to the proper Court. Thereupon the appeal was presented to the District Judge, who referred the matter for the decision of the High Court under the provisions of section 195 of the Agra Tenancy Act.

Mr. *Lakshmi Narayan*, for the Plaintiff-Opposite Party.—The view of the District Judge is right that the appeal lies to the Revenue Court. The defendant does not say that he is the proprietor of the land. All that he says is that he holds the land under a lease from one Sheo Prasad. The Court of first instance has found that it had been decided that the relation of landlord and tenant existed between the present plaintiff and Sheo Prasad and consequently Sheo Prasad had no right to lease the property to the defendant. Moreover, it has been held by this Court that if a sub-tenant pleads that he pays rent to a third person, no question of proprietary title arises. In the present case, the defendant does not set up the plea that he pays rent to a third person in good faith.

The Defendant-Petitioner was not represented.

JUDGMENT.

SUNDAR LAL, J.—This is a reference under section 195 of Act II of 1901 (U. P.), made by the District Judge of Budaun under the following circumstances:—The plaintiff, Har Narain, avers that he is the *zamindar* and owner of two plots of land Nos. 47/2 and 52/3 in *Patti* Muhammad Ali in *Mahal* Altaf Husain of *Mauza* Ganaur, of which the defendant Inderman is a non-occupancy tenant under the plaintiff. He sues for the ejectment of the said defendant, under section 58 of Act II of 1901 (U. P.). The second defendant to the suit is one Ganga Prasad *alias* Gangola, who according to the plaint is colluding with defendant No. 1 and has been put in possession of the said land by the defendant No. 1. Under section 64 of the Agra Tenancy Act (II of 1901) in all suits for ejectment any person in possession claiming through the tenant may be joined as a party to the suit. Ganga Prasad *alias* Gangola was, therefore, properly made a party defendant to the suit on the allegations made in the plaint.

Inderman filed a written statement disclaiming all interest as a tenant in the land in suit. The second defendant Ganga Prasad *alias* Gangola has defended the suit on the ground that he is in possession of plot No. 47/2 as a tenant of one Sheo Prasad (who is alleged to be the real *zamindar* and owner of the land) under a registered lease, dated 27th April 1914, granted by Sheo Prasad aforesaid for the term of nine years. As to the other plot (No. 52/3), the defendant alleges that it is in the possession of Sheo Prasad aforesaid

It is not clear what exact interest Sheo Prasad had in the land, but it appears that in 1914 the plaintiff, Har Narain, had sued Inderman and Sheo Prasad for the recovery of rent due to him from the defendant Inderman. That suit was decreed in appeal by the Collector by a judgment dated 24th July 1914. Sheo Prasad's pretensions to the land seem to have been disregarded by the Collector. It was during the pendency of that suit that the lease relied upon by the defendant was granted by Sheo Prasad. The Court of first instance in this case has held that the plaintiff was the real owner of the land in suit and that Inderman was a tenant of the plaintiff. It has decreed the claim.

The defendant Ganga Prasad *alias* Gangola preferred an appeal against the said decree in so far as it relates to plot No. 47/2. The appeal was in the first instance filed by him in the Court of the Commissioner. That officer, however, returned the memorandum of appeal for presentation to the proper Court on the ground that no appeal lay to him. The defendant then filed the memorandum of appeal in the Court of the District Judge, who is of opinion that the appeal really lay to the Commissioner and not to him, but in view of the fact that the Commissioner has already refused to entertain the appeal for want of jurisdiction, the learned Judge has made this reference to this Court for the determination of the question to which Court the appeal lies in law.

The suit is really one under section 58 of the Agra Tenancy Act, and falls in group "C" of the Fourth Schedule to that Act. Under section 179 of the said Act an appeal lies to the Commissioner from the decree of the Assistant Collector, unless by some other section of the Act an appeal is given in any case to another Court. Section 177 of the Act gives an appeal to the Court of the District Judge "in all suits in which (*e*) a question of proprietary title has been at issue in the Court of first instance and is a matter in issue in the appeal." The defence of Ganga Prasad *alias* Gangola in the suit is that the plaintiff is not the owner of the land in suit, but one Sheo Prasad under whom the defendants claim. The question of plaintiff's proprietary title to the land was thus put in issue in the Court of first instance and is a matter in issue in the appeal. In the case of the *Maharaja Parbhu Narain Singh* v. *Baldeo Prasad* (1) the tenant in a suit for the assessment of rent denied the title of the plaintiff to the land in suit in that case and urged that the Maharaja of Benares was the real owner of the land. The Maharaja was added as a defendant to the suit. The Court of first instance decided in favour of the plaintiff. The Maharaja appealed against the said decree to the Court of the District Judge who allowed the appeal. On appeal to the Court Mr. Justice Griffin held that no appeal lay to the District Judge. On appeal under the Letters Patent, the learned Chief Justice (Sir John Stanley) and Mr. Justice Banerji held that under section 177 (*e*) of the Agra Tenancy Act the appeal to the District Judge was rightly preferred by the Maharaja. The point referred to us is concluded by the decision in this case. There is another case reported as *Sheodihal Singh* v. *Badri Narain* (2), which takes the same view and points out that section 198 of Act II of 1901 does not apply to the circumstances of this case but the learned Judge has distinguished that case on the ground that the person whose title was set up by the defendant was made a party to the suit, and it, therefore, became possible to adjudicate upon the question of proprietary title against the said person. In this case Sheo Prasad is certainly not made party to the suit, and any adjudication made in this case on the question of the proprietary title to the land in suit would not be binding upon him. It would, however, all the same be binding upon the second defendant, who has raised the question and a final decision as against him in any case can be made in this case. The second defendant, who was not the tenant of the plaintiff, was competent in law to deny the plaintiff's title and the Court was bound to adjudicate upon the question thus raised by him. The ruling of the Board of Revenue

(1) 8 Ind. Cas. 817; 8 A. L. J. 36.
(2) 8 Ind. Cas. 1098; 7 A. L. J. 1198; 33 A. 61.

in the case of *Adya Sarun Singh* v. *Thakur* (3) in our opinion correctly lays down the law upon this point. Our reply to the reference is that an appeal lies to the Court of the District Judge, who is directed to entertain the appeal and proceed to hear and dispose of the same according to law. The costs of the reference will be costs in the cause.

WALSH, J.—I agree.

Reference answered accordingly.

(3) 31 Ind. Cas. 853.

LOWER BURMA CHIEF COURT.

CIVIL REGULAR SUIT NO. 231 OF 1915.

January 26, 1916.

Present:—Mr. Justice Robinson.

S. KING—PLAINTIFF

versus

D. J. BUCHANAN AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 13—Foreign judgment, suit based on—Jurisdiction—Limitation Act (IX of 1908), s. 11—Limitation, law of, whether lex fori *or* lex loci contractus.

A British subject who has been properly served cannot object to a judgment of the King's Bench Division on the ground of want of jurisdiction, where the contract on which the suit was based was one in which the price was payable in England.

Moazzim Hussein Khan v. *Raphael Robinson*, 28 C. 641: 5 C. W. N. 741, referred to.

The law of limitation is a law relating to procedure, having reference only to the *lex fori* and, therefore, the judgment of a competent English Court cannot be objected to on the ground that if the suit had been tried in India it would have been barred by limitation.

A claim that would be time-barred in British India cannot be said to be a claim founded on a breach of any law in force in British India.

Mr. *Giles*, for the Plaintiff.

Mr. *Auzam*, for the Defendants.

JUDGMENT.—This is a suit based on a judgment of the King's Bench Division. The claim was for price of papers and periodicals supplied. The first defendant has filed a written statement but the second defendant does not appear. The written statement raises seven defences based on section 13 of the Civil Procedure Code, but all but two are abandoned and rightly so. Defendant at first stated that he received no summons, but now admits that he did. He pleads, however, that he never submitted to the jurisdiction and that, therefore, the decree sued on is a nullity. He further pleads that the suit would have been barred by limitation if brought here and the judgment was in breach of the law in force in British India. Mr. Auzam, arguing the first point, relied on authorities dealing with foreigners not within the jurisdiction at the time of suit. These authorities do not, however, apply in the case of the present defendants, who are British subjects and as they have been served, I can find nothing in the point. The distinction to be made is laid down in *Moazzim Hussein Khan* v. *Raphael Robinson* (1). As to the question of limitation, the ordinary law relating to the law of prescription is embodied in section 11 of the Limitation Act. It is a law relating to procedure, having reference only to the *lex fori*. This contract was one in which the price was payable in England and the English Court had jurisdiction. The question of limitation is to be decided with reference to the law of England, and the fact that the remedy would be barred had the suit been brought here is no defence to the claim in England. The remedy only would be barred and not the right. *Ruckmaboye* v. *Lulloobhoy Mottichund* (2) and *Alliance Bank, Simla* v. *Carey* (3). The last clause of section 13 of the Code does not apply to such a point as this. The written statement, therefore, discloses no defence. I am asked to pass judgment at once and no objection was taken to this course. There remains nothing for plaintiff to prove as the payment sued on is to be taken to be conclusive. There will be a decree as prayed with costs.

Suit decreed.

(1) 28 C. 641; 5 C. W. N. 741.

(2) 5 M. I. A. 234; 8 Moo. P. C. 4; 1 Sar. P. C. J. 423, 13 E. R. 480.

(3) 49 L. J. C. P. 781; 5 C. P. D. 429; 29 W. R. 306; 44 J. P. 785.

FAZAL AHMAD *v.* WESAL-UL-DIN.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 407 OF 1915.

May 15, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

FAZAL AHMAD—JUDGMENT-DEBTOR—APPELLANT

versus

WESAL-UD-DIN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66—General Rules of Practice for Civil Courts in U. P., Ch. IV, r. 5 (a)—"Gift", property acquired by, if ancestral—Execution of decree.

Property to which title is made out by gift is not property *inherited* within the meaning of rule 5 (*a*) of Chapter IV of the General Rules of Practice for Civil Courts in the United Provinces and is, therefore, not ancestral property. [p. 743, col. 1.]

Execution First Appeal from a decree of the Subordinate Judge, Pilibhit.

FACTS.—In execution of a decree a certain land belonging to the judgment-debtor was attached and ordered to be sold. The judgment-debtor objected that the land was ancestral and should be sold as such. It was found that the land sought to be sold was purchased by the grandfather of the judgment-debtor in 1847 A. D. and had been in possession of the judgment-debtor and his ancestors for about 70 years, but on 3rd November 1872 the father of the judgment-debtor divided the property among his two sons and gave the ancestral property to them by a deed of gift of the above date. The Subordinate Judge held that the property was not ancestral within the meaning of the notification of the U. P. Government to be found in "The Rules for the Civil Courts Subordinate to the High Court", Volume I, Chapter IV, section 5, clause (1), and disallowed the objection.

The judgment-debtor appealed to the High Court.

Mr. *J. M. Banerjee*, for the Respondents, raised a preliminary objection that no appeal lay from such an order. It was an interlocutory order and he referred to *Siva Gami Achi* v. *Subrahmania Ayyer* (1) and *Deoki Nandan Singh* v. *Bansi Singh* (2).

[SUNDAR LAL, J., referred to *Shirin Begam* v. *Agha Ali Khan* (3) and to *Behari Singh* v. *Mukat Singh* (4). His Lordship remarked that they were bound to follow the rulings of their own Court and disallowed the preliminary objection.]

Dr. *S. M. Sulaiman*, for the Appellant, referred to the rules for the Civil Court mentioned above and submitted that the rule had been modified by a notification and now the rule was as follows: "All lands, being *mahals* or shares in or portions of *mahals* which have been owned by the proprietor or by persons from whom such proprietor has *directly* or *indirectly* inherited such lands from the 1st of January 1848." He said:—The phrase "*directly* or *indirectly*" is the new amendment of the rule and covers the present case. The property has been in the family for a long time and is really and substantially ancestral. The deed of gift was merely a nominal transaction and created no change in the devolution of property.

[SUNDAR LAL, J.—Was there any transfer of possession on the execution of the deed of gift?]

There is nothing on the record to show if the deed of gift was really acted upon and there was change of possession at once.

The expression "indirectly inherited" covers a case like this, what else could it mean?

[SUNDAR LAL, J.—It means inheritance by a collateral after the death of a "widow" or such other female heirs. Inheritance does not mean getting property by gift in the lifetime of the donor.]

There is nothing to show that there was transfer of possession during the lifetime of the father. It seems the judgment-debtor got possession after his father's death. If your Lordships think proper an issue may be remitted to the lower Court on that point.

Mr. *J. M. Banerji* was not called upon.

JUDGMENT.—This is an appeal arising out of the execution of a decree for sale of property. The decree-holder has applied

(1) 27 M. 259 (F. B.); 14 M. L. J. 57.
(2) 10 Ind. Cas. 371; 14 C. L. J. 35; 16 C.W. N. 124.
(3) 18 A. 141; A. W. N. (1896) 9
(4) 28 A. 273; A. W. N. (1906) 3; 3 A. L. J. 140.

for sale of a certain village. The question before the Court is whether the proceedings in execution should be in accordance with the rules relating to sale of ancestral property as defined in Chapter IV, rule 5, of the General Rules of Practice for Civil Courts or that proceedings should continue as for sale of non-ancestral property. The Court below issued to the judgment-debtor a notice under rule 66 of Order XXI. According to the decree-holders the property was non-ancestral. The judgment-debtor appeared to show cause and has urged that in this particular case the property should have been held to have been ancestral land within the meaning of that term as used in rule 5 of that Chapter. Under clause (*a*) of that rule all lands, being *mahals* or shares in or portions of *mahals* which have been owned continuously, in the Province of Agra by the proprietor from the 1st January 1860..... or by the person or persons from whom such proprietor has directly or indirectly inherited such lands, are to be deemed ancestral land within the meaning of that rule.

In this case the property was acquired by Ilahi Bakhsh, grandfather of the objector, in the year 1847. He gifted the property to Niaz Ahmad, who made a gift of the same to Fazal Ahmad in 1872. The rule in question applies to cases where the property has been directly or indirectly *inherited* by the proprietor. The question is whether property acquired by gift can be said to be inherited. Under the ordinary law of inheritance if Ilahi Bakhsh and Niaz Ahmad had several heirs, the property would have been divided and sub-divided and would have come in a fractional share only to Fazal Ahmad. But it is under a gift that Fazal Ahmad has acquired the whole property and we are unable to say that property to which title is made out by gift is property *inherited* within the meaning of the rule. We think the decision of the Court below is correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 119 OF 1912.

May 19, 1915.

Present:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

JANG BAHADUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja MUHAMMAD ABUL HASAN KHAN—PLAINTIFF—RESPONDENT.

Settlement decree—Under-proprietary rights—Lease, execution of, by under-proprietor, effect of—Tenancy held by joint under-proprietor, effect of—Superior proprietor purchasing share in under-proprietary holding—Adverse possession—Joint under-proprietors—Limitation—Appellants, some of, dead—Heirs of appellants not brought on record—Appellate Court, power of—Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33.

Where a settlement decree awarded to certain persons under-proprietary rights in an entire village, named Nakha, but the Extra Assistant Commissioner, in proceeding to assess the under-proprietary rent as ancillary to the settlement, declared those persons liable for the rent of only one of the hamlets of the village named Nakha Khas:

Held, that the Extra Assistant Commissioner had no authority to go behind and supersede or alter the settlement decree and that the said persons were entitled to under-proprietary rights in respect of the *entire* village, if they had nevertheless been all along so treated. [p. 745, col. 2.]

The mere execution of a lease by an under-proprietor in favour of the superior proprietor does not detract from his status as under-proprietor, unless it is shown that the lease was acted upon or that the lessee obtained possession under it. [p 746, col 2.]

A tenancy held in an under-proprietary holding by an under-proprietor, who is only entitled to a share in the holding, is not necessarily inconsistent with his joint interest in that holding. [p. 747, col. 1.]

Where the superior proprietor of a village purchases a share in the under-proprietary rights in the same, no right by adverse possession as between him and the other under-proprietors can be recognized in the absence of evidence to prove an express ouster by the former within the knowledge of the latter. [p 747, col. 2.]

Ujalbi Bibee v. *Umakanta Karmokar*, 31 C. 970; 9 C. W. N. 32; *Parbati* v. *Ram Prasad*, 5 A. L. J. 511; A. W. N. (1908) 239 and *Dwarka Nath Chowdhury* v. *Shashti Kinkar Banerjee*, 18 Ind. Cas. 869; 17 C. W. N. 595, referred to.

In cases of joint possession of a village, the land of which is not formally divided into different *mahals* by metes and bounds, possession by some of the co-sharers of different portions of the joint land is sufficient to prevent limitation from running against them in regard to the remainder. [p. 747, col. 2.]

Where an appeal is filed by more than one person, and some of them die subsequently, and their heirs are n brought upon the record, but the judgment procee on a ground common to all of them, the

Appellate Court may, in view of Order XLI, rules 4 and 33, Civil Procedure Code, reverse or vary the decree of the lower Court in favour of all the appellants, including the said heirs as well. [p. 747, col. 2; p. 748, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 8th July 1912.

Mr. *A. P. Sen* and Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Mirza *Sami Ullah Beg*, for Respondent No. 1.

JUDGMENT.—The dispute in this case relates to certain plots of land, described as appertaining to the hamlets of Pura Badal and Khairati Jot, which formed part of *Mauza* Nakha. The plaintiff-respondent is the superior proprietor of that village. The defendants-appellants claim to be under-proprietors of a 7-annas 9-pies 10¼th-*krants* share of the entire village Nakha. Their contention is that by a decree of the Settlement Court, dated the 6th April 1872, their ancestors, Kalka, Ram Pratap, Madho Charan and Har Bhajan, were declared to be the under-proprietors of the entire village Nakha, which then contained three hamlets known as Nakha Khas, Khairati Jot and Pura Badal, that by virtue of a subsequent sale in execution of a decree against some of the under-proprietors sometime in 1877 or thereabout an 8 annas 2-pies 9¾th-*krants* share of the under-proprietary right was purchased by the superior proprietor of the village and that the remaining under-proprietary share has been in the possession of the defendants ever since. In 1909 the plaintiff-respondent instituted proceedings for the partition of his 8 annas 2 pies 9¾th *krants* of the under-proprietary share of the land appertaining to the hamlet Nakha Khas, alleging that the decree of the Settlement Court and the auction sale above referred to related only to the hamlet Nakha Khas and not to the entire village Nakha. The plea taken by the defendants-appellants before the Partition Officer was that the settlement decree related to the entire village Nakha, and that an application for the partition of the hamlet Nakha Khas was not maintainable. The Revenue Court found that the hamlet Nakha Khas was a totally undefined area, and directed the applicant for partition to go to a Civil Court for a definition of the rights he wanted to be partitioned. The plaintiff filed the present suit for a declaration that the defendants had no under-proprietary rights in the hamlets of Pura Badal and Khairati Jot, comprising the plots specified in the plaint or any other plots which might be found to appertain to the same. In the alternative, he asked for a declaration that the defendants had no under-proprietary rights in the said hamlets and for the separation of the plots, appertaining to the hamlets, from the rest of the village. There was a further prayer that if the plaintiff was not found entitled to either of those reliefs, a decree should be given to him for possession of the plots in dispute or such other plots as might be found appertaining to the said hamlets by the Court or might be allotted under its direction by the Revenue Court. The defence, so far as it is material for the purpose of this appeal, was that no hamlet was exempted from the settlement decree, by which under-proprietary rights were granted to the ancestors of the defendants, that no separate plots appertained to any of the hamlets, that the defendants had all along been in possession of Pura Badal and Khairati Jot as under proprietors to the extent of their shares and that the claim was barred by limitation.

The learned Subordinate Judge found that the decree of the Settlement Court did not include the hamlets of Pura Badal and Khairati Jot, that the plaintiff had been in possession of the hamlets, though no separate plots appertained to them, and that the claim was not barred by limitation. He granted the plaintiff a declaration that the defendants had no under-proprietary rights in the said hamlets without specifying or determining the plots comprised in the same.

The finding of the learned Subordinate Judge in regard to the exclusion of these hamlets from the settlement decree is manifestly unsustainable. It appears from the documentary evidence on the record that on the 19th June 1839 the ancestors of the defendants filed a suit in the Settlement Court against *Musammat* Sarfaraz Kunwar, the predecessor-in-title of the plaintiff-respondent, claiming the entire village Nakha (*mussallum Mauza* Nakha), forming *Hadbast* No. 734, and situated in *Pargana* Paharapur, Tahsil and District Gonda, as under-proprietors or *pukht idars* (Exhibit A 7). The petition stated that the petitioners held the village by virtue

of their ancestral right and under the *kabuliats* granted by the superior proprietor and that no specification of the plots was necessary as the entire village formed the subject-matter of their claim. In reply *Musammat* Sarfaraz Kunwar pleaded that the claimants held the village under leases granted to them and were not under-proprietors (Exhibit A-9). On the 31st July 1871 the Extra Assistant Commissioner dismissed the claim, on the ground that the claimants were *thekadars* and had failed to establish the deduction of *dahyak* from the rents reserved (Exhibit 1). That order was, however, set aside on appeal by the Settlement Commissioner, who on the 6th October 1878 remanded the case for further enquiry into the nature of the tenure (Exhibit 2). On the 29th March 1872 the Extra Assistant Commissioner found that the land of the village was divided into four *pattis* known as *Patti* Ram Pratap, *Patti* Kalka, *Patti* Har Bhajan and *Patti* Madho Charan, and that the claimants were entitled to *birt* rights in the said village subject to the deduction of *dahyak* (Exhibit 3). On the receipt of that finding the Settlement Commissioner passed a decree on the 6th April 1872, decreeing the lease of *Mauza* Nakha, *Pargana* Paharapur, to the claimants as *birtias* with a drawback of 10 per cent. on the Settlement Officer's assumed rental for the term of the settlement (Exhibit 4). On the 6th July 1872 the Naib Sadar Munsarim reported to the Extra Assistant Commissioner that the revenue of *Mauza* Nakha, constituting *Hadbast* No. 734, had been assessed at Rs. 1,030 and the cesses at Rs. 26 (Exhibit 5). The Extra Assistant Commissioner proceeded on that report to assess the rent payable by the under-proprietors in respect of *Mauza* Nakha and after stating that the *mukhtiar* of the superior proprietor complained of a consolidated assessment having been made in respect of *Mauza* Nakha, which included the hamlets of Pura Badal and Khairati Jot, observed that the plaintiffs admitted that the said hamlets were included in their *birt* but not in their *thekas*. He, therefore, directed the Naib Sadar Munsarim to separate the land of Pura Badal, Khairati Jot from that of Nakha Khas and to specify the proportionate revenue assessed on the latter (Exhibits 6 and 7). On the 29th July 1872, the Naib Sadar Munsarim submitted a report apportioning the revenue of Nakha Khas, Pura Badal and Khairati Jot in the following manner (Exhibit 8):—

	Total area.	Revenue.	Cesses.
	Big. bis. bisw.	Rs. a. p.	Rs. a. p.
Nakha Khas ...	751—6—0	793 0 0	20 0 0
Pura Badal and *Khairati Jot*	189—0—0	231 0 0	6 0 0
TOTAL ...		1,030 0 0	26 0 0

The Extra Assistant Commissioner accepted that report, and assessing the rent payable by the under-proprietors at double the revenue, exclusive of the cesses, directed that the defendants should pay a rental of Rs. 1,598 in respect of Nakha Khas and deduct from the same Rs. 160 per year on account of *dahyak* (Exhibit 9). This order appears to have been subsequently modified by the Extra Assistant Commissioner on the 22nd September 1872 in consequence of a reduction of the revenue assessed in the village, and the result of the modification was that the rent payable by the under-proprietors was proportionately reduced to Rs. 1,008 8-0 in regard to Nakha Khas, out of which Rs. 100 were to be deducted by the under-proprietors on account of *dahyak* and the balance of Rs. 908-8-0 was to be paid by them to the superior proprietor (Exhibit 10). There is no reference in this order in specific terms to Nakha Khas, but it is obvious from the reference in it to the reduction of revenue that the reduction of the rent payable by the under-proprietors was due to no other cause.

The Naib Sadar Munsarim and the Extra Assistant Commissioner in apportioning the rent payable by the under-proprietors had, however, no authority to go behind or modify the settlement decree. The decree was of a declaratory nature, needing no execution, and the proceedings taken to assess the rent were ancillary to the settlement and could not supersede or alter the settlement decree. The settlement decree awarded under-proprietory rights to the predecessors-in-interest of the defendants in the entire village Nakha without the exemption of the hamlets, and the Extra Assistant Commissioner obviously made a mistake in

declaring the under-proprietors liable for the rent of only Nakha Khas. In the village papers (Exhibits 62 and 63) there is no reference to the division of the land of the village into hamlets. A *jamabandi fard tasfia lagan* was evidently prepared in 1279 *Fasli* (Exhibit 12) in pursuance of the aforesaid direction of the Extra Assistant Commissioner with the object of apportioning the revenue. It specified the names of the tenants belonging to each of the hamlets and the areas held by them but no *khasra*, numbers were given in it. The areas mentioned therein do not, moreover, tally with the areas given in the report of the Naib Sadar Munsarim above referred to or with the assessment statement prepared at about the same time (Exhibit 45), in which Pura Badal was described as containing 123 *bighas* 14 *biswas*, Khairati Jot as containing 42 *bighas* 11 *biswas*, and Nakha Khas as containing 514 *bighas* 3 *biswas*. There is nothing to show upon what basis that specification proceeded, and considering the conflict of areas between the three papers, and the absence of a regular *khetauni*; giving the numbers of the plots, and of any reference to the division in the *khasras*, the classification of tenants made by the Naib Sadar Munsarim cannot be regarded as authentic. The *birtias* were described by the Settlement Officer as powerful (Exhibit 45). They claimed the entire village as included in their *birt*, and with the settlement decree in their favour it is unlikely that they would have allowed the two hamlets to slip out of their hands. There was evidently some bungling at the time of the determination of rent, due probably to a misunderstanding of what the *birtias* stated.

In 1873, when the Court of Wards in charge of Birwa Mahnon Estate applied to bring the under-proprietary share of the defendants-appellants or their predecessors-in-title to sale in execution of their decree, the interest sought to be sold was described as a right to hold the perpetual lease of *Mauza* Nakha at an estimated *nikasi* of Rs. 1,010 per year, subject to the deduction of Rs. 101 on account of *dahyak* (Exhibit A-16). No suggestion was then made that the under-proprietary rights of the judgment debtors were confined only to one of the hamlets of the village.

The subsequent proceedings which took place in the recent settlement, show that the defendants or their predecessors-in-interest were recorded under-proprietors of the entire village Nakha, comprising 16 annas, assessed at an under-proprietary rent of Rs 908-8-0 (Exhibit A-5). No separate records in regard to each of these hamlets were prepared at the recent settlement. The assessment statement of the recent settlement described the entire village Nakha as forming a revenue-paying unit, belonging to the Birwa Mahnon Estate, but held in sub-settlement by under-proprietors under the settlement decree dated the 22nd September 1871. In character the village was described as indifferent with a great deal of waste and a high portion of *pala*, presenting a somewhat neglected appearance, and the opinion of the Settlement Officer was that the cultivation outside the immediate vicinity of the hamlets was not good. A revenue of Rs. 700 was proposed by the Settlement Officer but was reduced by the Commissioner to Rs. 650, on the ground that the terms of the sub-settlement were onerous (Exhibit A-19). The defendants were shown as under-proprietors of the entire 16 annas without any specification of hamlets, and there can be no doubt that the position now taken up by the superior proprietor had not till then entered his mind.

On behalf of the plaintiff-respondent reliance is placed on some leases granted by the superior proprietors between 1875 to 1887. But only two of them have been proved. The first of them was executed by Ramadhin on the 16th October 1875 and purported to relate to the entire hamlet Pura Badal (Exhibit 46). But there is no reliable evidence to show that that lease was acted upon or that the lessee obtained possession under it. The other lease was granted by Raja Udey Pratab Singh of Birwa to Kamta in respect of both the hamlets Pura Badal and Khairati Jot, on the 3rd March 1882. But the same objection applies to it. Reliance is also placed on certain proceedings taken by the superior proprietors to eject some of the tenants and to recover arrears of rent from others. Some of these proceedings taken as far back as 1896 were, however, infructuous. It appears for instance from the order of the Commis-

sioner dated the 2nd June 1896 (Exhibit A-18) that an objection filed by Ram Pratab to the issue of a notice of ejectment was upheld, on the ground that the latter village was a *birt* holding and that the objector was a co-sharer in the under-proprietary rights. That order was upheld by the Board of Revenue on the 15th March 1897 (Exhibit A-1). In 1905, another attempt was made to eject Ram Pratab but was unsuccessful (Exhibit A-3). The finding of the Board of Revenue then too was that Ram Pratab was a co-sharer and that his ejectment by notice under section 127 of the Oudh Rent Act could not be permitted. The precise plots to which those proceedings related are not ascertainable, but it is clear from the copies of the orders filed that the former proceedings related to some land in *Mauza* Nakha and the latter to some land in *Mauza* Pura Badal. In 1909, some proceedings in ejectment were taken by the present proprietor of the estate against Mahabir and *Musammat* Prandei, which were successful. But possession so recently taken cannot establish a right as against the under-proprietors.

The suits for arrears of rent on which reliance is placed on behalf of the plaintiff-respondent were filed between the years 1905 and 1908 and are similarly of no value: one of them filed against Ram Pratab in 1908 was dismissed on the 17th May 1909 (Exhibit A-4). The receipts for rent relate to the period between 1898 and 1906, but as the superior proprietor had become a co-sharer in the under-proprietary right as far back as 1877 or thereabout, such collection was consistent with the joint under-proprietary rights of the defendants and their predecessors-in-interest. An under-proprietor, who is only entitled to a share in the entire village, might, it is conceivable, take some land belonging jointly to him and the other under-proprietors, undertaking to pay rent for the same in order that he might get the benefit derivable from personal cultivation: but such a tenancy is not necessarily inconsistent with his joint interest in the under-proprietary holding. The proportionate share of an under-proprietor in the village may be very small and may not suffice for his maintenance. An under-proprietor of a fractional share may also, therefore, be a tenant of a holding. There is nothing to show how the accounts used to be adjusted between the under-proprietors and the superior proprietor, who had purchased a share in the under-proprietary rights, and, in the absence of evidence to prove an express ouster by the latter within the knowledge of the former, no right by adverse possession as between the co-sharers of an under-proprietary holding can be recognised [*Ujalbi Bibee* v. *Umakanta Karmokar* (1), *Parbati* v. *Ram Prasad* (2) and *Dwarka Nath Chowdhury* v. *Shashti Kinkar Banerjee* (3)]. We are not satisfied that the plaintiff has acquired a right by adverse possession to the under-proprietary rights decreed to the defendants in the hamlets of Pura Badal and Khairati Jot at the time of the regular settlement. The plaintiff is a co-sharer of the under-proprietary rights with the defendants in the entire village, and no right to the hamlets in question either by adverse possession or otherwise has been made out. The defendants have been in joint possession of the under-proprietary rights and in view of the fact that there was no formal division of the land of the village into different *mahals* by metes and bounds, possession by some of the co-sharers of different portions of the joint land is sufficient to prevent limitation from running against them in regard to the remainder.

The appeal in this case was filed by 23 defendants, of whom Ram Padarath and Ram Pratab died subsequently. No attempt was made to bring their heirs, if any, on the record. The judgment, however, proceeds on a ground common to all, and Ram Padarath and Ram Pratab and their heirs, if any, cannot be placed in a worse position than that in which they would have been, had they been no parties to the appeal. Order XLI, rule 4, of the Code of Civil Procedure declares that "where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate

(1) 31 C. 970; 9 C. W. N. 32.
(2) 5 A. L. J. 511; A. W. N. (1908) 239.
(3) 18 Ind. Cas. 869; 17 C. W. N. 595.

Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be." Order XLI, rule 33, of the Code empowers the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The appeal is, therefore, allowed and the plaintiff's claim and objection dismissed with costs here and below. The plaintiff-respondent will bear his own costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 176 OF 1915.

May 8, 1916.

Present:—Mr. Justice Walsh and Mr. Justice Sundar Lal.

PARAM HANS AND OTHERS—DEFENDANTS—APPELLANTS

versus

RANDHIR SINGH—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s 59—Attestation—Scribe writing name of second witness—No proof of authorization—Document, if mortgage—Charge—Money-decree, grant of.

A document bore the signature and mark of the executant and the signature of one attesting witness. It contained in the margin the name of another witness written by the scribe, but not his signature or mark. He was dead at the time of the suit and there was nothing to show that he authorized the scribe to sign his name for him. A suit was brought on this document within six years of the date of the cause of action:

Held, that the document was not a valid mortgage, as it was not duly attested as provided in section 59 of the Transfer of Property Act, nor could it create a charge. [p. 749, col. 1.]

Held, also, that a money-decree could, however, be given, as it was a suit upon registered document. [p. 749, col. 1.]

First appeal from an order of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra.

Mr. *Narain Prasad Asthana*, for the Appellants.

Mr. *J. M. Banerji* (with him Mr. *L. M. Banerji*), for the Respondent.

JUDGMENT.

SUNDAR LAL, J.—This is a suit upon a deed which purports to be a deed of mortgage bearing date 17th July 1903. The document bears the signature and mark of *Musammat* Sahodra, the executant. It bears the signature of one Gopal, an attesting witness, and the only other witness whose name is written by the scribe is Bansi. In the margin of the deed is given the name of another witness or a person who was expected to be an attesting witness, who is described as Bansi "son of Randhir, caste Gola Purab, resident of Saujan, by acknowledgment of the executant." This is written in the handwriting of the scribe. There is no signature or mark of this witness Bansi on the deed. He is dead, and there is nothing to show that he authorised the scribe to sign his name for him. He has not himself put his signature or mark. The question is whether he is an attesting witness within the meaning of section 59 of the Transfer of Property Act. In a recent case which came before the Patna High Court, *Ram Bahadur Singh* v. *Ajodhya Singh* (1), Chief Justice Chamier and Mr. Justice Jwala Prasad came to the conclusion that to be an attesting witness within the meaning of section 59 of the Transfer of Property Act the witness must not only have seen the execution of the document but should have also subscribed as a witness, that is, he must have put his own mark or signature to it. It may be that in the present case the scribe wrote up what he found in the draft of the deed with the intention of subsequently obtaining the signature or mark of Bansi on the acknowledgment of the executant, as before the Privy Council ruling in *Shamu Patter* v. *Abdul Kadir Rowthan* (2) witnessing a document on

(1) 34 Ind. Cas. 370; 20 C. W. N. 699; 1 P. L. J. 129.

(2) 16 Ind. Cas. 250; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 35 M. 607; 39 I. A. 220 (P. C.).

the mere acknowledgment of the executant was regarded as sufficient by this Court. In our opinion in the absence of proof that the scribe was authorised by Bansi to sign for him as an attesting witness or to put his mark or signature to the document on his behalf as a witness, the document has not been duly attested by at least two witnesses and is not a valid mortgage according to the aforesaid Privy Council ruling. We think that the document cannot operate as a mortgage as against the transferee of the property. It creates no charge, as has been recently ruled by a Full Bench of this Court in *Collector of Mirzapur* v. *Bhagwan Prashad* (3). The suit for sale of the property, therefore, fails. It is, however, a suit upon a registered document and has been brought within six years from the date of the cause of action. The plaintiff is entitled to a money-decree against *Musammat* Sahodra. We, therefore, vary the decree of the Court below by dismissing the suit for sale and making a money-decree for the claim against *Musammat* Sahodra with costs.

WALSH, J.—It is as well to add a caution against treating an important question like this, namely, as to whether an alleged attestation or execution is genuine or not, which may obviously involve an investigation of a criminal act in the way in which it has been treated by the Court below. That Court has assumed in favour of the document that a witness who was actually called before the Court must have seen the alleged executant touch the pen of the scribe as an authority to sign for him, although there is not a scrap of evidence on the point.

BY THE COURT.—We allow the appeal of the transferee with costs but amend the decree of the Court below by making a decree for money against *Musammat* Sahodra with costs.

Appeal allowed; *Decree amended.*

(3) 18 Ind. Cas. 311; 35 A. 164; 11 A. L. J. 141.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 44 OF 1914.

March 28, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Phillips.

SWAMINATHA MUDALY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VELU MUDALY AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), ss. 15, 17—Right of part owner of dominant heritage to use water—Long user for over statutory period—Prescriptive title, acquisition of—Use of water for joint cultivation—Cessation of joint cultivation, whether affects easement.

There is no substantial difference between the English and Indian laws as to the acquisition of a prescriptive title to water and the inferences and presumptions deducible from long user of the same. [p. 752, col. 1.]

If there has been long-continued user of water in a tank or channel and the enjoyment is inconsistent with any other inference than that it has been as of right, Courts will infer a title by prescription. [p. 752, cols 1; p. 750, col. 1.]

When user is proved the presumption is that it is of right until the contrary is shown. [p. 751, col. 2.]

Philips v. *Halliday*, (1891) A. C. 228; 61 L. J. Q. B. 210; 64 L. T. 745; 55 J. P. 741; *Shaikh Khodu Buksh* v. *Shaikh Tajuddin*, 8 C. W. N. 359; *Gardner* v. *Hodgson's Kingston Brewery Company Ltd.*, (1903) A. C. 229, 72 L. J. Ch. 558; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458, referred to.

Plaintiffs and defendants jointly owned plot *A*, each being entitled to a definite but unascertained share therein. They jointly cultivated betel in it by using water which flowed into it from tank *B* through channels *C* and *D*. The site of tank *B* and channel *C*, belonged to defendants and channel *D* belonged in part at least to plaintiffs. It was in evidence that plaintiffs had been taking water from *B* to the land *A* for 60 or 80 years:

Held, (1) that plaintiffs had acquired a prescriptive right to the water of the tank and not a mere license for its use; [p. 750, col. 2; p. 752, col. 1.]

(2) that plaintiffs' joint user with defendants did not affect the nature of the right, which was a right over the servients heritage acquired by the plaintiffs as part owners of plot *A*, and that, consequently, the cessation of their joint cultivation would not extinguish the easement. [p. 752, col. 2.]

Appeal from the judgment of Mr. Justice Bakewell, dated the 24th March 1914, in the Ordinary Civil Jurisdiction of this Court, in Civil Suit No. 393 of 1913.

Messrs. *C. P. Ramaswami Aiyar* and *T. Arumainatham Pillai*, for the Appellants.

Messrs. *K. Narasimha Aiyar* and *V. Narasimha Aiyangar*, for the Respondents.

SWAMINATHA MUDALY *v.* VELU MUDALY.

JUDGMENT.

WALLIS, C. J.—There is not much difference, if any, between the facts as found by the learned Judge and by my learned brother whose judgment I have had the advantage of reading, and the only question is as to the proper inference arising from these facts with reference to the plaintiffs' claim to the tank water by prescription as pleaded in paragraphs 16 and 17 of the plaint. If we take into account only the fact that the water has been brought from tank *B*, which is on land purchased by the defendants' ancestors to *A*, which consists of plots purchased by the ancestors of the plaintiffs and defendants and the fact that all the plots were cultivated jointly, it may be said that the fact that the defendants used their water from tank *B* in raising betel jointly with the plaintiffs sometimes on portions of *A* purchased by the defendants' ancestors and sometimes on portions purchased by the plaintiffs' ancestors only amounts to a user by the defendants of their own water for their own purposes, even though that cultivation was being carried on by them jointly with the plaintiffs, and should not raise any presumption of right to the use of the water by the plaintiffs. This would appear to be the view taken by the learned Judge who tried this case.

On the other hand, the user of the plaintiffs may be presumed to be as of right and to have a lawful origin and if a lawful origin of the plaintiffs' right can be suggested, such an origin may be presumed. Here we have the fact that the land on which the tank and channel were excavated was purchased by Murugappa Mudaly, who is described in the sale-deed as one of the Thottam or garden Mudaliars, a description which includes the plaintiffs, whereas in the sale-deed of portions of the plot *A* purchased by him shortly afterwards the description is omitted. This suggests that sites *B* and *C* may have been purchased by him on behalf of all the families of both the plaintiffs and defendants who were about to embark on betel cultivation on plot *A* and that the tank and the channel may have been excavated by them. Then we have the fact that the channel *D*, by which the water from *B* and *C* is brought on to the land *A*, bears the name of Muthia Mudaly, who was an ancestor of 7th and 8th defendants who claim jointly with the plaintiffs and not of defendants Nos. 1 to 6 who dispute their claim, and may possibly have been constructed on behalf of both the plaintiffs and defendants. Then we have the Will of Muthiah Mudaly by which he purported to bequeath certain shares in the land *A* and the tank *B*, which is clearly the assertion of claim to share in the water of the tank *B* as of right. Then there is evidence that the plots in *A* purchased in the name of the plaintiffs' and defendants' ancestors have been so completely thrown into one that the boundaries of the different plots are no longer distinguishable and that the suit of one of the parties for the recovery of his particular plot was dismissed, on the ground that it was not possible to identify it in view of the fact that all the separate plots had been thrown into one.

The evidence as to the payment of quit-rent for the tank *B* and the enjoyment of the produce of the trees on *B* is conflicting, as some of the plaintiffs' witnesses say the quit-rent was paid by the headman for the time being and that the produce of the trees was enjoyed by the co-sharers according to their shares. On the other hand, defence witness No. 1 denies this and produces a bundle of quit-rent receipts, but he is an unreliable witness and the receipts do not show by whom the quit-rent was actually paid before the disputes which gave rise to this litigation.

On the whole, I think there is sufficient evidence that the plaintiffs are entitled to share in the water of the tank *B* with the defendants in the proportion of their shares in the common cultivation formerly carried on in plot *A*. I would, therefore, allow the appeal and give a decree in the terms of prayers (*a*) and (*b*) and that an enquiry be directed as to prayer (*g*). The appeal is allowed with costs in this Court.

PHILLIPS, J.—Plaintiffs and defendants are owners of a plot of land marked *A* in the plan, and admittedly they have been using the water of the tank *B* for irrigating that land. According to plaintiffs, such irrigation began about 1812, when plot *A* was purchased, and defendants admit the use of the water since 1839. The water

from *B* passes along a channel *C* and then into a public channel *F*, and from there through a channel *D* to plot *A*. Defendants allege that the user of the water by plaintiffs was permissive, whereas plaintiffs claim it as of right. The land on which the tank *B* and the channel *C* have been excavated was purchased in 1812 in the name of Murugappa of the "Thottam Mudaliars," a description which would apply to all the parties to this suit. Murugappa was an ancestor of defendants Nos. 1 to 6. In 1814 the ancestors of plaintiffs and defendants bought 7 plots of land and in 1816 one plot (Exhibits A—H) and these 8 plots form plot *A*. Admittedly these 8 plots were cultivated jointly by all the parties, and it is now impossible to identify the various plots on the ground, although each owner is entitled to a certain definite but unascertained share. There is no evidence to show in whose name the land on which channel *D* is dug was purchased, but Exhibit P, a document executed by 1st defendant in 1886, recites that plot *A* belongs to Muthiah Mudaly (an ancestor of defendants Nos. 7 and 8 and headman after Murugappa) and others, and gives the same owner for the channel *D*. First defendant also admits that channel *D* is called Muthiah Mudali's channel and Muthiah Mudali leaves two shares in the tank and channel by his Will, Exhibit Q. There is no evidence to show when *B* and *C* were dug, but it is sufficient that the sale-deed for that land stands in the name of Murugappa of the Thottam Mudaliars whereas the sale-deed for a portion of plot *A* (Exhibit *B*) stands in the name of Murugappa himself. This fact as well as the fact that channel *D* through which the water must pass to *A* coupled with the recital in Exhibit Q lend support to plaintiffs' case that the tank water belonged to them and the defendants jointly, and it is quite clear that plaintiffs owned, or had at least a share in, channel *D*. We must take it then that for at least sixty years plaintiffs and defendants have been taking water from tank *B* for the purpose of cultivating their plot *A*. Even assuming, as the learned Judge has done, that the land on which *B* and *C* were dug belonged originally to 1st to 6th defendants' ancestor, there is no evidence to show that the excavation was done by him or at his costs, or that the water of the tank belonged to him exclusively. I may here say that I agree with the learned Judge that the specific agreements set up by plaintiffs and defendants, respectively, *i. e.*, Exhibits W and IX, are of no value, and were probably brought into existence after these disputes arose. There is thus no evidence, beyond 1st defendant's mere word, that plaintiffs have ever paid anything to defendants for the use of the water. The position, therefore, is this; plaintiffs have for 60 or 80 years been taking water from tank *B* to their land in *A* through channels *C* and *D*. Tank *B* and channel *C* are on land purchased in 1st to 6th defendants ancestor's name, and channel *D* belongs, at least in part, to plaintiffs. In these circumstances what is the presumption? The learned Judge has found that plaintiffs have been using the water by permission of the defendants, but with all respect I am unable to see that there is any evidence of permission, if the agreement Exhibit IX is excluded, and such permission, if any, can only be inferred from the facts of the case. In *Philips* v. *Halliday* (1) the presumption from long-continued possession in assertion of a right was laid down by Lord Herschell as follows: "It is a well-settled principle of English Law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title." In Gale's Work on Easements (page 204) we also find the rule laid down that when user is proved, the presumption is that it is of right until the contrary is shown. No doubt it was remarked by Banerjee, J., *Shaikh Khoda Buksh* v. *Shaikh Tajuddin* (2) that in this country it would not be right to draw the same inference from user as in England, but his remarks had a reference to a right of way, in respect

(1) (1891) A. C. 228; 61 L. J. Q. B. 210; 64 L. T. 745; 55 J. P. 741.

(2) 8 C. W. N. 359.

of which I agree that the observation has considerable force; but rights to water stand on a different footing for in this country they are very highly valued, and a license for the use of water *gratis* is by no means common. I, therefore, see no reason why the presumption of English Law should not be applied. The question as to whether user was "of right" as required in the Easements Act was considered in *Gardner* v. *Hodgson's Kingston Brewery Company, Ltd.* (3), where an owner had enjoyed a right of way over a yard for over 40 years, paying annually Rs. 15 to the owners of the yard. It was held by the Court of Appeal that plaintiff's right had not been established; the reason which influenced the Court being the annual payment of Rs. 15. In fact Lord Ashbourne goes so far as to say that the case would be perfectly clear in favour of plaintiff but for the payment of Rs. 15. It was held that the payment of Rs. 15 negatived the case which had to be made out in order to prove prescriptive title, *i.e.*, that the enjoyment was inconsistent with any other inference than that it had been as of right, there being a second reasonable inference, *i. e.*, that the employment was by license. It would appear, therefore, that if there has been long-continued user and the enjoyment is inconsistent with any other inference than that it had been as of right, the Courts in England will infer a title by prescription. There appears to be no substantial difference between the language of the English Prescription Act and the Indian Easements Act, and, therefore, the same would appear to be the law in this country. Applying this principle to the present case the plaintiffs would appear to have acquired a prescriptive title to the water of the tank for, on the facts established, their long user is inconsistent with any other inference than that it has been of right.

A further objection is raised on behalf of respondents that the right prescribed for by plaintiffs cannot be definitely specified. In the plaint the right set out is to take water jointly with defendants for the irrigation of the crops jointly raised by them in plot *A*; and now defendants are unwilling to cultivate jointly with plaintiffs. It is, therefore, contended that plaintiffs' right, which only has reference to joint cultivation, has ceased with the cessation of joint cultivation. I may observe that this point does not appear to have been raised in the original trial; but the underlying fallacy of this contention is apparent. The right that plaintiffs have, they have as part owners of the dominant heritage *A* over the servient heritage *B*, and not by virtue of cultivating jointly with defendants and the user alleged in paragraph 11 of the plaint was one in accordance with an agreement which has been found to be untrue. The prescriptive right claimed in paragraph 17 has not been limited in the same manner and though its exact extent has not been specified in the plaint, it can be ascertained from the materials before us. In the past, plaintiffs have exercised their right conjointly with defendants, but this joint user does not affect the nature of the right, which is really a right over the servient heritage acquired by them by virtue of their ownership of plot *A*. Plaintiffs and defendants have been enjoying the lands as tenants-in-common; the respective shares in the right possessed by plaintiffs and defendants can be ascertained on partition. So long as the combined shares do not exceed the total right heretofore enjoyed, the servient owner has no ground of complaint. The right that has been prescribed for is not merely a right to irrigate jointly with defendants, but a right as part owners of a dominant heritage, and as regards this right, they are entitled to a declaration, I, therefore, agree in the order proposed.

Appeal allowed.

V. R. P.

(3) (1903) A. C. 229; 72 L. J. Ch. 558; 88 L. T. 698; 52 W. R. 17; 19 T. L. R. 458.

BHAWANI DIN v. JHAMMAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 143 OF 1915.

March 24, 1916.

Present:—Mr. Lindsay, J. C.

BHAWANI DIN—PLAINTIFF—APPELLANT

versus

Musammat JHAMMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 137—Adverse possession—Limitation, running of—Auction-purchaser, subsequent, suit by, against prior auction-purchaser.

A share of a property was mortgaged without possession, and subsequently a grove forming part of that property was similarly mortgaged separately. In 1899 the defendant purchased the grove at a sale in execution of a decree obtained by the subsequent mortgagee against the mortgagor alone; and in August 1902 the plaintiff purchased the mortgaged share of the property at a sale in execution of a decree obtained by the prior mortgagee against both the mortgagor and the subsequent mortgagee. In June 1914, the plaintiff sued the defendant for actual physical possession of a proportionate share in the grove. The defendant pleaded adverse possession from the date of his purchase, and relied upon Article 137, Schedule I, of the Limitation Act:

Held, (1) that as the property was subject to the prior mortgage at the time the defendant purchased it and as the defendant by his auction-purchase only acquired a right to redeem the earlier mortgage, he could not set up a plea of adverse possession from the date of his purchase; [p. 754, col. 2.]

(2) that the plaintiff's right to possession of the property came into existence at the date of *his* purchase, *i.e.*, 16th August 1902, and there could be no adverse possession running against him prior to that date, and that, inasmuch as the suit had been brought within twelve years of that date, no question of limitation could arise; [p. 754, col. 2.]

(3) that Article 137 of the Limitation Act had no application to this case. [p. 754, col. 1.]

Appeal from the decree of the District Judge, Hardoi, dated the 31st March 1915, reversing the order of the Munsif, Shahabad, dated the 21st November 1914.

Pandit *Harkaran Nath Misra*, for the Appellant.

Babu *Basdeo Lal* holding brief of Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal. The suit was brought for possession of a one-fifth share of a certain grove situated in a village called Pachdeora. This grove, according to the findings of both Courts, constituted a portion of a 5-*biswas* 5-*biswansis* share in this village, which once belonged to a man named Debi Singh. Debi Singh on the 4th February 1881 mortgaged 2½ *biswas* out of his share in all this property to one Jhao. The mortgage was a simple mortgage and the mortgage-money was Rs. 1,000. Ultimately the mortgagee rights under this first mortgage came to one Pancham Lal. On the 23rd of October 1888 Debi Singh made a separate mortgage of the grove now in suit (No. 425). This was a mortgage without possession and was made in favour of two men Mahadin and Ranjit Singh. Mahadin secured the mortgagee rights of Ranjit Singh by assignment and in October 1896 the heirs of Mahadin sold his mortgagee rights to a man named Sartaj Singh. In October 1897 Sartaj Singh brought a suit to recover the money owing on this second mortgage of the 23rd October 1888 and in 1899 this grove No. 425 was sold and purchased at the execution sale by one Gobind Prasad, who was the husband of the present defendant No. 1 Jhamman. In the suit for sale which was brought by this man Sartaj Singh the prior mortgagee, that is to say, Pancham Lal, was not impleaded. Consequently neither Pancham Lal nor his representatives-in-interest are in any way bound by the decree which was obtained by Sartaj Singh. On the 22nd of March 1898 Pancham Lal brought a suit for sale on the mortgage of the 4th of February 1881. He obtained a decree for sale and in execution of that decree a one-fifth share of Debi Singh's property was brought to sale in satisfaction of the mortgage decree. That one-fifth share was purchased by the present plaintiff Bhawani Din. The sale was confirmed on the 16th of August 1902 and on the 10th October 1902 Bhawani Din was put in formal possession by the order of the Court.

The present suit was brought on the 17th of June 1914, Bhawani Din asserting that he was entitled to obtain actual physical possession of a one-fifth share of the grove in question No. 425. One plea in defence was that the grove in question was not covered by the mortgage of the 4th February 1881; that is to say, it was treated as being property outside the 5-*biswas* 5-*biswansis* share belonging to Debi Singh. On this point both Courts have held against the defendants. It has been found that this grove did, as a matter of fact, constitute a portion of the property which went to make

up the 5-*biswas* 5-*biswansis* share. For the respondents here an attempt has been made to attack this finding of fact of the Courts below, on the ground that certain dealings with this grove property regarding which there was evidence in the case have been misunderstood by the Courts below. So far as I understand the judgment, this plea is not open to the respondents. It seems to me that the Judge has found quite clearly that this grove was situated in the *patti* of Debi Singh and it must be taken that the grove, therefore, formed part of the 5-*biswas* 5-*biswansis* share which Debi Singh once possessed. The next defence which succeeded in the lower Appellate Court was a defence of adverse possession. This plea, I understand, was not raised in the Court of first instance. The case was put in this way on behalf of *Musammat* Jhamman who is the representative of Gobind Prasad, the man who purchased the grove at the auction-sale which was held in execution of Sartaj Singh's decree. It was said that the purchase having been made in 1899, the auction-purchaser had been in adverse possession since that date and this suit which was brought on the 17th June 1914 was, therefore, beyond time and Article 137 of the First Schedule was relied upon in support of the defence of limitation. On the facts as they have been stated above, this Article has got no application whatever to the case and there is no ground at all upon which any plea of adverse possession could be entertained. From what has been already said, it is apparent that all that Gobind Prasad acquired at the time when he bought the grove in execution of Sartaj Singh's decree was the equity of redemption. The property was subject to a mortgage at the time this purchase was made and it makes no difference to the present plaintiff whether the mortgage was or was not proclaimed at the time the sale took place. There can be no doubt that the mortgage was there all the time and that no subsequent dealings with the property by the mortgagor could affect the rights of the prior mortgagee. Again, it is to be borne in mind that in the suit which was brought by Pancham Lal the subsequent mortgagee Sartaj Singh was made a party and, therefore, his rights under the decree obtained by Panchman Lal were confined to redemption of the prior mortgage on this grove. What Gobind Prasad, therefore, acquired by his auction-purchase was an equity of redemption, that is to say, a right to redeem the earlier mortgage, and in these circumstances it is impossible for Gobind Prasad or his representatives to set up a plea that there was any adverse possession from the date of his purchase. The present plaintiff, Bhawani Din, purchased this property in 1902 at the auction-sale held in execution of the decree obtained on the first mortgage and his right to possession over this property first came into existence at the date of the purchase. There could be no adverse possion running against the present plaintiff prior to the 16th of August 1902 and as the present suit was brought within 12 years from that date no question of limitation can arise. The order of the learned Judge is, therefore, wrong and must be discharged. I allow this appeal, set aside the decree of the lower Appellate Court and restore the order of the Court of first instance. The plaintiff-appellant will have his costs both here and in the lower Appellate Court.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 118 OF 1914.

June 21, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

BAMANDAS BHATTACHARYYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NILMADHAB SAHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease by occupancy tenant representing to be tenure-holder—Suit for rent—Lessee, right of, to question landlord's title—Sub-lease—Estoppel—Bengal Tenancy Act (VIII B. C. of 1885), s. 85 (1), (2), applicability of—Precedents, value of.

The creation of the complete relation of landlord and tenant has the effect, in law, of estopping the tenant from denying the title which he has admitted to exist in the landlord, the estoppel arising as the legal effect of carrying the contract into execution. [p. 757, col. 1.]

Bistratullah Mundle v. *Kasirunnessa Bibi*, 11 C. W. N. 199, referred to.

Two conditions are essential to the existence of the estoppel in such cases, *viz*, possession and permission, and estoppel prevails so long as such possession con

tinues. The parties are mutually bound by the terms of the lease, and it is not open to either of them to prove against the other facts contradictory to the allegations which form the basis of their contract, after that contract has been carried into execution and the contracting parties have enjoyed benefits thereunder. [p. 757, cols. 1 & 2.]

A lease granted in contravention of section 85, clause (1), of the Bengal Tenancy Act is operative as between the grantor and the grantee. [p. 758, col. 2.]

Telam Pramanik v. *Adu Shaikh*, 18 Ind. Cas. 791; 17 C. W. N. 468; *Bhaiganti Bewa* v. *Himmat Bidyakar*, 35 Ind. Cas. 7; 24 C. L. J. 103; 20 C. W. N. 1335; 24 C. L. J. 103; *Trevivan* v. *Lawrence*, 1 Salk. 276; 6 Mod. 256; 91 E. R. 241; *Doe d Strode* v. *Seaton*, (1835) 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale. 303; 5 L. J. (N. S.) Ex. 73; 41 R. R 831; *Langford* v. *Selmes*, 3 Kay & J. 220; 3 Jur (N. S.) 859; 69 E R. 1089; *Grija Kant Lahory* v. *Hurrish Chunder Chowdhry*, 19 W. R. 114 at p. 117 (P. C.); *Concha* v. *Concha*, 11 A. C. 541; 56 L.J. Ch 257; 55 L. T. 522; 35 W. R. 477; *Lilabati Misrain* v. *Bishun Chobey*, 6 C. L. J. 621 at p. 627; *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi*, 35 C. 34 (F. B.); 6 C. L. J. 273; 11 C. W. N. 983, referred to.

Kreglinger v. *New Patagonia Meat & Cold Storage Co*, (1914) A. C. 25 at p. 39; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114, dissented from.

The title of a grantee who can fall back upon prior possession as tenant or otherwise cannot be defeated by the mere proof of contravention of section 85. [p. 759, col. 1.]

The Bengal Tenancy Act is not a complete code even in respect of the law of landlord and tenant, much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. [p. 758, col. 1.]

Each case forms a real precedent only in so far as it affirms a real principle and to follow previous authorities, in so far as they lay down principles, is essential; but to look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. [p. 758, col. 1.]

Jarip Khan v. *Durfa Bewa*, 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59, referred to.

In an action for rent on the basis of a lease wherein the plaintiffs, who were really occupancy *ryots*, were described as tenure-holders and the defendants-lessees as under-tenure holders, the defendants, who were let into possession and continued in possession till date of suit, resisted the claim on the ground that the plaintiffs were only occupancy *ryots* and that the permanent lease in their favour was void as contravening the provisions of section 85 of the Bengal Tenancy Act, and that it was really a sub-lease within the meaning of section 85, sub-section 2:

Held, (1) that the defendants were estopped from asserting that their obligations were other than those set out in the lease on the strength whereof they obtained possession from their grantors; [p. 759, col. 1.]

(2) that the case did not attract the operation of section 85 (2) of the Bengal Tenancy Act. [p. 757, col. 1.]

Appeal against the decree of the Subordinate Judge, Krishnaghur, dated the 22nd December 1913.

FACTS of the case appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babus *Baranashibasi Mookerjee*, *Khetra Mohan Ghose*, *Sarat Chandra De* and *Santosh Kumar Bose*), for the Appellants.—The tenants-defendants are barred by the doctrine of estoppel from questioning the title of the landlords-plaintiffs. Even if the defendants be permitted to question the title of the plaintiffs and to prove that the instrument which is the root of their title is inoperative under section 85, Bengal Tenancy Act, it is still open to the plaintiffs to establish independently of the instrument the relationship of landlord and tenant between the plaintiffs and the defendants with certain rights and liabilities.

Sir. *S. P. Sinha*, Advocate-General, (with him Babus *Surendra Chandra Sen* and *Dwijendra Nath Mookerjee*), for the Respondents.—On principle the truth of the appellants' contention seems to me to be beyond all doubt, but there is at least one case holding a contrary view. It is a decision of Geidt, J., in *Basaratullah Mundle* v. *Kasirunnessa Bibi* (1).

On the question of the measure of damages I dispute the first ten items claimed by the plaintiffs.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent under a lease, and of damages for breach of a covenant contained therein. On the 27th August 1896, the plaintiffs granted the lease to the defendants in respect of an area of 942 *bighas*, the interest of the grantors was described as that of tenure-holders and the grantees who paid a premium of Rs. 1,280 were made under-tenure-holders by the instrument. The rent was fixed in perpetuity at Rs. 688 4-0, the tenants undertook to pay Rs. 538-4 0 direct to the superior landlord of their grantors and the balance, Rs. 150, to the lessors themselves. The lease contained a covenant that if by reason of non-payment of the rent due to the superior landlords, year after year, instalment by instalment, a suit is brought against the lessors and if in execution of the rent-decree the tenure or other property of

(1) 11 C. W. N. 190.

the lessors is attached and sold in auction, the lessees will be bound to pay the rent due with interest, costs and damages and the proper value of such properties of the lessors as may be sold. The contingency thus contemplated did not happen for many years, as the lessors, who entered into possession of the lease-hold property under this instrument, duly performed their obligations. On the 29th November 1910, however, the superior landlord instituted a suit against the present plaintiffs for recovery of rent for the two years, 1908—10; it is not disputed that this rent had fallen into arrears, because the present defendants had failed to pay to the superior landlord the rent due as they had undertaken to do in the lease. The suit was decreed on the 4th January 1911 for a sum of Rs. 2,987, execution was taken out in due course and the tenure was sold on the 14th June 1911, when it was purchased by the present defendants for a sum of Rs. 1,600. As the rent-decree was thus satisfied only in part, the plaintiffs, on the 21st December 1911, paid to the decree-holder the balance of the judgment debt, that is, a sum of Rs. 1,264. The superior landlord, on the 10th May 1912, obtained against the plaintiffs a supplementary decree for Rs. 549 and costs and interest, on account of rent due for the period between the date of institution of the previous suit and the date of sale of the tenure. The plaintiffs satisfied this decree on the 30th June 1912. On the 7th August 1912, they instituted this suit for recovery of Rs. 6,470 composed of five items, namely, Rs. 1,280 as their share of the proceeds of the sale held on the 14th June 1911, Rs. 3,000 as the value of the property sold, Rs. 1,264 as the amount paid in satisfaction of the first decree, Rs. 626 as the amount paid to satisfy the second decree, and Rs. 300 as the arrears of rent due for two years. The defendants resisted the claim, substantially on the grounds that the plaintiffs were not tenure-holders but occupancy *ryots*, that the permanent lease in their favour was void and inoperative as granted in contravention of section 85 of the Bengal Tenancy Act and that they were, consequently, not bound by any of the covenants in the lease. They further pleaded that the damages claimed were excessive. The Subordinate Judge has found the main facts in favour of the plaintiffs, but he has dismissed the suit on the ground that, as the plaintiffs were in reality occupancy *ryots* and not tenure-holders, the lease was void under section 85 of the Bengal Tenancy Act. On the present appeal, the decree of the Subordinate Judge has been assailed as erroneous in law and as not really supported by the decisions mentioned by him, namely, *Jarip Khan* v. *Durfa Bewa* (2) and *Telam Pramanik* v. *Adu Shaikh* (3).

Section 85 of the Bengal Tenancy Act provides as follows:—"(1) If a *ryot* sublets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent: (2) A sub-lease by a *ryot* shall not be admitted to registration if it purports to create a term exceeding nine years." The third sub-section refers to sub-leases granted before the commencement of the Bengal Tenancy Act and has obviously no possible application to the present case. The question for consideration is whether the first two clauses apply and, if so, what is their effect upon the rights of the parties. It is plain that the first sub-section has no application, because the superior landlord of the plaintiffs is not a party to this litigation and neither the plaintiffs nor the defendants have argued that the lease of the 27th August 1896 is valid against him. The controversy is thus restricted to the second sub-section. With reference thereto, the defendants contend that the lease of the 27th August 1896 is in essence a sub-lease by a *ryot* within the meaning of sub-section 2, that it should not have been admitted to registration, that the fact of registration contrary to law must be ignored, that the instrument is thus inadmissible in evidence under section 49 of the Registration Act, and that there is accordingly no proof that the defendants hold as tenants under the plaintiffs on the conditions mentioned therein. The plaintiffs put forward a two-fold answer to this argument, namely, *first*, that the defendants who entered into possession under the lease are barred by the doctrine of estoppel and are not competent to question the title of

(2) 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59.

(3) 18 Ind. Cas. 791; 17 C. W. N. 463.

the lessors as tenure-holders on proof that they were in reality occupancy *ryots*, and *secondly*, that if the defendants are permitted to question the title of their lessors and to prove that the instrument which is the root of their own title is inoperative under section 85 (2), still it is open to the plaintiffs to establish independently of the lease that the defendants were their tenants, that they entered upon the land as such and that they have been in occupation for many years by payment of rent on certain terms and subject to certain liabilities in the event of default. It is obvious that the *second* branch of this contention will not require examination, if the *first* is, as we think it must be sustained.

It is well settled that the creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord; the estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. The grounds of this rule were recently examined by this Court in *Bhaiganti Bewa* v. *Himmat Bidyakar* (4) (decided by Sanderson, C. J., and Mookerjee, J., on the 11th May 1916), where the following observation was made: "Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues." From this point of view, the defendants are not competent to deny that the plaintiffs are tenure-holders, they cannot be permitted to allege or prove that the plaintiffs were occupancy *ryots* at the date of the lease executed in their favour, consequently, the case does not attract the operation of section 85 (2) of the Bengal Tenancy Act, in other words, the defendants cannot show that the lease was void and that no interest passed to them. The case thus falls within the rule that where no interest passes, an estoppel arises [*Trevivan* v. *Lawrence* (5)], and not within the converse rule that where an interest passes no estoppel arises [*Doe* d *Strode* v. *Seaton* (6) and *Langford* v. *Selmes* (7)]. The justice of the view we take will be obvious from a consideration of the case converse to what has happened here. Suppose, after the lessees had gone into possession, the lessors had sued to eject them on the plea that they were occupancy *ryots* and not tenure-holders and that the sub-lease was consequently void under section 85 (2). The lessees would plainly have been entitled to rely on the doctrine of estoppel to defend their position. But as was pointed out by the Judicial Committee in *Grija Kant Lahory* v. *Hurrish Chunder Chowdhry* (8) and by the House of Lords in *Concha* v. *Concha* (9), estoppels are, as a general rule, mutual, or in the language of Lord Coke, "every estoppel ought to be reciprocal, that is, to bind both parties and this is the reason that regularly a stranger shall neither take advantage of nor be bound by the estoppel" [Co.-Litt. 352; *Lilabati Misrain* v. *Bishun Chobey* (10)]. We feel no doubt whatever that the parties to this litigation are mutually bound by the terms of the lease of the 27th August 1896, and that it is no more open to the defendants than to the plaintiffs to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefits thereunder. In fact, the Advocate-General, with the candour which always characterises his arguments, did not seriously contest the correctness of this view.

The question remains, however, whether the numerous judicial decisions which interpret section 85 of the Bengal Tenancy Act and which are by no means easy to

(4) 35 Ind. Cas. 7; 20 C. W. N. 1335; 24 C. L. J. 103.

(5) 1 Salk. 276; 6 Mod. 256; 91 E. R. 241.

(6) (1835) 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale. 303; 5 L. J. (N. S.) Ex. 73; 41 R. R. 831.

(7) 3 Kay. & J. 220; 3 Jur. (N. S.) 859; 69 E. R. 1089.

(8) 19 W. R. 114 at p. 117 (P. C.).

(9) 11 A. C. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477.

(10) 6 C. L. J. 621 at p. 627.

reconcile, militate against this conclusion. The majority of those decisions, to which we shall presently make a brief reference, do not really touch the cardinal question in controversy in this suit, but before we consider them, two important principles may be conveniently re-stated. In the *first* place, as is clear from the decision of the Full Bench in *Kripa Sindhu Mukerjee* v. *Annada Sundari Debi* (11), the Bengal Tenancy Act is not a complete code even in respect of the law of landlord and tenant, much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. In the *second* place, as pointed out by Lord Haldane, L. C., in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (12) each case forms a real precedent only in so far as it affirms a principle and the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle: "To follow previous authorities, so far as they lay down principles, is essential, if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

As regards the decisions upon the construction of section 85 of the Bengal Tenancy Act, it is plain that a long line of cases affirms the view that a lease granted in contravention of section 85 (1) is operative as between the grantor and the grantee [*Madan Chandra Kapali* v. *Jaki Karikar* (13) *Gopal Mondal* v. *Eshan Chunder Banerjee* (14), *Tamijuddi* v. *Asgar Howladar* (15), *Bipin Behari Hati* v. *Amrita Lal Bhuttacharji* (16), *Arab Ali* v. *Rachimaddi* (17), *Ali Mahammad Bepari* v. *Nayan Rajah Bhuiya* (18), *Abdul Karim Patwari* v. *Abdul Rahman* (19), *Janaki Nath Hore* v. *Prabhasini Dasi* (20) and *Lani Mia* v. *Muhammad Easin Mia* (21)]. The only case which supports the contrary view is the decision of Geidt, J., in *Basarutullah Mundle* v. *Kasirunnessa Bibi* (1) which, so far as we have been able to discover, has not been followed in any subsequent decision. The conclusion as to the binding character of the lease as between grantor and grantee may be supported on one of two grounds, namely, *first* that the validity of a lease granted in contravention of section 85 (1) can be questioned only by the landlord of the grantor or by the holder of a derivative title from him, or *secondly*, that the doctrine of estoppel binds the grantor and grantee equally and debars each from disputing the validity of the lease to the detriment of the other. The first of these principles has not been universally accepted and is possibly in conflict with the rule enunciated in *Jarip Khan* v. *Durja Bewa* (2) and *Telam Pramanik* v. *Adu Shaikh* (3). These cases, however, do not affect the authority of the decision in *Manik Borai* v. *Bani Charan Mondal* (22), which was followed in *Ganesh* v. *Thanda* (23) (decided by Fletcher and Richardson, JJ., on 22nd July 1914). It is not necessary for our present purpose to make a choice between the two classes of cases, one of

(11) 35 C. 34 (F. B.); 6 C. L. J. 273; 11 C. W. N. 983.

(12) (1914) A. C. 25 at p. 39; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(13) 6 C. W. N. 377.

(14) 29 C. 148.

(15) 1 Ind. Cas. 942; 36 C. 256; 13 C. W. N. 183.

(16) 3 Ind. Cas. 685; 9 C. L. J. 76.

(17) 10 Ind. Cas. 562; 13 C. L. J. 656.

(18) 13 Ind. Cas. 912; 15 C. L. J. 122; 16 C. W. N. 620*n*.

(19) 13 Ind. Cas. 864; 15 C. L. J. 672; 16 C. W. N. 618.

(20) 30 Ind. Cas. 893; 22 C. L. J. 99; 19 C. W. N. 1077.

(21) 33 Ind. Cas. 448; 20 C. W. N. 948.

(22) 10 Ind. Cas. 469; 13 C. L. J. 649.

(23) S. A. No. 2246 of 1912.

which places a limited construction on section 85 and holds it to have been enacted for the benefit of the superior landlord, while the other places a wider construction upon the section and allows a stranger to avail himself of its provisions to defeat the title of a grantee who had not obtained possession before or after the grant. Apart from the conflict on this point, there is no serious doubt as to two propositions, namely, *first*, that the title of a grantee, who can fall back upon prior possession as tenant or otherwise, cannot be defeated by mere proof of contravention of section 85, and *secondly*, that, as between grantor and grantee the rule of estoppel applies when elements essential to attract its operation are proved to exist. In the case before us, as we have already explained, the defendants are precluded by the doctrine of estoppel from asserting that their obligations are other than those set out in the lease of the 27th August 1896, on the strength whereof they obtained possession from their grantors. In this view, the decree of the Subordinate Judge cannot be supported.

We have finally to consider the question of the measure of damages. The defendants dispute only the first two items claimed by the plaintiffs. The first item must obviously be disallowed; the plaintiffs cannot claim the value of the property lost to them as also the sale-proceeds, which simply represent the property transformed into money. As regards the second item, the claim is clearly excessive. As between the plaintiffs and the defendants, the property may be deemed to be a tenure, but the only reliable evidence as to the market value of a permanent tenure which comes from the side of the defendants is, that it sells for 13 years' purchase. As the net profit derivable by the plaintiffs was Rs. 150 a year, the value cannot be estimated at a higher figure than Rs. 1,950. The appeal will consequently be allowed and the plaintiffs will have a decree for Rs. 4,318 with interest thereon at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. The plaintiffs will also have their costs, in proportion to the sum decreed, both here and in the Court below.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 155 OF 1914.

March 24, 1915.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Bhaiya GUR PRASAD SINGH—DEFENDANT—APPLICANT

versus

Bhaiya SANT BAKHSH SINGH AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Jurisdiction—Munsif officiating as Subordinate Judge, reverting as Munsif, and again officiating as Subordinate Judge—Authority to hear particular sort of cases given at former occasion, effect of.

Where a Munsif acted as an officiating Subordinate Judge in a district, and it was then notified that he would have jurisdiction to hear a particular sort of cases during such time as he held the post of Subordinate Judge, but he reverted for a short time as Munsif and on being again promoted to officiate as Subordinate Judge in another district heard a case of that particular sort:

Held, that the notification published on the previous occasion gave him jurisdiction to hear the case on the subsequent occasion when he had to officiate as Subordinate Judge, in spite of the fact that he had reverted between the two officiating periods and that a similar notification was also issued later on after he had been made a permanent Subordinate Judge. [p. 759, col. 2, 760, col. 1.]

Application against the order of the Subordinate Judge, Bahraich, dated the 10th September 1914.

Babu *Aditya Prasad*, for the Applicant.

Pandit *Gokaran Nath Misra* and Babu *Gopal Sahai Bhargava*, for the Opposite Party.

JUDGMENT.—The first point raised in this revision is that the learned Subordinate Judge had no jurisdiction to hear the case. We find that by a notification No. 1093/I-77, dated Lucknow the 2nd June 1914, and published in the United Provinces Gazette of the 20th June 1914, Part II, at page 1435, the learned Subordinate Judge was given the necessary power to hear such a case under section 17 of the Oudh Civil Courts Act during such time as he held the post of Subordinate Judge. At that time the officer in question was officiating Subordinate Judge of Sitapur. He subsequently reverted for a short period as Munsif, and was again promoted to officiate as Subordinate Judge of Bahraich. We consider that this notification gave him the necessary authority to hear such cases during all periods when he was again appointed to officiate as Subordinate Judge,

in spite of the fact that he had reverted between two such periods. It is true that a subsequent notification was issued on the 6th November 1914, No. 1839/I-77, which was published in the United Provinces Gazette of the 21st November 1914, Part II, page 2684, and which gave him power to hear such cases after he had been made a permanent Subordinate Judge. But we do not think that it was necessary to issue the second notification, and we find that he had jurisdiction to hear the suit in question.

The case in which the compromise which it is now sought to support was filed, was a case brought by a son in a joint Hindu family against his father, mother, and brother for partition of his joint family. The son would have been entitled under the ordinary law to a quarter share. A compromise was written by which the two sons were to obtain shares considerably greater than the shares to which they were entitled, and the father and mother were given merely an assignment of property for their maintenance. The other brother and the father signed the compromise, but the mother refused to accept it. We consider that the fact that the mother refused to accept it was sufficient in itself to invalidate the compromise, and that such a compromise could not possibly be effective unless all the parties concerned agreed to it. The mother was entitled to a quarter share, and, unless she agreed to the compromise, it was impossible to increase the shares of the sons in the manner in which the compromise proposed to increase them. In addition the learned Subordinate Judge finds on the facts that the father signed the compromise without understanding its contents. It appears that the father is blind and deaf, and we agree with the learned Subordinate Judge that it is established that he did not understand the terms of the agreement in question.

For the above reasons we find that the learned Subordinate Judge correctly refused to give effect to the compromise in favour of or against any of the persons who were parties to it. We accordingly dismiss this application. The applicant will pay his own costs and those of the opposite party.

Application rejected.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 18 OF 1912-13 OF LUCKNOW DISTRICT.

November 8, 1913.

Present:—Mr. Tweedy, J. M.

RIKHI—PLAINTIFF—APPELLANT

versus

BADRI SINGH—DEFENDANT—RESPONDENT.

Ejectment—Lambardars, *two—Oudh Rent Act* (*XXII of* 1886), *s.* 126 (2).

Where there are two *lambardars* in a village, and there is no sub-division of land between them, any one of them is alone entitled to eject the tenants of the village, inasmuch as section 126 (2) of the Oudh Rent Act gives extensive powers to a *lambardar*. [p. 761, col. 1.]

Appeal from the decree of the Commissioner, Lucknow, dated the 17th June 1913, upholding the order of the Assistant Collector, Lucknow, dated the 16th March 1913.

FACTS of the case clearly appear from the following orders of the Assistant Collector and the Commissioner which were passed in the case:—

The Assistant Collector's order—"Defendant issued a notice of ejectment to plaintiff. The plaintiff contends that he is the tenant of Tori Singh *lambardar* and that defendant is not entitled to eject him. Defendant's reply is that there are two *lambardars* in the village, he being one of them, and that, the lands not being divided, he was competent to issue the notice in question.

The following issues were raised:—

'(1) Is plaintiff a tenant of another party?

'(2) Can defendant alone eject plaintiff?

1. The plaintiff has produced Tori Singh *lambardar*, who has deposed that plaintiff is in the habit of paying rent to him. He admits, however, that the defendant too is a *lambardar* and that there is no sub-division of the lands between them. I hold that plaintiff is a tenant of defendant.

2. Defendant has filed copy of a statement made by the plaintiff in the Munsif's Court on 17th January 1910 in a pre-emption suit which gives the lie to him. He said: 'I cultivate land in *Patti* Bakhtawar Singh. I paid Rs. 44 as rent to defendant No. 2 (*i. e.*, Badri Singh) and other *zamindars*.' He does not deny having made the statement. In my opinion defendant was competent to issue the notice and I allow it to stand. Plaintiff will pay defendant's costs."

The Commissioner's order—"Respondent is one of two *lambardars*. Section 126 (2) gives extensive powers to a *lambardar*. It does not provide for the case of a rival *lambardar*. Respondent has exercised his legal powers. Appeal is dismissed with costs and Pleader's fees."

JUDGMENT.—I agree with the view of law taken by both lower Courts and dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 142 OF 1911.

April 1, 1915.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Raja RAGHURAJ BAHADUR SINGH—DEFENDANT—APPELLANT

versus

Rae RAJESHWAR BALI—PLAINTIFF, *Musammat* SUNDER KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Award—Civil Procedure Code (Act V of 1908), Sch. II, cls. 10, 14 (b)—*Remission of award, ground for—Expression capable of many interpretations—"Indefinite or incapable of execution."*

The fact that a particular expression used in an award is capable of more than one interpretation, does not show that it is indefinite; much less that it is so indefinite as to be incapable of execution. The expression in such a case has to be interpreted in execution proceedings consequent on the decree following the award. [p. 763, col. 2.]

Appeal against the order of the District Judge, Fyzabad, dated the 14th August 1911.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *E. Manual*, Babu *Panna Lal* and Munshi *Mohammad Farzand Ali*, for the Respondents.

JUDGMENT.—The village of Daryabad in the Bara Banki district is a *bhaiyachara* village which is held by the following sharers:—

1. Rae Rajeshwar Bali, *Talukdar* of Rampur,
2. Raja Raghuraj Bahadur Singh, *Talukdar* of Harha,
3. Certain persons known as *chaudhris* and
4. Certain persons known as *moharrirs*.

In the village there is one *patti* of some 200 odd *bighas*. Most of the area of this is covered by house property and no portion of it is cultivated. The houses are occupied by tenants and others, who in most cases pay dues. The Raja of Harha applied in the Revenue Court for partition of this *patti* rateably among the co-sharers. Rae Rajeshwar Bali objected that the *patti* was already divided in specified shares among the co-sharers, and that a portion was in his exclusive possession and could not be taken away from him. The Revenue Court took his objection as an objection to title, and referred him to the Civil Court to establish his title. He thereupon filed a suit in the Court of the Subordinate Judge of Bara Banki for a declaration that the *patti* had been separated into specific shares owned by particular sharers and that certain specified *muhallas* and plots were his absolute property. The decision of this suit was, by the consent of the parties, referred to the arbitration of the Subordinate Judge of Bara Banki. The hearing of the suit was transferred to the Court of the District Judge of Fyzabad, and Pandit Durga Dat Joshi, Subordinate Judge of Bara Banki, was appointed arbitrator under an order authorising him to decide all matters in difference arising in the suit. The Subordinate Judge, as arbitrator, made an award dated the 18th April 1911 and that award was filed according to the provisions of clause 10, Second Schedule, Act V of 1908. Objections were made to the award by various parties.

The following objections were filed by Raja Raghuraj Bahadur Singh of Harha:—

"1. That the arbitrator has committed gross misconduct in deciding the case.

"2. That the award is entirely invalid in law.

"3. That the award is quite imperfect.

"4. That the arbitrator was wrong in not giving even those houses to the objector which were admittedly in his possession according to the plaintiff.

"5. That the arbitrator was wrong in not giving to the objector even those houses of which he had obtained decrees from competent Courts against the plaintiff.

"6. That the arbitrator was wrong in not examining the objector's witnesses and also in ordering that only a certain number of witnesses would be taken.

"7. That the arbitrator was wrong in not taking into consideration the documents filed by the objector and in deciding the case without paying due regard to them.

"8. That the arbitrator had no power to decide the matter not claimed by the plaintiff, *viz.*, the building of houses.

"9. That the arbitrator was wrong in relying upon certain papers in matters to which they do not relate.

"10. That the arbitrator was wrong in not deciding all the issues and as he had ordered that the parties should not be represented through Counsel, the arbitrator ought himself to have decided all the legal objections as the general agents of the parties were not lawyers."

Most of these objections are on the face of them objections to the award as irretrievably bad. It does not appear that the objector desired that the Court of the District Judge should in the first place modify or correct the award, or that it should remit the award for the re-consideration of the arbitrator. The objections relate in the main to alleged corruption of the arbitrator. This is a ground for setting aside the award under clause 15, Second Schedule, Act V of 1908, and it is clear that objections Nos. 1, 4, 5, 6, 7, 9, and 10 were objections stating the allegation of misconduct and the nature of the alleged misconduct. If the allegation of misconduct had been established, it would have been the duty of the Court to set aside the award, to supersede the arbitration, and to proceed with the decision of the suit. It is true that objections Nos. 2 and 3 might be interpreted as falling under clause 14, but we do not consider that they can be so interpreted. The objector did not suggest that the award was so indefinite as to be incapable of execution, or that there was an apparent objection to its legality. He stated on the contrary that the award was entirely invalid and quite imperfect. In the 8th objection the words are very vague. But it may be possible to interpret them as suggesting that the award had determined matters not referred to arbitration. Had the objector suggested that the award had determined matters not referred to arbitration, it would have been open to him to ask the District Judge to correct the award under the provisions of clause 12 so as to separate the decision on that point, or else, if the Court were unable to separate that portion of the decision, to refer the award back to the arbitrator under the provisions of clause 14. But it will be seen from the objections that the objector nowhere stated the remedy which he desired. The objector should have in his grounds of objections clearly stated what he wished the District Judge to do. It is impossible to find from the objections themselves what he wanted. The decision of the District Judge shows that the objector in the first place asked him to set aside the award on the ground of misconduct and asked him, if he found no misconduct proved, to send the award back to the arbitrator for re-consideration. The portion of the decision referring to this latter request is as follows:—

"The learned Counsel for the first defendant argues that the arbitrator has not made it clear, and should be asked to make it clear, in his award whether the rights of the defendant No. 1 with respect to the house bought by him within the *muhallas* allotted to the plaintiff are in any way affected by the award, and that if he says they are not affected the first defendant would be satisfied."

In another portion of the decision we find the manner in which it was further urged that the award should be remitted. It is as follows: —

"The learned Counsel also argued in the same strain on the issue relating to the non-joinder at the outset of the second and third sets of defendants. He urged that as they were joined after the period of limitation had expired, the addition of parties does not cure the initial defect in the suit as originally brought (ground 2). I do not think that this is a ground for remission of the award. It really means that the arbitrator should have found the suit unmaintainable."

We do not understand how the award could have been remitted to the arbitrator in order to re-decide the question as to whether parties had been joined within limitation.

We now come to the grounds of indefiniteness. The learned District Judge says: "The

third ground is also a vague one, *viz.*, that the award is imperfect.

"The learned Counsel explains that by imperfection is meant that the award is incapable of execution.

"He means that (1) the areas of the *muhallas* should have been measured and stated in the award, (2) it is impossible for the defendants to get compensation out of the other lands of the village. As to the first point the Subordinate Judge deputed an *amin* to prepare a plan indicating the houses owned by each of the parties and when the map was prepared, the defendant No. 1 objected that it was wrong.

"The arbitrator has noted that the objector did not specify in what respects the plan was incorrect, and that it was admitted that the property in suit was correctly shown.

'The first defendant now wants to go behind his agent's admission, which he cannot be allowed to do. In the plan filed with the plaint, the areas of the *muhallas* are demarcated and it is not stated in what respects it is incorrect.

"As to the second objection, it is urged that according to his share of the whole *mauza*, the first defendant's share of the *abadi* should be about 85 *bighas*.

"The learned Counsel understands the award to mean that the first defendant should get compensation out of the non-*abadi* land of plots Nos. 533 and 538, which amounts to 31 *bighas* 11 *biswas* 16 *biswansis* only. But I understand the award to mean that compensation is to be awarded out of the rest of the land of the *mauza*."

The learned District Judge thus decides upon the question of indefiniteness that the award is not indefinite. He ended up by finding that there was no misconduct on the arbitrator's part and that the award was valid and capable of execution, and he passed a decree in terms of this last portion. This order is dated the 14th August 1911.

Raja Raghuraj Bahadur Singh of Harha has filed an appeal against the decree and a revision. Both appeal and revision have been admitted for hearing. The appeal and revision take exactly the same grounds. They are that the award is invalid, indefinite, and incapable of execution, that it ought to have been remitted to the arbitrator, and that the interpretation put by the Judge on the clause relating to compensation is clearly wrong.

The Counsel for the plaintiff-respondent objected at the outset that no appeal lay under the provisions of clause 16 of the Second Schedule of Act V of 1908, and there is much to be said for his contention that no appeal lies. It is unnecessary, however, in our opinion, for us to go into this question, as the decision of the point whether an appeal does or does not lie in this particular case is considerably more complicated than the decision of the point whether the appeal must fail in the circumstances of the case. As we shall show later, there can be no doubt as to the fact that on the merits both appeal and revision must fail, and we do not consider that it will serve any useful purpose to examine the vast mass of decisions on the first point.

The learned Counsel for the appellant has put his case before us in a concise form. He states that he objects now to one portion of the award and one portion only. He withdraws all suggestions of misconduct, he withdraws all suggestions that the award is upon any matter not referred to arbitration, and he confines himself to the plea that one particular portion of the award is so indefinite as to necessitate its reference to the arbitrator in order that it may be corrected on that point. This portion is as follows: "And that in the partition which is pending in the Revenue Court the deficiency in the shares of each set of defendants should be made up from the non-*abadi* lands in possession of the plaintiff."

We cannot find that there is anything indefinite in these words. It is argued that they are capable of more than one interpretation. But the fact that a particular expression is capable of more than one interpretation does not show that it is indefinite, and certainly does not show that it is so indefinite as to be incapable of execution. We have no difficulty in attaching a meaning to these words. We do not propose to state what our interpretation of these words is as, if we did so, we should be in effect deciding a point which may have eventually to be decided in contested execution proceedings before the District Judge

and we consider it desirable that we should not prejudge the decision as to the interpretation of these words, which should and will in all probability be made in execution proceedings in another Court.

For the above reasons we find that the appeal and the revision must alike fail. We dismiss them both, and direct that Raja Raghuraj Bahadur Singh of Harha pay his own costs and those of the plaintiff-respondent in appeal and in the revision proceedings.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 78 OF 1913.

June 2, 1915.

Present:—Mr. Lindsay, J. C.

Khan Bahadur Mir BUNIYAD HUSAIN —PLAINTIFF—APPELLANT

versus

Musammat HAZIR-UN-NISA, DEAD, AND AFTER HER DEATH HER DAUGHTER *Musammat* SALONA—DEFENDANT—RESPONDENT.

Grant—Maintenance grant—Presumption—Duration of grant.

Where lands are granted by way of maintenance, the presumption is that the grant is made for the lifetime of the grantee. [p. 770, cols. 1 & 2.]

Appeal from the decree of the Sub ordinate Judge, Bara Banki, dated the 9th July 1913.

Syed *Wazir Hasan*, Syed *Ali Mohammad* and *Pandit Sarju Prasad Misra*, for the Appellant.

Mirza *Sami Ullah Beg* and Messrs. *Mohammad Nasim* and *Syed Hasan*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was brought by the appellant Mir Buniyad Husain to recover possession of an area of 83 *bighas* odd situated in five villages, Qadirpur, Jalalpur, Jeanpur, Mantara and Chaktara. The original defendant in the case was *Musammat* Hazir-un-nisa, the widow of one Saiyed Bakhshish Ahmad. Saiyed Bakhshish Ahmad was the uncle of the plaintiff Buniyad Husain and is said to have died in the month of November 1900. The allegation in the plaint was to the effect that the lands in suit had been given to Bakhshish Ahmad by way of maintenance and that the defendant, his widow, had no rights to retain possession of these lands as the grant had really determined on the death of the original grantee Saiyed Bakhshish Ahmad. The only allegation in the plaint as to the nature of Saiyed Bakhshish Ahmad's possession with respect to these lands is contained in paragraph 1, in which all that is stated is that the lands had been given to Saiyed Bakhshish Ahmad by way of maintenance. Nothing was said as to who made the grant or as to when the grant was made. In the written statement of defence filed by *Musammat* Hazir-un-nisa it was denied that Saiyed Bakhshish Ahmad held the lands in dispute in lieu of maintenance. The case set up on behalf of the defendant was that the lands in question had been granted to Saiyed Bakhshish Ahmad in lieu of his share in the family property. In paragraph 10 of the written statement it was set out that Saiyed Bakhshish Ahmad, in order to maintain the family status and as desired by his father Husain Bakhsh and his brother Mubarak Husain, consented to receive the lands in suit as rent-free *sir* lands in lieu of his share. In short, the position taken up by the defendant was that Saiyed Bakhshish Ahmad did not hold his lands by way of maintenance but in absolute ownership, they having been given to him by his father Husain Bakhsh in lieu of the share of the family property to which he would otherwise have been entitled. In order to understand the position of the parties it is necessary to refer to the pedigree of the family. We begin with Saiyed Husain Bakhsh who died in the year 1871. This man was twice married. By his first wife he had a son named Haji Husain, by the second wife he had two sons, one Mubarak Husain who was the father of the present plaintiff and Saiyed Bakhshish Ahmad who was the husband of *Musammat* Hazir-un-nisa. At the time of the British annexation of Oudh it appears that the landed property belonging to this family was in possession of Haji Husain. The evidence

shows that during the last days of the Nawabi Haji Husain held a *kabuliat* for the property. The consequence was that when the summary settlement came to be made it was made with Haji Husain. There is also evidence on record (Exhibits A-1 and A-7) which shows that while Haji Husain was in possession both Mubarak Husain and Saiyed Bakhshish Ahmad laid claim to shares in the property, each of them maintaining that he was entitled to the remainder. These claims, however, were dismissed. It is important to notice that at the time when these claims were made, Saiyed Husain Bakhsh was still alive and it would appear, therefore, that neither Mubarak Husain nor Saiyed Bakhshish Ahmad had any real claim to any share in the property so long, at any rate, as their father was alive. In the year 1867 Saiyed Husain Bakhsh brought a suit against his son Haji Husain in which he was given a decree for possession of the property. The judgment of the Settlement Officer is on record. It bears date the 1st of August 1867. The result of this litigation was that the property, which had hitherto stood recorded in the name of the son, Haji Husain, came to be recorded in the name of Saiyed Husain Bakhsh. This property, I must mention, included the five villages in which the lands now in dispute are situated. Subsequent to this, that is to say, in the year 1868, Haji Husain brought suits against his father and was successful in obtaining decrees for certain lands situated in the villages of Jalalpur and Qadirpur. These lands were subsequently recorded as being occupancy lands in the possession of Haji Husain, held by him without any right of transfer and without any liability to pay rent. These lands are not in dispute in the present case. They are, it is said, still in the possession of Haji Husain's descendants. We come now to the year 1870. On the 17th of November in that year Saiyed Husain Bakhsh executed a deed of gift by which he transferred the whole of his property without any exception to his son Mubarak Husain. Haji Husain, the son of the first wife, brought a suit for having this deed of gift set aside. This claim was dismissed on the 17th July 1871 (*cf.* Exhibit 34). It is alleged that since the date of this deed of gift Mubarak Husain got possession of the whole of the property and remained in possession till his death in the year 1880, when he was succeeded by his son, the present plaintiff Mir Buniyad Husain. Saiyed Husain Bakhsh himself died in the year 1871, some months after this deed of gift had been executed. The *khewat* entries which have been produced in this case show Buniyad Husain as being the owner of the entire villages of Qadirpur and Jeanpur. He is recorded as the owner of an 8-anna share in Jalalpur and Chaktara while in Mantara he is recorded as being the owner of a *patti* of 5 annas 4 pies. The important issue in the suit was issue No. 4 which was framed in the following language:—"Was the defendant's husband in possession of the lands in suit only by way of *guzara*?" Both parties led evidence on this issue. The plaintiff tried to make out by his evidence that the grant for maintenance had been made after the death of Mubarak Husain in the year 1880. The story was that Saiyed Bakhshish Ahmad and his brother Mubarak Husain lived amicably till the time of the latter's death, and that after Mubarak's death Saiyed Bakhshish Ahmad began to be dissatisfied with his position and demanded a separate allowance. It was stated that in consequence of this demand made by Bakhshish Ahmad the present plaintiff, or rather his mother who was acting for him at that time, made over these lands to Bakhshish Ahmad by way of maintenance so as to bring him in an income of about Rs. 600 a year. No document was drawn up to evidence this grant. On the other hand, the witnesses whom the defendant produced tried to make out that the grant of these lands had been made to Bakhshish Ahmad by his father Saiyed Husain Bakhsh. According to the defence story this grant was made just before Saiyed Husain Bakhsh executed the deed of gift in favour of his son Mubarak Husain. The defendant was unable to produce any documentary evidence of this grant and the only proof we have of it consists of the statements of three or four of the defence witnesses. These witnesses deposed that the grant so made by Saiyed Husain

Bakhsh was not a mere grant of maintenance. They swore that the lands had been given absolutely to Saiyed Bakhshish Ahmad as some sort of compensation for his having been excluded under the gift which Husain Bakhsh was about to make in favour of his elder son Mubarak Husain. There were thus two conflicting versions before the Court below. The learned Subordinate Judge, after a consideration of the circumstantial and documentary evidence before him, came to the conclusion that the defence story which was put before him was the true one. He rejected as unworthy of credit the story told on behalf of the plaintiff, and he found that the plaintiff had failed to prove that Bakhshish Ahmad was holding these lands under a maintenance grant. The result was that he dismissed the suit. This finding of the Subordinate Judge is the principal matter with which we are concerned here in appeal. It is argued that this finding is against the weight of evidence and that in the light of the documentary and circumstantial evidence on the record the Subordinate Judge should have accepted the evidence of the plaintiff's witnesses in preference to that which was given by the witnesses called on behalf of the defendant.

I will consider first the oral evidence which was led in the case and begin with the evidence produced on behalf of the plaintiff upon whom, undoubtedly, the burden lay of proving that Saiyed Bakhshish Ahmad received these lands by way of a maintenance grant. The first witness for the plaintiff was one Debi Din, a man of 78 years of age who had been in the employ of Husain Bakhsh as a Dewan. Debi Din knew all about the gift which had been executed by Husain Bakhsh in favour of Mubarak Husain. He was the man in fact who drew up the deed. Debi Din deposed that after the death of Husain Bakhsh and during Mubarak's lifetime Saiyed Bakhshish Ahmad used to be maintained by his brother. He went on to say that after the death of Mubarak Husain Buniyad Husain made the grant of 200 *bighas kachcha* to Bakhshish Ahmad for his maintenance. He explained that at that time Buniyad Husain was a minor, about some 14 years of age, and that his mother acted for him in the matter as she was managing the property at the time. Debi Din swore that he was present at the time when this grant was made, some 34 or 35 years before the date on which he gave evidence. He further deposed that up till the time of the recent settlement the lands in suit were recorded in the name of Saiyed Bakhskish Ahmad as "*muafi bila lagan.*" He went on to say that when the last settlement was made, Bakhshish Ahmad made an application to the Settlement Officer to have the lands recorded as *guzara* as he disliked being described in the village papers as a mere *muafidar*. Debi Din adds that at the time this grant was made Bakhshish Ahmad was not married. From other evidence it appears that Bakhshish Ahmad was married about 1886. The second witness who was produced for the plaintiff was one Lala Singh, who had been in the employment of the plaintiff's father for some 35 or 36 years. He corroborates the story which is told by Debi Din and says that the grant of these lands was made after the death of Mubarak Husain by the plaintiff's mother who was acting on the plaintiff's behalf. He tells the story of how this grant came to be made, and he mentions one Chaudhri Karamat Ali who was called in to settle the dispute between Bakhshish Ahmad and the mother of the plaintiff. His story is that Karamat Ali persuaded the lady to make a grant of land to Bakhshish Ahmad, saying that Bakhshish Ahmad was not married and that the land would eventually come back to her. Another witness in this connection was Gulzar, a barber. His evidence is much to the same effect as that of the two witnesses whose statements have just been referred to. Then we have the story of one Tajammul Husain. He also professes to have been present at the time this grant was made. He attributes the leading part in the business to Chaudhri Karamat Ali. Pancham, plaintiff's witness No. 7 who was a *gorait* in the village of Jalalpur, swore that the lands in suit had formerly been in possession of Mubarak Hussian and that they afterwards came into the possession of Bakhshish Ahmad, some thirty or thirty-three years before the suit. He swears that Bakhshish Ahmad began to collect the rents, saying that the lands had been allotted to him for *guzara*. The plaintiff himself gave evidence and supported the case which had been put forward by the other witnesses. He describes how Bakhshish

Ahmad began to be dissatisfied with the arrangement which had existed in the lifetime of Mubarak Husian and how he demanded a separate allowance of his own. Another witness Gurdin, a tenant, swore that he had held certain lands from Mubarak Husain for which he afterwards paid the rent to Bakhshish Ahmad, the latter having told him that he had received the lands by way of maintenance. I have omitted to mention the evidence of one Ram Sewak who was called as the plaintiff's witness No. 5. This man was called for the purposes of producing a document to support the plaintiff's case. He was cross-examined by the defendant and in cross-examination he made a statement to the effect that Husain Bakhsh had declared to him that he had given 200 *bighas* to Bakhshish Ahmad before he had executed the deed in favour of Mubarak Husain. The lower Court has laid great stress on this statement made by Ram Sewak. It is contended here, as it was alleged in the Court below, that Ram Sewak had been got hold of by the defendant to make this false statement. He had been summoned by the plaintiff merely to produce a document and the defendant had taken the opportunity of his being in the witness-box to extract from him this piece of evidence which, it is said, he had been bribed to give. In support of the story put forward for the defence, we have the evidence of one Raza Husain who gives his age as 72 years. This witness says that about 44 or 45 years before the date on which he gave his evidence he had been called to attend a *majlis* at the house of Husain Bakhsh. The witness swears that after the assembly had broken up, he was detained there by Mubarak Husain who brought him and several others into the presence of Husain Bakhsh. He says Mubarak Husain suggested to his father that the estate should be made over either to him (Mubarak Husain) or to his brother Bakhshish Ahmad so as to prevent any dispute thereafter, the apprehension being that after the death of Husain Bakhsh the eldest son, Haji Husain, would again set up some claim to the family property. The witness says that when this proposal was made to Husain Bakhsh he sent for Bakhshish Ahmad and asked him if he was agreeable. Bakhshish Ahmad said he had no objection to such an arrangement, whereupon Saiyed Husain Bakhsh is said to have expressed his pleasure at the noble conduct of Saiyed Bakhshish Ahmad in surrendering his claim to a share in the estate. He thereupon, it is said, made a present of 200 *bighas* of *sir* land to Saiyed Bakhshish Ahmad. According to the statement of this witness this grant to Saiyed Bakhshish Ahmad was made in the very year in which the plaintiff was born. According to the plaintiff's statement he was born in the years 1867 and having regard to the chronology of the case it would seem very doubtful whether any such grant could have been made by Husain Bakhsh in that year. I have already mentioned that Saiyed Husain Bakhsh did not get his decree against Haji Husain till the month of August 1867. In cross-examination this witness also stated that no particulars were given to him of the 200 *bighas* which were granted. All that was said was that 200 *bighas* were being given to Bakhshish Ahmad. The next witness in this connection is one Panjtan, age 70 years. His story is much of the same strain as was told by Raza Husain. Referring to the grant he was asked if any discussion took place at the time as to the amount of profits accruing from the lands which were being given to Saiyed Bakhshish Ahmad, the witness answered that nothing was said in this connection, nor was anything said as to who was to pay the Government revenue of these lands. This witness slipped up very badly in cross examination. He seems to have been anxious to assign a definite date to the transaction to which he was deposing, and he stated that the grant was made a year or so before the great famine of 1285 *Fasli*. That would be the famine of the year 1877 A. D. It is admitted on all hands that Saiyed Husain Bakhsh died in the year 1871: so if this statement as to the year in which the grant was made is to be taken as correct, it follows that the grant could not have been made by Saiyed Husain Bakhsh. Later on the Court asked the witness some questions, in answer to which he tried to escape from the result of this admission by saying that he had merely given an approximate date. The third witness Thakur Din, who had been the servant of Saiyed Bakhshish Ahmad, said that he used to call the tenants to pay the rents of their *sir* to Saiyed Bakhshish Ahmad and that those rents were paid before the death of Husain Bakhsh. Taking his cue from the

statement made by the previous witness, the Counsel for the plaintiff cross-examined this witness as to the date upon which he entered the service of Bakhshish Ahmad. The witness admitted that he did not take service with Saiyed Bakhshish Ahmad till after the year of the great famine 1285 *Fasli*. Clearly, therefore, not much reliance can be placed on the statement of Thakur Din when he says that he used to call tenants to pay their rents to Saiyed Bakhshish Ahmad before Saiyed Husain Bakhsh died. The fourth witness named Bhagor also gave some evidence about certain land which he said was in his possession. The witness in cross-examination deposed that this land was in possession of one Ori before it came to him and that Ori used to pay rent to the agent of Mubarak Husain. The last witness for the defendant was one Abrar Husain. According to him Saiyed Husain Bakhsh told him that he had made a present of 200 *bighas* of *sir* land to Bakhshish Ahmad. The witness says that this admission was made after the deed of gift had been executed in favour of Mubarak Husain. If there were nothing on the record but the statements of these various witnesses produced for the plaintiff and the defendant respectively, I should have had no hesitation in finding that the evidence given by the plaintiff's witnesses is far more reliable than that produced on behalf of the defendant. I dismiss the stories of Raza Husain and Panjtan, the two principal witnesses for the defence, as being entirely false and concocted for the purposes of this case. The story they have told is a ridiculous one and cannot command credence for one moment; and as I have explained, one of them at any rate broke down hopelessly in cross-examination. The learned Subordinate Judge has disposed of the evidence of the plaintiff's witnesses upon grounds which do not commend themselves to me. It is not much to the point to say that a witness like Debi Din is a biased witness because he is a an old servant of the family. In a case like this an old servant of the family would be the very person who would be called in and consulted in a business of this kind. The learned Subordinate Judge has also remarked of the plaintiff's own evidence that it was contradictory. He refers to various petty discrepancies to which he has attached what is, in my opinion, an undue degree of importance. All I can say regarding the statement of the plaintiff is that it stood the test of the cross-examination remarkably well. The witness does not appear to me to have been shaken in any way. Debi Din's story has been discredited principally upon what the Subordinate Judge describes as a glaring contradiction between his statement and that of the plaintiff himself. Debi Din in his evidence mentioned that Buniyad Husain seems to have taken some part in the settlement of the *guzara* and the Subordinate Judge has commented on this, treating it as a ridiculous statement that a boy of 14 or 15 years of age should have interfered in such a matter. However, it is unnecessary to enter minutely into questions of discrepancies or contradictions in the oral evidence adduced by the parties. We have before us, as I have said, two conflicting versions and the only way to arrive at the truth is to ascertain which of the two versions fits in best with the circumstances which are disclosed by the other evidence in the case.

The plaintiff has relied most strongly upon certain documentary evidence which, it is claimed, settles conclusively the question of the nature of the tenure of these lands possessed by Bakhshish Ahmad. It is proved that in the year 1893, while the recent settlement operations were going on in the Bara Banki district, Saiyed Bakhshish Ahmad made various applications to the Settlement Officer with regard to the entries which ought to be made concerning him in the village papers. Exhibit No. 11 is a copy of an application which was filed by Saiyed Bakhshish Ahmad before the Settlement Officer on the 3rd August 1893. From the contents of this petition it would appear that before it was presented the Settlement Officer had in the usual way given Saiyed Bakhshish Ahmad a *parcha*, that is to say, a document showing the lands held by him and the manner in which it was proposed to record them in the new Settlement Records. Saiyed Bakhshish Ahmad did not approve of the contents of the *parcha* which was issued to him and so he presented this petition Exhibit No. 11 in which he described himself as a *guzaradar*. In the body of the petition he states that he was in receipt of a cash *guzara* of Rs. 400 and that he held 200 *kachcha bighas* of *sir* land,

as *guzara*, for which he was not liable to pay any rent. In describing this area of land which he held in *guzara*, he stated that it had been allotted to him "*bilewaz hakkiyet hissadari*," that is to say, in lieu of his share in the landed property. He goes on to say that in the *parcha* which had been given to him he was described as a *muafidar*. He stated that he objected to be called a *muafidar*, and he asked that an entry should be made to show that he held the lands as *guzara* and that another entry should also be put in the registers to show that he was entitled to a sum of Rs. 400 a year as cash maintenance. This application seems to have been dealt with on the spot by the Settlement Officer. No notice of it appears to have been given to any one else, for on the same day the Settlement Officer recorded that a correction of the papers should be made in the manner suggested by Saiyed Bakhshish Ahmad. The result of this was, that in the registers of under-proprietary rights which were prepared at this revision of settlement, we find Saiyed Bakhshish Ahmad shown as an under-proprietor, and in the column which describes the nature of the interest held by him we find the words "*guzara hayati*." In other words, the register shows that the lands held by Saiyed Bakhshish Ahmad in the village of Qadirpur were held by him for a life-maintenance (Exhibit 13). Exhibit 35 is the *khetauni* which was prepared at the settlement for this same village, and here again we find Saiyed Bakhshish Ahmad described as holding lands granted by the *zamindar* by way of maintenance. Then again with regard to the village of Jalalpur, in which two of the plots in suit are situated, we find that Saiyed Bakhsish Ahmad made a similar application to the Settlement Officer (Exhibit 1). The Settlement Officer passed a similar order to the one passed in the Qadirpur case, and in Exhibit 3, which is an under-proprietary register, we find these lands entered as being the *guzara* of Saiyed Bakhshish Ahmad. Similarly in the case of the lands situated in Jeanpur. Exhibit 6 is an application of the same kind made by Saiyed Bakhshish Ahmad to the Settlement Officer, and here again we find in the register of under-proprietors the name of Saiyed Bakhsish Ahmad with the remark that he is holding lands by way of *guzara*. The *khetauni* of this village for 1299 *Fasli* has an entry showing that the lands held by Saiyed Bakhshish Ahmad were the grant from the *zamindar*, "*atia zamindar*." In the case of the village of Mantara we have no copy of any application made by Saiyed Bakhshish Ahmad to the Settlement Officer, but the under-proprietary register again shows that the lands held by Saiyed Bakhshish Ahmad in this village were described as *guzara* and in the *khetauni* (Exhibit 36) as a grant from the *zamindar*; and similarly with respect to the other village, Chaktara. We have it, therefore, that in the year 1893 Saiyed Bakhshish Ahmad, on his own application, got these lands recorded by the Settlement Officer in the particular way he wished to have them recorded, that is to say, he got himself described in the papers as the *guzaradar*. If, as the defence now tries to make out, all these lands had been given absolutely to Saiyed Bakhshish Ahmad by his father Saiyed Husain Bakhsh, how are we to explain these petitions addressed to the Settlement Officer, in which Bakhshish Ahmad asked that he might be recorded as a mere *guzaradar*? It is not possible to suppose that Saiyed Bakhshish Ahmad was in any way ignorant of the difference between the position of a person who holds lands merely for maintenance and of one who holds them under an absolute title. There can be no reason for doubting the truth of the statement made by the plaintiff's witness Debi Din that until the time came for revision of the settlement, Saiyed Bakhshish Ahmad had been described in the village papers all along as *muafidar*. This is evident from the fact that the *parcha* which was issued to Saiyed Bakhshish Ahmad by the Settlement Officer in 1893 described him in this particular way. It is impossible to conceive that if, as is now sought to be proved by the defence, Saiyed Bakhshish Ahmad got an absolute gift of these lands from his father, he should have allowed himself to be described for about 20 or 25 years in the village papers as a mere *muafidar*. The fact is that Saiyed Bakhshish Ahmad clearly accepted the position and the only claim that he made in the year 1893 was to have the word "*guzaradar*" substituted in the

papers for the word "*muafidar*," which had hitherto been entered into them. The learned Counsel for the respondent has tried to make as much as possible out of the statement contained in the petition Exhibit 11 to the effect that these lands had been given to Saiyed Bakhshish Ahmad in lieu of his rights as a *hissadar*. The actual words used in the petition are "*bilewaz hakhiyet hissadari mukarrar hai*." I am not prepared to accept the argument that these words necessarily import that an absolute gift of the lands had been made to Bakhshish Ahmad to compensate him for the loss of his share in the property of his father, which was being conveyed by a deed of gift to his elder brother Mubarak Husain. In the course of argument a good deal has been said regarding the entries which have been made in the revenue registers of these villages subsequently to the time of the settlement, that is to say, in the *patwari's* annual registers. These entries show considerable variations from year to year, but little importance can be attached to them when we have before us the evidence of what took place at the settlement. It is the entries in the settlement papers which are of primary importance and, as has already been pointed out, those papers assigned to Bakhshish Ahmad merely the position of a *guzaradar*. To put the case shortly, therefore, we find that the story put forward by the plaintiff in this case is fully supported by the documentary evidence to which reference has been made—evidence which demonstrates the position which Saiyed Bakhshish Ahmad claimed for himself in relation to the lands in suit. This documentary evidence is altogether irreconcilable with the case which the defendant's witnesses have attempted to prove. The result, therefore, is that it must be held that the story put forward in the evidence by the plaintiff's witnesses in this case is substantially a true one. My finding, therefore, is that the lands in suit are proved to have been held by Saiyed Bakhshish Ahmad by way of maintenance (*guzara*) and that it is not proved that the lands were gifted to him absolutely by his father Saiyed Husain Bakhsh. On this finding the decree of the Court below must be reversed. Where it is shown that the lands had been given by way of maintenance, the presumption is that the grant had been made for the life time of the grantee. This suit was brought within twelve years from the date of the death of Saiyed Bakhshish Ahmad and it is, therefore, within time. I accept this appeal, set aside the decree of the Subordinate Judge and direct that the plaintiff's claim be decreed. The plaintiff will get his costs both here and in the Courts below.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 428, 429, 461 AND 462 OF 1914.

April 5, 1916.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

SATROHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NAGESHAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17 (b), 49—Compromise, petition of, filed in mutation proceedings—Registration, whether obligatory—"Create, declare, assign, limit or extinguish," meaning of—Order of Revenue Court in mutation proceedings, whether confers title—Family arrangement—Interpretation of documents.

In order to constitute a binding family arrangement it is not necessary that there should be any formal contract between the parties. [p. 773, col. 2.]

Lalla Oudh Beharee Lall v. *Ranee Mewa Koonwer*, 3 Agra H. C. R. 82; *Khunni Lal* v. *Govind Krishna Narain*, 10 Ind. Cas 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M. W. N. 432; 38 I. A. 87; *Lakshmibai* v *Ganpat Moroba*, 5 B. H. C. R. 128; *Williams* v. *Williams*, 2 Ch. A. C. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657, referred to.

Such arrangements are given effect to, not on the ground that they amount to transfers of property, but because they constitute binding agreements between the parties from which the law will not permit them to resile. [p. 773, col. 2.]

No order of a Revenue Court in mutation proceedings can *per se* operate to confer title. [p. 774, col. 1.]

The expressions "create", "assign", "limit" or "extinguish" in section 17 *(b)* of the Registration Act, all imply a definite change of legal relation to property by an expression of will embodied in the document referred to, and the expression "declare" imports a similar meaning. It implies a declaration of will, not a mere statement of fact. [p. 774, col. 2.]

SATROHAN LAL *v.* NAGESHAR PRASAD.

Sakharam Krishnaji v. *Madan Krishnaji*, 5 B. 232, referred to.

Where a petition by way of compromise is filed before a Revenue Court in a mutation case between the members of a family, and mutation is made in accordance with it, such petition, in spite of its being unregistered, is subsequently admissible in evidence as proof of a family arrangement, if it does not create or confer upon the parties to it fresh and distinct titles but simply recognises or acknowledges their antecedent titles. For, in such a case it cannot be regarded as a dispositive document requiring registration, but merely as an admission, expressed in writing, of a title which was already in existence and which was not called into being for the first time by the execution of the petition. The petition has in each case to be interpreted in order to find out its nature and purport. [p. 773, cols. 1 & 2.]

Bharosa v. *Sikhdar*, 27 Ind. Cas. 97; 12 A. L. J. 898; *Audan Khan* v. *Ashraf Khan*, 3 O. & A. L. R. 319 and *Ram Sarup* v. *Bindeshuri*, 27 Ind. Cas. 938; 18 O. C 51; 2 O. L. J. 67, referred to.

Where a document amounts to a record of a formal agreement which is to regulate the respective interests of the parties in the property, not merely in present but in future, it falls under the provisions of section 17 (*b*) of the Registration Act and requires registration. [p. 777, col. 2.]

The question of the true interpretation of any particular document should not be approached with any ready-made assumption concerning the nature of the legal effect which it is intended to produce, but must be based upon the intention of the parties to the document, which depends upon a consideration of the evidence disclosing the circumstances attending the execution of the document. [p. 774, col. 1.]

Appeals from the decree of the District Judge, Gonda, dated the 18th July 1914, reversing the order of the Subordinate Judge, Gonda, dated the 2nd May 1914.

FACTS appear from the following Orders of Reference by Stuart, A. J. C.:—

S. A. Nos. 428, 429 OF 1914.

"The facts, in so far as they are essential for the decision of these appeals are as follows:—

"A mortgage was executed in favour of Balgovind Lal and his son Sheonarain Lal of a four-annas share in a certain village, and to the rights of the mortgagees under this deed were added the rights under a deed of further charge. Balgovind Lal had four sons, (1) Sheonarain Lal, (2) Hanwant Prasad, (3) Umed Rai and (4) Satrohan Lal. Sheonarain Lal is now represented by Nageshar Prasad, Rajeshri Prasad and Shiam Kishore, the defendants-respondents in these two appeals. Hanwant Prasad is represented by Shiam Kali, the wife of Mahadeo Prasad, son of Hanwant Prasad, who has not been heard of for many years. Umed Rai is represented by his sons Sukhdeo Bakhsh, Krishen Bahadur and Rab Chander Bahadur. Satrohan Lal is still alive and party to these proceedings. The suits have been brought by the representatives of the sons of Balgovind Lal other than Sheonarain Lal, and their case is that one-half of the mortgagees' rights under these mortgages has gone into the possession of Sheonarain Lal and that the remaining half should come into their possession as the representatives of the sons of Balgovind Lal. They denied any connection between Sheonarain Lal and his brothers, on the assertion that Sheonarain Lal had been adopted into another family. There has been considerable contention on this point in the Courts below—a contention which is somewhat difficult to understand, for if Sheonarain Lal had not been adopted into another family, the share of the plaintiffs would be greater instead of being less. The point of adoption appears to me irrelevant. Whether Sheonarain Lal was or was not adopted the plaintiffs to these suits should succeed, unless it can be shown that Sheonarain Lal (as alleged by the defendants) supplied the whole of the consideration for the mortgages, or unless it can be shown that the plaintiffs are estopped from bringing these suits. The defendants alleged that Sheonarain Lal supplied the whole of the consideration and the point appears to be decided against them, although there is no clear finding upon the subject. I am thus left with the remaining point—are the plaintiffs estopped from bringing these suits? On that point we have an agreement of 25th September 1903. Baldeo Prasad as representative of Hanwant Prasad, Sukhdeo Bakhsh as representative of Umed Rai, and Satrohan Lal in person had applied for mutation of names in respect of a half share of the mortgagees' rights and other property and their application was opposed by the sons of Sheonarain Lal. The parties arrived at an agreement by which the half share in question should remain recorded in the names of the sons of Sheonarain Lal. As the remaining half stood already recorded in their names they have thus remained in possession of the whole. Mutation was made accordingly. The learned Subordinate Judge refused to admit this document into evi

dence because it was not registered. The learned District Judge has admitted it into evidence and has decided the case practically upon it. I find that there appears to be a conflict of opinion on the point as to whether such a document when unregistered can or cannot be produced in evidence. In *Audan Khan* v. *Ashraf Khan* (1) I decided on 19th November 1913 that such a document could not be admitted into evidence if unregistered and that no titles could be based thereon. On 11th November 1914 the Judicial Commissioner decided in *Ram Sarup* v. *Bindeshuri* (2) that such a petition of compromise filed in a mutation case does not require to be registered. I am unable to reconcile these two decisions and consider that in consequence of the difference of opinion upon the point these appeals should be decided by a Bench.

"I accordingly refer Appeals Nos. 428 and 429 of 1914 to a Bench for decision."

S. A. Nos. 461, 462 of 1914.

"A sister sued her brothers in two cases for possession of certain property to which she would have been ordinarily entitled under the Muhammadan Law of inheritance. The brothers set up two pleas—*one*, that sisters in their family were debarred from succession by a family custom and *further*, that a compromise had taken place between themselves and their sister, under the terms of which she had agreed to forego her claim to all the property in suit with the exception of a small portion of which she had been put in possession. This compromise was unregistered. It was entered into in the course of mutation proceedings before a Revenue Court and given effect to when mutation was made. The Munsif dismissed the suits. The Additional Judge on appeal reversed the decision of the Munsif in the two cases and decreed the plaintiff's claim. The brothers now come before this Court in second appeal. Their learned Counsel withdraws the plea on the ground of custom and presses the plea only that his clients should be allowed to succeed on the compromise. The point for decision is whether this compromise can or cannot be received in evidence and acted upon. It is unregistered. There is a difference of opinion as to whether such an unregistered compromise can be received in evidence, and I have referred the decision of two other appeals Nos. 428 and 429 of 1914 to a Bench in order to have this point decided finally. I direct that these two appeals also, Nos. 461 and 462 of 1914, be referred to a Bench and heard with Nos. 428 and 429 of 1914 which have already been referred."

(1) 3 O. & A. L. R. 319.

(2) 27 Ind. Cas. 938; 18 O. C. 51; 2 O. L. J. 67.

Mr. *Muhammad Wasim* and Syed *Zahur Ahmad*, for the Appellants.

Babu *Aditya Prasad*, for the Respondents.

JUDGMENT.

LINDSAY, J. C.—These four appeals have been referred for disposal to a Bench, the principal question involved being whether certain documents were admissible in evidence or not for want of registration. The documents to be considered were drawn up in the course of mutation proceedings pending in a Revenue Court between persons who were related as members of the same family. They are in the form of petitions addressed to the Court and it is admitted that in each case the Court made an order for mutation in accordance with what was expressed in the petitions addressed to it.

The suits out of which these appeals have arisen were suits for the recovery of immoveable property, and in each case a plea was taken by way of defence to the effect that the plaintiffs were estopped from suing. In each case it was said that there had been what is called a "family settlement," a settlement which had been acted on by the parties, and that the plaintiffs could not now be allowed to disturb an arrangement to which they themselves had been parties.

The documents, the admissibility of which has now to be determined, were put forward in proof of the settlement or arrangement upon which the defendants in each case relied. The facts have been set out in the two referring orders and it appears that the learned Judge who made them was led to do so by an apparent conflict of authorities in this Court, one being a ruling of his own in *Audan Khan* v. *Ashraf Khan* (1) the other being a decision of mine which is reported as *Ram Sarup* v. *Bindeshuri* (2).

It is true that there have been many decisions of various High Courts regarding the question of the admissibility in evidence of documents such as we have before us here, that is to say, petitions by way of compromise presented to a Court in the course of disputes regarding immoveable property between members of a family. In some of the numerous cases cited before us at the time of argument, the documents were rejected on the ground that they fell within the prohibition contained in section 49 of the Registration Act; in other cases it was held that the documents did not require registration and could be received in evidence, although unregistered. Speaking for myself I am unable to perceive what profit can be derived from the consideration of a host of apparently conflicting rulings on a question of this kind, a question upon which it does not appear to me to be possible to lay down any rules or principles of universal application.

Each case must be decided upon its own facts and the question of admissibility must be determined with reference to the law as contained in sections 17 and 49 of the Registration Act. If the document is one the registration of which is rendered obligatory by section 17 then it cannot under section 49 be received as evidence of any transaction affecting the property to which it relates unless it has been duly registered.

But in order to ascertain whether or not the document in dispute is one of those which are amenable to the provisions of section 17 the document has to be interpreted, and it is, I think, correct to say that such differences of opinion regarding the question of admissibility as are to be found in the cases upon the subject are to be attributed not to any doubts regarding the law to be applied, but to the fact that the documents considered, being susceptible of various interpretations, have been construed one way or the other in accordance with the evidence available for the purpose of showing what the intention of the parties really was.

It is now settled law that transactions in the nature of family arrangements or settlements are to be enforced [*cf. Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (3) and the ruling of their Lordships of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (4)]. And it is also settled by a long course of authorities that in order to constitute a binding family arrangement it is not necessary that there should be any formal contract between the parties [*cf. Lakshmibai* v. *Ganpat Moroba* (5) and *Williams* v. *Williams* (6)].

Such transactions are given effect to not on the ground that they amount to, transfers of property, but because they constitute binding agreements between the parties from which the law will not permit either party to resile. To quote the language of the judgment in *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (3), which has been approved by their Lordships of the Privy Council:—"The true character of the transaction appears to us to have been a settlement between several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other that the parties themselves seem to have regarded the arrangement and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement." And so when the particular transaction under consideration is of the character described in the above passage, the tendency of the Courts in interpreting documents put forward in proof of such a transaction has been, not to regard them as dispositive documents which require registration but as admissions, expressed in writing, of a title which was already in existence and which was not called into being for the first time by the execution of the particular document which is under consideration.

It is quite true as observed by Chamier, J.,

(3) 3 Agra H. C. R. 82.

(4) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M. W. N. 432; 38 I. A. 87.

(5) 5 Bom. H. C. R. 128.

(6) 2 Ch. A. C. 294; 36 L. J. Ch. 419; 16 L. T. 42; 15 W. R. 657.

in a case which has been cited to us *Bharosa* v *Sikhdar* (7), that all compromises are not based upon the assumption that one of the parties has some antecedent title to the property allotted to him and I agree that even a compromise between members of the same family relating to a dispute over immoveable property may be thrown into a form which would preclude all notion of the admission of a pre-existent title.

The question of the true interpretation of any particular document is not or, at any rate, should not be approached with any ready-made assumption concerning the nature of the legal effect which it is intended to produce. It ought not to be assumed off-hand that the document relates to a transaction amounting to an admission of previously existing title, nor again ought it to be assumed that it was intended to take effect as a formal instrument the purpose of which is to create fresh titles. In all cases the real question for decision is, "what was the intention of the parties?" and that question must be decided upon the evidence which discloses the circumstances attending the execution of the document: and in dealing with evidence of this kind two facts have to be borne in mind. *One* is that a binding family arrangement may be come to without the execution of any formal contract at all. The *other* is that no order of a Revenue Court in mutation proceedings can *per se* operate to confer title.

Consequently when, as here, we have to construe a petition addressed to a Revenue Court in the course of mutation proceedings, we have to consider the situation of the parties at the time when the document was presented and to deduce from the surrounding circumstances what the parties intended by laying the petition before the Court.

Section 17 (*b*) of the Registration Act requires the registration of non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property, and we have now to consider whether the documents in dispute in this case fall within this category.

And here, I think, I may usefully refer to a judgment of West, J., reported as *Sakharam Krishnaji* v. *Madan Krishnaji* (8), in which the language of section 17 (*b*) has been judicially interpreted.

The learned Judge points out the meaning which is to be attached to the word "declare" in the context. He demonstrates that the expressions "create," "assign," "limit" or "extinguish," all imply a definite change of legal relation to property by an expression of will embodied in the document referred to, and that the expression "declare" must import a similar meaning. The term implies a declaration of will, not a mere statement of fact, and so the learned Judge held that a letter containing an admission, direct or inferential, that a partition once took place does not "declare" a right within the meaning of the section. The document which he had to consider was, he held, an acknowledgment that there had been, in times past, a partition between the brothers who signed it and the defendant, and he went on to point out that an acknowledgment of a partition was distinct from an instrument of partition, calling attention to the fact that the use of the expression "acknowledge" in section 17 (*c*) showed that a document containing an acknowledgment must be something different from the instruments referred to in section 17 (*b*), as otherwise section 17 (*c*) would be superfluous.

Coming now to the document in dispute in Appeals Nos 428 and 429, we have the following facts to consider. The property with which the two suits are concerned consists of the mortgagee rights in a two anna share in *Mauza* Mataria Karma, which were created in favour of one Balgovind under a registered deed of mortgage which was executed in the year 1882 together with the further mortgagee rights created in respect of the same property and in favour of the same mortgagee by a deed of further charge drawn upon the same day as the mortgage. At the time these deeds were executed Balgovind had four sons, Sheonarain Lal, Hanwant Prasad, Umed Rai and Satrohan Lal.

In the year 1894 an agreement was executed between Balgovind and his two sons Hanwant and Umed Rai. It was stated in

(7) 27 Ind. Cas. 97; 12 A. L. J. 998.

(8) 5 B. 232.

this document that Hanwant, Umed and Satrohan, three of the sons of Balgovind, were already in possession of three-fourths of Balgovind's property. It was declared that Balgovind was to remain in possession of the residue (=1/4th) for the period of his lifetime without power of alienation and that after his death his widow was to hold possession in like manner. When she died the one-fourth share was to be divided among the three sons just mentioned.

It is admitted that Balgovind's widow got possession after her husband's death: and she died on the 8th April 1903.

It is proved that after the death of the lady applications for mutation were made in the Revenue Court, one on behalf of Satrohan Lal and the sons of his two brothers Hanwant Prasad and Umed Rai and the other by Nageshar Prasad and Harihar Prasad, the sons of Balgovind's other son Sheonarain Lal.

On the 25th September 1903 two petitions were put in before the Revenue Officer in charge of the mutation proceedings. One of these was the original of Exhibit A-18 on the record and relates to the interest which Balgovind had as a mortgagee in *Mauza* Mataria Karma. The other referred to certain other property which Balgovind had owned in *Mauza* Bijaura.

The Revenue Court was informed by means of these petitions that the dispute regarding the inheritance to Balgovind's property had been amicably settled and that the parties had come to an arrangement by which the two sons of Sheonarain Lal had been recognised as the owners and possessors of the mortgagee interests in Mataria, while Satrohan Lal and the sons of his two other brothers Umed Rai and Hanwant Prasad had been recognised as the owners and possessors of the property in Bijaura. The Revenue Court was invited to take notice of this arrangement and to order mutation accordingly, and it is proved that mutation was thereafter made as desired and that the parties have ever since been in possession in accordance with this arrangement.

The present suits were brought in the year 1913, one by Satrohan Lal and *Musammat* Shiam Kali the widow of Mahadeo Prasad, son of Hanwant Prasad (Suit No. 64), and the other (Suit No. 72) by the three sons of Umed Rai. The defendants in each case were Nageshar Prasad son of Sheonarain Lal and Rajeshri Prasad and Shiam Kishore, the grandsons of Sheonarain through the latter's son Harihar Prasad. In each case the claim was for a portion of the mortgagee rights in Mataria and in each case the plea was raised that the suit was barred by reason of the arrangement come to in the mutation proceedings which were held in 1903. These defendants put forward the petition Exhibit A-18 dated the 25th of September 1903 as proof of a family arrangement. The first Court rejected this document on the ground that it was inadmissible for want of registration and finding the other issues in favour of the plaintiffs decreed their claims. In appeal the District Judge has held that the document did not require registration, that it was admissible in evidence and was sufficient proof of a family settlement by which the plaintiffs were bound. He has dismissed both suits accordingly and, in my opinion, his judgment is correct and should be maintained. I am of opinion that the petition of which Exhibit A-18 is a certified copy was not a document which required registration under section 17 (*b*) of the Registration Act. It appears to me to be nothing more than an acknowledgment of a title already in existence and that it does not on the face of it purport or operate to create, declare, assign, limit or extinguish a right, title or interest in immoveable property, using the word "declare" in the sense referred to in the judgment of West, J., cited above. The parties were all members of the same family, sons and grandsons of Balgovind Lal. They were claimants of the latter's property and they desired recognition of their claims by the revenue authorities, to whom they applied for entry of their names in the revenue records. The Revenue Court, which had no authority to conclusively determine any question of title in issue between the parties, was eventually requested to cause entries to be made in the land records so as to give effect for revenue purposes to the settlement which the parties had made for

themselves, and this being the view I entertain of the facts I am unable to hold that it was the intention of the parties that the petition so presented to the *tahsildar* should be treated as the expression of a formal contract between them. In short, it appears to me that the document was merely intended to give the Revenue Court notice that there was no longer any dispute between the parties which stood in the way of a mutation order being made. I agree, therefore, that the document was admissible in evidence and that it proved a family arrangement constituting a bar to the entertainment of these suits.

I may notice here that another question relating to the adoption of Sheonarain Lal was raised in these appeals. The finding of the lower Appellate Court, which is a finding of fact, has been attacked on various grounds here. It appears to me that the appellants have not put forward any ground which in law would justify our interference with the finding, but the matter need not be discussed in view of my opinion that the suits could not be maintained.

I would dismiss both these appeals Nos. 428 and 429 with costs.

I turn now to the other two appeals Nos. 461 and 462 of 1914.

These appeals have sprung out of two suits brought by the plaintiff-respondent, *Musammat* Janab Begam, for recovery of shares of certain properties.

The facts are as follows:—

One *Musammat* Mamni or Mammin Begam was the owner of a 3-anna 2-pie 8-*krant* share in two villages named Dular Mau and Bhulsi. It has been stated in the pleadings and also in the judgment of the lower Appellate Court that this lady died towards the end of the year 1903, but according to what is to be found in the certified copies on record of the mutation proceedings which took place after her death she died on the 26th December 1908. I think this latter date must be the correct one, otherwise it is difficult to understand why there should have been such delay in applying for mutation; there seems to be no doubt that the applications for mutation were first made in the beginning of the year 1909.

Musammat Mamni left a husband Haidar Khan, and four sons Neaz Ahmad, Sultan Ahmad, Ismail Khan and Fazl Hayat. She also left three daughters, one being the present plaintiff Janab Begam, another Khudaija Begam and a third Nisar Begam.

The sons applied in January 1909 for mutation claiming that their mother's property should be recorded in the revenue registers in their names in equal shares. The application was opposed by the father and two of the daughters in a petition dated the 12th February 1909. One of the daughters, Nisar Begam, took no part in the proceedings. In this latter petition it was stated that Haidar Khan and the two daughters Janab Begam and Khudaija Begam were also heirs of *Musammat* Mamni and were entitled to have mutation made in their favour to the extent of their shares under the Muhammadan Law.

Subsequently two petitions were put in, one of which was the original of Exhibit 4 on the record. This was dated the 27th February 1909 and was signed by Haidar Khan and his four sons.

Haidar Khan represented to the Revenue Court that he had come to terms with his four sons. He stated that a one-fourth share of Mamni's estate had been given to him by the sons, which he was to hold for his life without power of alienation and that he had agreed to accept this arrangement. He further stated that after his death the one-fourth share was to be equally divided between the four sons and that no one else was to have any rights in it. He asked that mutation should be made accordingly, and it is proved that an order for mutation was subsequently made in this sense.

On the 4th March 1909 another petition was put in by the two daughters Janab and Khudaija. This was signed by the four brothers also. The daughters represented that they too had arrived at a settlement with their brothers, that they had been given land measuring 6 *bighas* 10 *biswas* and 18 *biswansis* consisting of certain specified plots and had been placed in possession of the same. They added that the land had been given to them rent (revenue?) free and that their brothers had undertaken the liability to pay the revenue chargeable

in respect of these plots. It was added that if at any time the lands specified should go out of the possession of the two ladies by reason of the partition of the village, the brothers undertook to give the two sisters land of equal area out of their own shares. Exhibit 3 is the certified copy of this petition.

The two suits now brought by Janab Begam relate one to the share of her mother's property and the other to the share of her father's property, Haidar Khan having died in the year 1912. The four sons contested the suits, claiming (1) that the suits were barred by a custom of the family excluding daughters from inheritance and (2) that the suits were also barred by reason of the family arrangement arrived at in the course of the mutation proceedings.

The first Court held that the custom set up by the defendants was proved. The learned Additional Judge in appeal has found that it was not, and there is no longer any discussion regarding this matter.

As to the other defence the first Court held that there was a family arrangement, the evidence of which was to be found in Exhibit 3. The Munsif was of opinion that this document was admissible in evidence although unregistered, because, as he said, orders of Court do not require registration. In appeal the Judge dissented from this view and relying upon the judgment of my learned colleague in *Audan Khan* v. *Ashraf Khan* (1) expressed the opinion that the document required registration and could not be received in evidence, as it was not registered.

Was this a correct decision? In my opinion it was. Here again we have to look to the surrounding circumstances and also to the language of the document relied upon and in this connection we must also consider the language of the petition which was put in by the father Haidar Khan and his four sons (Exhibit 4).

If we examine the language of these two documents carefully, it seems to me that they cannot be interpreted as mere admissions or acknowledgments of existing title. They go much further than this. Thus in the petition put in by the father we find not merely a declaration that he has received a one-fourth share of the property with a life-interest only, but also a further declaration of an agreement between himself and his sons that after his death this one-fourth share is to devolve upon his sons in equal shares. And again in the petition of compromise put in by the two daughters we have the statement of an undertaking on the part of the four bothers that they would be liable in the future to make good to these ladies any loss of these lands resulting out of a partition of the *mauza*.

It is impossible, in my opinion, to resist the conclusion that in this case it was the intention of the contracting parties that these documents should be treated as the record of a formal agreement which was to regulate their respective interest in the property not merely *in present* but *in future* and in this view there can, I think, be no doubt that the documents did require registration under the provisions of section 17 (*b*) of the Registration Act. And so, although it may be said that the documents are evidence of a family settlement between members of the same family who were asserting claims to the same property, it must be held that the parties intended to and did come to a formal settlement drawn up in a manner which attracted the operation of the above section of the Registration Act. In no sense can it be said that either Exhibit 3 or Exhibit 4 amounts merely to an admission or acknowledgment of a pre-existent title.

The judgment of the lower Appellate Court in these two appeals is, in my opinion, correct and the appeals Nos. 461 and 462 should, I think, be dismissed with costs.

STUART, A. J. C.—I referred the decision of these appeals for decision to a Bench, and was led to do so partly by the wording of the head-note in *Ram Sarup* v. *Bindeshuri* (2), which on closer examination I find to be not altogether accurate as it does not state the decision of the learned Judicial Commissioner. The head-note is as follows:—

"Where a petition of compromise filed in a mutation case was relied upon as a family arrangement, *held*, that it did not require to be registered under section 17 of the Registration Act as it did not create or confer any fresh title but was only in the nature of an agreement by which an antecedent title in the parties was acknowledged and defined."*

*This head-note of the case is given in 18 O. C. 51—*Ed.*

I consider that the head-note should have run—

"Where a petition of compromise filed in a mutation case was found by the Court to contain a recital of the terms agreed upon under a family arrangement, *held*, that it did not require to be registered under section 17 of the Registration Act as it did not create or confer any fresh title but was only in the nature of a recital of the terms of the agreement by which an antecedent title of the parties was acknowledged and defined."*

Subject to the above remarks, I concur with the judgment of the learned Judicial Commissioner of to-day's date. I do not consider that there is anything in his judgment which conflicts with the view that I took in the case reported as *Audan Khan* v. *Ashraf Khan* (1). In that case the petition of compromise did not contain a recital of the terms of a family arrangement, but it created a fresh title. It did not recite the terms of an agreement by which an antecedent title of the parties was acknowledged and defined, but it purported in itself to be an instrument creating title and, therefore, required registration. The distinction is well brought out in the decision of West, J., in *Sakharam Krishnaji* v. *Madan Krishnaji* (8), where the learned Judge pointed out that in a case in which the paper contained an acknowledgment that there had been a partition but was not in itself the instrument of partition it could be received in evidence, although it had not been registered. I agree, accordingly, with the order proposed by the learned Judicial Commissioner that Appeals Nos. 428, 429, 461, and 462 of 1914 should stand dismissed with costs.

BY THE COURT.—In compliance with the judgment of to-day's date Second Civil Appeals Nos. 428, 429, 461 and 462 of 1914 stand dismissed with costs.

Appeals dismissed.

*This conforms with the head-note of the same case reported in 27 Ind. Cas. 938.—*Ed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2793 AND 3609 TO 3613 OF 1914.

March 8, 1916.

Present:—Mr. Justice Newbould.

JOGENDRA NATH DATTA CHOWDHURY—PLAINTIFF—APPELLANT (IN ALL)

versus

IN NOS. 2793 AND 3612

HARIDAS CHONG AND OTHERS—DEFENDANTS—RESPONDENTS

IN NOS. 3609 AND 3610

NAYAN RAM CHONG AND OTHERS—DEFENDANTS—RESPONDENTS

IN NOS. 3611 AND 3613

NIMAI CHONG AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s 77, suit under, scope of—Validity of document, whether in issue.

The scope of a suit under section 77 of the Registration Act is limited to two points only: *(a)* whether the document has been executed and *(b)* whether the requirements of the law for the time being for registration of documents have been complied with. [p. 779, col 1.]

In such a suit the plaintiff would be entitled to a decree if the document was in fact executed by the defendant, even if it was not freely executed, and even if it was not a *bona fide* document, and the Court is not concerned with the questions whether the document is valid and whether it has been freely executed. [p. 779, col. 2.]

Broucke, W. W. v. *Rajah Saheb Mohan Bikram Shah*, 5 Ind. Cas. 20; 14 C. W. N. 12, followed.

Appeals against the decrees of the Subordinate Judge, 1st Court, Shylet, dated the 11th June 1914, reversing those of the Munsif, 3rd Court, Habiganj, dated the 25th September 1913.

FACTS of the case appear from the judgment.

Dr. *Sarat Chandra Bysack* (with him Babu *Hemendra Kumar Dass*), for the Appellant.—These appeals arise out of suits brought under section 77 of the Registration Act for obtaining registration of certain *kabulyats* executed by the defendants in respect of certain *chokran* and *jamai* lands, registration of which was refused by the Registrar. The first Court held that the contesting defendants executed the documents and so decreed the suits ordering the documents to be registered. The lower Appellate Court reversed the decision of the first Court, and in so doing entered into questions which are not within the scope of cases under section 77, *viz.*, whether there was undue influence,

fraud, threat and whether there were *chakran* lands and so forth. The lower Appellate Court misunderstood the scope of the suits—it could not, in such suits, try questions as to the validity of the documents. [See *Raja Lackhi Ghosh* v. *Debendra Chundra Mojumdar* (1), *Balambal Ammal* v. *Arunachala Chetti* (2), *Broucke, W. W.* v. *Rajah Shaheb Mohan Bikram Shah* (3).] In a suit of this nature the only questions that can be considered are: (1) whether the document was executed, and whether it was presented within time as provided in the Registration Act. Questions of undue influence, fraud, coercion, or questions as to whether the lands were *chakran* lands or not have no bearing on suits of this nature. The lower Appellate Court has erred in law in reversing the decision of the first Court on a consideration of questions like the above.

[NEWBOULD, J.—What if the documents were not freely executed?

I submit that under section 77 the Court has no jurisdiction to enter into such questions.

No one for the Respondents.

JUDGMENT.—These appeals arise out of suits brought under section 77 of the Indian Registration Act for the registration of certain *kabulyats*. The plaintiff was granted a decree by the Munsif, who found that the documents in question had been executed by the principal defendants. In hearing the appeals the learned Subordinate Judge appears to have misunderstood the scope of suits under section 77. As was pointed out in the case of *Broucke, W. W.* v. *Rajah Shaheb Mohan Bikram Shaha* (3), "The authorities are clear upon the question as to what may be put in issue in suit under this section. The enquiry before the Registrar under section 74 and the subsequent enquiry in Court are to be directed to two points only: (*a*) whether the document has been executed and (*b*) whether certain requirements of the law for the time being have been complied with by the applicant or person presenting the document for registration". The Court is not concerned with the validity of the document. The judgment of the lower Appellate Court deals with the questions whether the documents were valid and whether they had been freely executed. The learned Subordinate Judge has written in his judgment: "I am unable to hold that the *kabulyats* were freely executed by the tenants as *bona fide* documents" and at the conclusion of his judgment, he has written that "as there is no clear proof as to the execution of the *kabulyats* in question the plaintiff's suit for registration thereof must fail." If there was a finding that the *kabulyats* had not been executed this would have been conclusive in second appeal. But reading the judgment as a whole it seems to me clear that the learned Subordinate Judge did not apply his mind to the question, whether the documents had been executed or not. If the documents were executed by the defendants, the plaintiff would be entitled to a decree even if they were not freely executed and even if they were not *bona fide* documents. The appeal must, therefore, be remanded for re-hearing by the lower Appellate Court in accordance with the directions expressed in this judgment. Costs will abide the result.

Appeals allowed; Cases remanded.

(1) 24 C. 668; 1 C. W. N. 444.
(2) 18 M. 255.
(3) 5 Ind. Cas. 20; 14 C. W. N. 12.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 446 OF 1915.

July 3, 1916.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

Babu SARJOO PRASAD MISSIR AND OTHERS—DECREE-HOLDERS—PETITIONERS—APPELLANTS

versus

NANOO RAI AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY—RESPONDENTS.

Bengal Tenancy Act (VIII B, C. of 1885), s. 174—

SARJOO PRASAD *v.* NANOO RAI

Application to set aside sale—Jurisdiction—Officers of Court, whether bound to give information to parties—Wrong information supplied, effect of—Act of officer of Court, when act of Court—Deposit of decretal amount etc., period within which to be made—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

A Court has no jurisdiction to entertain an application to set aside a sale under section 174 of the Bengal Tenancy Act until it is satisfied that the statutory conditions provided by the section have been fulfilled. [p. 780, col. 2.]

Ugrah Lall v. *Radha Pershad Singh*, 18 C. 255; *Abdool Latif Moonshi* v. *Jadub Chundra Mitter*, 25 C. 216, not followed.

The High Court has jurisdiction to set aside an order made under section 174 without jurisdiction. [p. 782, col. 1.]

No duty is cast upon the officers of a Court to give any information to the parties for the purposes of section 174. [p. 781, col. 2.]

No relief can be given to a party who has been misled by wrong information supplied by an officer of a Court. Relief can only be granted in cases where a party has been misled by an "act of the Court", that is, an act of a prescribed officer acting in accordance with the prescribed rules of the Court. [p. 781, col. 2.]

Chundi Charan Mandal v. *Banke Behary Lal Mandal*, 26 C. 449 (F. B.); 3 C. W. N. 283, relied upon.

A deposit of the decretal amount together with the statutory 5 per cent. on the purchase-money, under section 174, in order to be valid and to give the Court jurisdiction must be made within 30 days of the sale, and not later. [p. 782, col. 1.]

Miscellaneous appeal from an order of the District Judge, Darbhanga, dated the 10th August 1915.

Messrs. *Harnarain Pershad, Mohammad Mustafa Khan* and *Baidya Nath Sinha*, for the Appellants.

Mr. *Chandra Sekhar Prasad Singh*, for the Respondents.

JUDGMENT.

ATKINSON, J.—This application comes before us on an application by the decree-holder and auction-purchasers to set aside the order of the District Judge of the 10th August 1915 and the order of the Munsif dated the 8th of March 1915, on the ground that there was no jurisdiction to entertain the application of review, inasmuch as the order setting aside the sale in this matter, dated the 21st March 1914, was illegal and invalid. The facts are shortly as follows:—

The plaintiff obtained a decree against the defendant on the 2nd of September 1912 for Rs. 18-4-9. In pursuance of that decree and in execution of it, the property was put up for sale on the 17th of February 1914; and the defendant had, under section 174 of the Bengal Tenancy Act, 30 days from the 17th of February 1914 to lodge in Court the amount recovered under the decree with costs, *plus* 5 per cent. upon the purchase-money, to save the property from being sold.

The property was sold for Rs. 115. On the 10th of March 1914, the defendant applied to an officer of the Munsif's Court, by a petition dated the 10th March 1914 asking to be informed what was the decretal amount, the whole decretal sum, which it was necessary he should deposit under the section. The Munsif's officer told him that the amount of the decree was so much, that poundage-fees were so much and that interest amounted to so much, making a gross sum of Rs. 21-7-9. Thereupon the defendant lodged or deposited in Court the amount so stated to him by the officer of the Munsif's Court, but ignoring altogether in the deposit which he made the 5 per cent. upon the purchase-money which would have increased the amount that was deposited by Rs. 5-12-0.

Thus on the 10th March, when the amount of the decree and costs was ascertained by the defendant, he lodged or deposited in Court on the 21st March 1914 the amount so ascertained as aforesaid less the shortage of Rs. 5-12-0. On the same day, the 21st March, notwithstanding the shortage in the deposit, the defendant applied to the Munsif to set aside the sale that had been made under the provisions of section 174 of the Bengal Tenancy Act. The Munsif on the 21st March 1914, although the full amount of money that should have been deposited was not lodged, made an order setting aside the sale against the purchaser. That order, so made, was absolutely without jurisdiction. The Munsif was lacking in the due discharge of his duty in entertaining any application to set aside the sale, until he had satisfied himself that the statutory conditions provided by section 174 had been fulfilled; and clearly they were not fulfilled. An order was made by the Munsif on the application of the purchaser on the 8th March 1915, declining to review the order which the Munsif had made upon the 21st March 1914; and even on this date the defendant had not lodged the shortage due on foot of the full amount of his due deposit. With this fact before him, the Munsif declined to review his order setting aside the sale;

although, even at that moment of time, he had not acquired jurisdiction. As far as I can ascertain looking at the record, the shortage of Rs. 5-12-0 was not lodged until after the order of review had been refused by the Munsif, *viz.*, the 11th March 1915.

From that order of refusal to review the purchaser appealed. The learned District Judge on the 10th of August 1915 refused by his order to entertain the appeal on the ground that he had no jurisdiction in the matter, as no right of appeal lay from an order refusing to review.

This case, in its facts, is unlike any other case recorded in the Reports. But speaking for myself, I am of opinion that the cases reported as *Ugrah Lall* v. *Radha Pershad Singh* (1) and *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (2) are no longer to be regarded as authorities on the question of lodgments or deposits to be made under section 174 of the Bengal Tenancy Act. I think the decisions in both these cases are materially inconsistent with the Full Bench decision reported as *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3). No doubt, the decision in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3) was a decision on section 310A of the old Code corresponding with Order XXI, rule 89, of the existing Code, as to the right of a defendant, a judgment-debtor, to make lodgments in Court with a view to setting aside a sale effected in execution of a decree. But when we compare the two sections, section 174 of the Bengal Tenancy Act and Order XXI, rule 89 of the new Code, it requires a very subtle mind to distinguish any essential difference between the obligation imposed by both these sections. To my mind it is merely trifling with words to suggest, as has been suggested, that there is any material difference between the two sections.

Therefore, in construing and applying the law to section 174 of the Bengal Tenancy Act we shall be guided by the principles laid down in the Full Bench case reported as *Chundi Charan Mandal* v. *Banke Behari Lal Mandal* (3).

It is said in this case that forsooth the defendant was misled by some mistake on the part of an officer of the Munsif's Court. I fail to follow that line of reasoning. There was no duty cast upon the officer of the Munsif's Court to give any information to the defendant, for any purpose which he might require under section 174. The law throws the obligation upon the defendant himself, to ascertain for himself, by whatever means he likes, the amount he has to pay into Court. But it casts no responsibility, no duty whatsoever, upon the officer of the Court to furnish information or give information. If an officer of the Court does yield to any application that may be made to him by a judgment-debtor; then he gives that information, not by virtue of his acting as an officer of the Court, but solely by virtue of his friendship, if you like, or regard, or as agent of the individual to whom he gives the information. It seems to me that the observations of Chief Justice Jenkins (or Mr. Justice Jenkins as he then was) at page 459* of *Chundi Charan Mandal* v. *Banke Behari Lal Mandal* (3) aptly fit the facts and circumstances of this case. The learned Judge there says:—"In my opinion, it is essential to the respondents' success, that it should be established that he has been prejudiced by the act of the Court, and that the mistake that has been made is attributable to that act. What constitutes an act of the Court must depend on the circumstances of each case. It is clear, I think, that a mere casual act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character, it appears to me, generally speaking, that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court." In my opinion, to hold otherwise would be a dangerous innovation, and a most dangerous practice to establish, offering the gravest insecurity to decree-holders and auction-purchasers.

Therefore, in my opinion, this defendant was in no way misled by the Munsif's officer. He got from the Munsif's Court the only information he asked for; and having got it, he failed to discharge the balance of his statutory duty, by depositing in addition 5 per cent. calculated upon the

(1) 18 C. 255.
(2) 25 C. 216.
(3) 26 C. 449; 3 C. W. N. 283.

*Page of 26 C.—*Ed.*

amount of the purchase-money. That was his own default and the default of no one else, and for that default he must be responsible.

I am satisfied, beyond all shadow of a doubt, that we have jurisdiction in this case to review the decision of the Munsif. His order setting aside the sale was absolutely without jurisdiction. We are asked to set aside the order of the 8th March 1915 refusing to review. We have little doubt that we should do so; and we do so for the obvious reason that the order of the 21st March 1914, on which it was based, was made without jurisdiction.

Mr. Singh very ably argued this case for the respondents, pressing us strongly, so far as human nature is concerned, to view the facts in the too generous light put forward by him on behalf of the defendant. But there was one argument of his I want to answer, and that is that it does not matter when the money is lodged under section 174, if, in point of fact, it is all lodged at the time the application comes before the Munsif, even though that time may be 40 or 50 days after the sale. In my opinion that view is wrong. The money, to be a valid deposit and to give the Court jurisdiction, must be lodged within 30 days from the sale and not later. I can conceive, in some cases, where possibly a mistake might have been or may be made, where an individual judgment-debtor may be misled by an officer of the Court as such. In such a case, the Court always has power in the exercise of its jurisdiction to redress a wrong. But this case is not one of such a character.

Therefore, without hesitation and without a shadow of doubt, hoping this practice will end, which is alleged to exist and which is a bad practice, we allow this appeal and set aside the order dated the 8th March 1915 of the Munsif, and also the order of the 21st March 1914 setting aside the sale.

Having regard to the delay and the way in which this case has been presented both on documents and otherwise, we will give no costs.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3326 OF 1915.

June 29, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

KASIM ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG, AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Municipal Act (III B. C. of 1884), s. 155—"Within a distance of two miles above or below the ferry", meaning of—Bengal Ferries Act (I B. C. of 1885)—'Ferry' 'right of ferry', 'ferry boat,' meaning of—Municipal right of ferry, invasion of—Statutes, construction of words in sections of.

The words "within a distance of two miles above or below the ferry" in section 155 of the Bengal Municipal Act mean "within a distance of two miles above or below the ferry along the banks of the river or stream," and not 'within a radius of two miles of the Municipal ferry.' [p. 783, col. 2; p. 786, col. 2.]

Section 155 of the Bengal Municipal Act cannot be construed in the light of the provisions of the Bengal Ferries Act, I of 1885, inasmuch as section 4 of the Act lays down that the provisions of the Public Ferries Act shall not apply to a Municipal ferry under the provisions of the Bengal Municipal Act. [p. 784, col. 1; p. 787, col. 1.]

Government of Bengal v. *Senayat Ali*, 27 C. 317; 4 C. W. N. 348, explained.

The words used in defining the limits of a public ferry under Act I of 1866 and the limits of a Municipal ferry under Act III of 1884 are not used in the same sense as those in section 16 of Act I of 1885. [p. 784, col. 2; p. 786, col. 2.]

Per *N. R. Chatterjea, J.*—When the words used in a section of an Act are plain, and construed in their ordinary sense mean one thing, the Court cannot construe the section in a different way merely because the construction of the words in their ordinary sense may, in some cases, lead to results which might seem anomalous. [p. 785, col. 1.]

Abley v. *Dale*, 11 C. B. 378 at p. 391; 20 L. J. C. P. 233; 87 R. R. 697; 2 L. M. & P. 433; 15 Jur. 1012; 138 E. R. 519, referred to.

The banks referred to in the last clause of section 155 of Act III of 1884 are banks of the same river, and the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality. [p. 785, col. 2.]

Per *Richardson, J.*—The word ferry in the expression "Municipal ferry" must denote a place where passengers are conveyed by boat from one side of the river to the other; and the "right of ferry" is the right so to carry passengers at such a place. [p. 787, col. 1.]

A "ferry boat" must mean any boat used for the purpose of carrying passengers across the river, whether at that place or at some other place. [p. 787, col. 1.]

KASIM ALI *v.* CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG.

It is not an invasion of a Municipal right of ferry created by the Bengal Municipal Act for an unlicensed ferry boat to pick up passengers at some place outside the prescribed area of two miles above or below the ferry and without touching at the nearer bank to take them across the river to a point on the further bank within that area or to do the converse. [p. 787, col. 2.]

Appeal against the decree of the Additional District Judge, Chittagong, dated the 6th May 1915, reversing that of the Munsif, 2nd Court, at that place, dated the 7th July 1913.

Mr. *Jack* (with him Babu *Kshitish Chandra Sen*), for the Appellants.

Sir *S. P. Sinha* (with him Babu *Probodh Kumar Das*), for the Respondents.

JUDGMENT.

N. R. CHATTERJEA, J.—The appeal arises out of a suit for an injunction under the following circumstances.

There is a Municipal ferry, known as the Autimohamed Pathuriaghat ferry, on the Kurufali river in the town of Chittagong. The ferry was let out by the Chittagong Municipality (the defendant No. 1) to certain farmers who are the other defendants in the suit. The plaintiffs, who are boatmen, allege that they and other boatmen and *sampanwallas* have been from a long time ferrying passengers in their boats between the Autimohamed and Chaklai *Ghats* on the river Kurufali and the Kalapal and Jimat Ali's Pole *Ghats* on the Sikalbaha Canal, which is connected with, and at right angles to, the Kurufali river, and as the said *ghats* on the Sikalbaha Canal are not within a distance of 2 miles along the banks of the river Kurufali above or below the Municipal ferry, they are entitled to ferry boats. They further allege that after a criminal case in connection with the ferry had been decided by the High Court, the District Magistrate of Chittagong issued an order upon the Autimahomed *Ghat* ferry-holder prohibiting the levy of tolls on boats coming through Sikalbaha or Boalkhali, but that, notwithstanding such order, the Municipality and the *ijaradars* have been constantly harassing the boatmen and *sampanwallas*, including the plaintiffs by bringing criminal cases against them. The plaintiffs, therefore, brought the present suit for an injunction restraining the defendants from opposing or obstructing the plaintiffs, and other boatmen and *sampanwallas* in carrying passengers to and from the town of Chittagong through the Sikalbaha Canal or levying tolls from them.

The defence shortly stated was that Kalapole and Jimat Ali's Pole on the Sikalbaha Canal are within two miles of the Municipal ferry station, that the Sikalbaha Canal is a part of the river Kurufali, and that the Municipal Commissioners have every right to prosecute people who infringe the ferry laws by carrying passengers within the ferry limits either within the Sikalbaha Canal or alongside the banks of the river Kurufali.

The Court of first instance decreed the suit, but that decree was reversed on appeal by the Court of Appeal below, and the plaintiffs have appealed to this Court.

The decision of the question involved in the case turns upon the construction of section 155 of the Bengal Municipal Act (Act III of 1884). That section runs as follows: "No person shall keep a ferry boat for the purpose of plying for hire within a distance of two miles above or below any Municipal ferry without the previous sanction of the Commissioners, if he plies within the limits of the Municipality, of the Magistrate of the District, if without such limits, or of the Magistrate of the District and the Commissioners, if one of the two banks between which he plies is within, and the other bank is without, such limits.

"This section shall not apply to any private ferry which may be in existence at the commencement of this Act."

It is contended on behalf of the appellants that the words "within a distance of two miles above or below the ferry" mean within a distance of two miles above or below the ferry along the banks of the river. On the other hand, it is contended on behalf of the respondents that the words mean within a radius of two miles of the Municipal ferry, and this is the construction which has been placed on the section by the learned District Judge.

I am of opinion that the words "above or below the ferry" mean above or below the ferry along the banks of the river. That

the words "above or below" have reference to the banks of the river or stream, appears from the 4th paragraph of the section which refers to sanction of the Magistrate and the Commissioners if one of the two banks between which a private ferryman plies is within and the other bank is without such limits. If it was intended to fix the limits of a Municipal ferry to any point within a distance of two miles in any direction of the ferry station, I do not see the use of the words 'above or below the ferry.' The Legislature could have clearly expressed such intention by saying from "any point within a distance of two miles," as it has done in the Bengal Ferries Act, I of 1885, section 16 of which runs as follows: "No person shall, except with the sanction of the Magistrate of the District, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry."

The learned District Judge holds: "Thus the jurisdiction of a public ferry extends to a radius of two miles from the ferry station. Municipal ferries are simply public ferries administered by the Municipality and surely when they are made over to the Municipality, their jurisdiction does not thereby become more restricted. I think, therefore, that the provisions of the Municipal Act referring to them should be read in the light of the corresponding provisions of the Public Ferries Act."

Section 155 of the Bengal Municipal Act, however, cannot be construed in the light of the provisions of the Bengal Ferries Act (Act I of 1885). Section 4 of Act I of 1885 (which is a later Act) lays down that nothing in that Act contained shall apply to any ferry deemed or declared to be a Municipal ferry under the provisions of the Bengal Municipal Act, 1884.

The provisions of section 4 of the Act appear to have been lost sight of by the learned District Judge.

Section 2 of Act I of 1866, which related to public ferries and was repealed by Act I of 1885, contained the words "within a distance of two miles above or below the ferry."

The ferry on the Kurufali river was a public ferry, and was made over by the Government to the Municipality in the year 1863. Section 148 of Act III of 1884 provides that the Local Government may, with the consent of the Commissioners, make over to them any existing public ferry within or adjacent to the limits of the Municipality to be administered by them until the Local Government shall otherwise direct, and that every ferry while so administered shall be deemed to be a Municipal ferry. It is urged on behalf of the respondents that the words used in defining the limits of a public ferry under Act I of 1866, and the limits of a Municipal ferry under Act III of 1884, were used in the same sense as those in section 16 of Act I of 1885. But the limits of a public ferry under section 2 of Act I of 1866 extended, and those of a Municipal ferry under Act III of 1884 extend, only to a distance of two miles 'above or below the ferry,' and those Acts cannot, as stated above, be construed with reference to a later Act by which the limits of a public ferry were extended to "any point within a distance of two miles" and when the later Act expressly provides that nothing in that Act shall apply to any ferry deemed or declared to be a Municipal ferry under the provisions of the Bengal Municipal Act, 1884. The provisions of Act I of 1885 show that the Legislature did not intend to alter the limits of a Municipal ferry, which extend only to two miles above or below the ferry, *i. e.*, along the banks of the river or stream on which there is a Municipal ferry.

The case of the *Government of Bengal* v. *Senayat Ali* (1), upon which reliance is placed on behalf of the appellants, does not decide the point under consideration. But after deciding the actual point which arose for decision in that case, the learned Judges proceeded to observe: "A ferry, as we understand the meaning of that expression in the Bengal Municipal Act, means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls, and the object of section 155 appears to us to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license

(1) 27 C. 317; 4 C. W. N. 348.

within the prescribed limits." These observations were unnecessary for the decision of the case, but they support the view I have taken.

The defendants in their written statement stated that the Sikalbaha Canal is a part of the Kurufali river. But the Munsif points out that "no attempt was made by the defendants to make out that the Sikalbaha Canal is a part of the river Kurufali itself and that, therefore, the bank of the Sikalbaha canal should be regarded as the bank of the Kurufali itself."

The distance between the Kalapole bridge and the place where the Sikalbaha Canal meets the Kurufali is nearly three-quarters of a mile, but the distances between the Kalapal and Jimat Ali *Ghats* on the Sikalbaha Canal and the Municipal ferry stations on the Kurufali river have not been found. The learned Pleaders here stated with reference to the map on the record that the distance of one of the *ghats* on the canal and one of the Municipal ferry stations by the river route is more than two miles, but that the distances between the other *ghats* is less than two miles. In the view I take of the case, however, an enquiry into the distances is unnecessary.

The learned District Judge says: "Now if the section 155 be taken to refer strictly only to the actual banks of the river, boatmen could ply between a place one yard down to the Sikalbaha Canal and Autimahomed *Ghat* without restriction, whereas if they started at a place several miles up the Kurufali river they would have to get permission of the Commissioners. This seems to me to be an absurd construction of section 155 of the Municipal Act and it seems quite clear that the Legislature cannot have intended that it should be so interpreted." But if, as I think, the words used in the section are plain and construed in their ordinary sense mean that the limits of a Municipal ferry extend to two miles "above or below" the ferry along the banks of the river (up stream or down stream), the Court cannot construe the section in a different way merely because the construction of the words in their ordinary sense may, in some cases, lead to results which might seem anomalous. As pointed out by Jervis, C. J., in *Ably* v. *Dale* (2): "If the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislatures when we depart from the ordinary meaning of the precise words used merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." It must also be borne in mind that section 156 imposes a penalty for breach of the provisions of section 155. It says: "Whoever keeps a ferry boat, contrary to the provisions of the last preceding section shall be liable to a fine not exceeding fifty rupees, and to a further fine, not exceeding ten rupees, for each day during which the offence is continued after he has been required by a notice in writing to desist from such offence."

It is unnecessary, however, to consider, in the present case, whether the hypothetical case put by the learned Judge would constitute a substantial infringement of the Statute, as the *ghats* on the Sikalbaha Canal are at some distance from the junction of the canal with the river.

I am of opinion that the words used in the section do not mean "within a radius of two miles of the ferry", as held by the Court of Appeal below.

The learned District Judge holds that one of the banks between which plaintiffs ply being within Municipal limit, they would, in any case, require the permission of the District Magistrate and of the Commissioners. But the banks referred to in the last clause of section 155 of Act III of 1884 are banks of the same river, and the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality.

The learned Judge is of opinion that the "injunction prayed for seems to be unnecessary as it has not been proved that the ferry farmer is at present obstructing the passage of their boats or levying tolls on the plaintiffs and should he do so, he would be liable to

(2) 11 C. B. 378 at p. 391; 20 L. J. C. P. 233; 87 R. R. 697; 2 L. M. & P. 433; 15 Jur. 1012; 138 E. R. 519.

prosecution under the provisions of the Indian Penal Code." But the Court of first instance finds that "the evidence adduced by both the parties shows that many *sampanwallas*, including several of the plaintiffs, were at the instance of the Chittagong Municipality prosecuted for plying boats for hire between Kalapole and Chittagong town." The Municipality, in their written statement, deny the right of the plaintiffs and state that they rightly prosecuted the "people including some of the plaintiffs who infringed the ferry laws and committed offences against the same and often got convictions."

Under the circumstances, I think an injunction should be granted. The decree of the Court of Appeal below is accordingly set aside and that of the Court of first instance restored with costs here and in the Court below.

RICHARDSON, J.—I have no hesitation in accepting the meaning attributed by the appellants to the words "above" and "below" which occur in section 155 of the Bengal Municipal Act. These words, as applied to a place upon a river (the ferry in question is on a river), imply a relation up stream or down stream between that place taken as the starting point and other places on the same river; it is impossible to use the words intelligibly or consistently with reference to places on other rivers or streams or *khals*, whether or not they flow into the river first spoken of. If the words can be used at all in connection with a piece of water (such as a lake) which is not a river, they could only mean places above and below the same piece of water, though it might be more difficult to say what places were above and what were below. For the present purpose we need only consider river ferries.

In Act I (B.C.) of 1866 relating to public ferries, what may be called the area of protection was defined in the same terms as those used in the Bengal Municipal Act. Act I (B.C.) of 1866 was repealed by the Bengal Ferries Act [Act I (B.C.) of 1885]. Section 16 of the latter Act lays down that "no person shall, except with the sanction of the Magistrate of the District, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry." Two provisos are added. Under the first the Local Government is empowered in specified cases to reduce or increase the two miles' distance. The second enacts that "nothing hereinbefore contained shall prevent persons keeping boats to ply between two places, one of which is without, and one within, the said limits, when the distance between such places is not less than three miles or shall apply to boats which the Magistrate of the District expressly exempts from the operation of this section."

Now, the frame of that section is entirely different from the frame of the corresponding section in the Act of 1866 and in the Municipal Act. In the first place the area of protection was clearly extended. Instead of a distance of two miles above or below the protected ferry, we have a distance or radius of two miles from its limits and no unlicensed ferry is to be maintained "to or from any point" within such distance. The stringency of the words "to and from any point" is qualified by the second proviso, so that an express rule is laid down on a question on which the other two Acts are silent, namely, to what extent the entry of a ferry boat into the area of protection from outside is to be regarded as an invasion of the protected ferry. The question arises in the present case, but before dealing with it we may dispose of another question which admits of an easy answer.

We were asked, on behalf of the respondent Municipality, to adopt the view of the District Judge that section 155 of the Bengal Municipal Act should be interpreted in the light of section 16 of the Act of 1885. The argument was that as the Legislature could not have intended by the latter section to enlarge the limits within which protection was previously afforded to public ferries, therefore, the language used in the Act of 1866 and in the Municipal Act must mean the same thing as the language used in the Act of 1885. If such reasoning could be employed, it would seem more appropriate to apply it conversely and to interpret the Act of 1885 in conformity with the Act of 1866. But the limits defined in the Act of 1885 are not identical with the limits defined in the earlier Act which it repealed and no construction can make them identical,

The Act of 1885, therefore, can afford no assistance in the interpretation of section 155 of the Municipal Act.

Moreover, section 4 of the Act of 1885 declares that "nothing in that Act contained shall apply to any ferry deemed or declared to be a Municipal ferry under the provisions of the Bengal Municipal Act, 1884." The Legislature did not overlook the existence of Municipal ferries (which it had dealt with in the previous year), but expressly left them untouched and the law relating to them unaltered. The learned District Judge, in the Court of Appeal below, must have overlooked that section when he substituted the language used in the Act of 1885 for that used in the Municipal Act.

An elementary canon of construction forbids us from straining the language of the Municipal Act for the purpose of depriving people like the plaintiffs of any rights to which they would otherwise be entitled. In the present case what we are asked to do is not merely to strain the language but to change it into something totally different. To do so would contravene all rule and precedent.

We must confine ourselves, therefore, to the Municipal Act, on which alone the rights of the parties depend. That Act prohibits an unlicensed ferry boat from plying for hire within a distance of two miles above or below a Municipal ferry. The only question which remains is as to the protection, if any, this prohibition affords against boats entering the area of protection from outside, either from beyond the two miles limit on the river or by way of a tributory or *khal* which joins the river within the two miles' limit. The word ferry in the expression "Municipal ferry" must denote a place. It is the place where passengers are conveyed by boat from one side of a river to the other. A right of ferry is the right so to convey passengers at such a place. A ferry boat, however, as the term is used, must mean any boat used for the purpose of carrying passengers across the river, whether at that place or some other place. Rivers in this country are often large. It is not easy to give a defined limit to the term "ferry boat" and it is unnecessary in the present case to attempt a definition. The parties unite in describing the appellants' boats as ferry boats. Is it then an invasion of a Municipal right of ferry created by the Act for an unlicensed ferry boat to pick up passengers at some place outside the proscribed area of two miles above and below the ferry and without touching at the nearer bank to take them across the river to a point on the further bank within that area or to do the converse? In my opinion, so extended a protection was not contemplated by the Act. To come within the prohibition the *terminus a quo* and the *terminus ad quem* of the unlicensed boat must both be within the proscribed area. This is a construction which does no violence to the language used and it is the most reasonable construction. Otherwise there would be no limit to the protection afforded. The prohibition would extend to ferry boats starting at any distance, however great from the Municipal ferry. It would cover a journey between two places both outside the proscribed area provided the river was crossed within, or partly within and partly without, that area.

The view indicated receives support from the opinion expressed in *Government of Bengal* v. *Senayat Ali* (1), though that expression of opinion was not necessary to the decision of the case.

We may add that we have not to consider what, apart from the Act, would amount to an invasion of an established right of ferry created and defined by the Act. Apart from the Act, the owner of a right of ferry might have rights which would be in some respects possibly wider and in others possibly narrower than those which the Act confers upon a Municipality. The question in such a case would be, what in the circumstances are the reasonable limits of the right enjoyed [*Hammerton* v. *Dysart* (3)].

The learned District Judge considers it absurd to suppose that while a Municipal ferry is protected for two miles above or below it, no protection is afforded against a ferry boat starting few yards up a *khal*. It is possible that such a device might be regarded as a merely colourable evasion of the Act and, therefore, substantially an infringement of the Municipal right of ferry. But no such point arises here. The appellants' boats start from two places on the

(3) (1916) A. C. 57; 85 L. J. Ch. 33.

Sikalbaha *Khal* at some distance from its junction with the river within the two miles above the Municipal ferry. They make continuous journeys between those places and their *terminus* on the other side of the river. It is not suggested that they pick up passengers at the mouth of the *khal* and it is not established that the appellants' conduct of this traffic is a merely colourable evasion of the Act.

I agree that the appeal should be allowed.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 778 OF 1915.

July 17, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

KAILASH MAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DWARIKA NATH MAJHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 3—Joinder of parties—Ghatwali *land, suit by tenant of, against* ghatwal—*Secretary of State, if necessary party.*

In a suit by a tenant against his landlord, who is a *ghatwal*, for declaration of occupancy rights in a *ghatwali* land and for recovery of its possession, the Secretary of State is not a necessary party, though he may be a proper party and, therefore, the suit cannot be dismissed for the non-joinder of the Secretary of State. [p. 789, col. 2.]

Semble.—A *ghatwal* is not a mere servant of Government, but has an interest in the *ghatwali* land held by him. [p. 789, col. 1.]

Appeal against the decree of the District Judge, Bankura, dated the 7th January 1915, reversing that of the Deputy Subordinate Judge of that District, dated the 29th November 1912.

FACTS.—The appeal arises out of a suit for declaration of occupancy rights and for recovery of possession of certain lands against his *ghatwal* landlord in which the plaintiff claimed to have an occupancy right. The *ghatwal* landlord had dispossessed the plaintiff from the lands in suit. The Subordinate Judge on the evidence gave the plaintiff a decree. On appeal, the District Judge dismissed the suit, on the ground of the Secretary of State not having been made a party to the suit. Hence this second appeal by the plaintiff to the High Court.

Babu *Bepin Behari Ghose* (with him Babu *Lankim Chandra Mukerjee*), for the Appellants.—The Secretary of State is not a necessary party to this suit. The plaintiff has no cause of action against the Secretary of State, and any decision between him and the *ghatwal* will neither be binding upon nor affect the rights of the Government. The land has been found to have been brought under cultivation by the plaintiff's predecessors, and it has been in possession of the plaintiff and his predecessors for more than 50 years. The plaintiff is thus an occupancy *raiyat*, and having been dispossessed from the lands by his *ghatwali* landlord he has brought this suit against him for the recovery of possession. He does not claim any right or relief against the Government. Hence the Secretary of State not being a necessary party, was not joined in the suit as a party.

[FLETCHER, J.—The Secretary of State may be said to be a proper party but he is not a necessary party. The suit cannot fail for non-joinder of a proper party.]

Yes. In a suit for adjustment of rights between the plaintiff, an occupancy *raiyat*, and the *ghatwal* landlord, the Secretary of State is in no way concerned and is not a necessary party. The plaintiff is in no way bound to add the Secretary of State as a party to the suit.

Babu *Rishendra Nath Sarkar*, for the Respondents.—The suit against the *ghatwal* cannot proceed unless the Secretary of State be joined as a party, because the *ghatwal* derives his right to the land by virtue of an appointment from the Secretary of State, and a right of occupancy declared against the present *ghatwal* will be binding upon the succeeding *ghatwal* who may come upon the land by virtue of an appointment from the Government.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned District Judge of Bankura, dated 7th January 1915, after remand from this Court. I was one of the Judges responsible for the order of remand and i may be that the remand order might have been expressed in more clear terms, so that the learned Judge of the lower Appellate Court might not have fallen into an error. As a matter of fact, I think, if the order be

read as a whole, there is no doubt—and it is not suggested that there is any—that there is ambiguity in the order of remand; and the only person who has fallen into a doubt as to the meaning of the order of remand seems to be the learned District Judge. What the order meant is this: That it was outside the authority of the learned District Judge to send the case back to the Court of first instance directing the Judge there to add the Secretary of State as a party to the suit and the order of remand directed the learned Judge of the lower Appellate Court to re-hear the appeal without adding the Secretary of State as a party to the suit and that, when re-hearing the appeal, if the learned Judge came to the conclusion that the Secretary of State was a necessary party to the suit, he was not precluded from dismissing the plaintiffs' suit on the ground of the absence of a necessary party, the plaintiffs having expressly stated that they did not intend in any case to have the Secretary of State added as a party. The case went back to the learned District Judge and it is practically admitted on both sides that the learned Judge has not disposed of the case properly. The learned Judge has come to the conclusion that the Secretary of State is a necessary party. That is hardly attempted to be supported by the learned Government Pleader in this Court. Although he may be described as a proper party, there is no reason why this litigation should not take place and be determined between the two contending parties, whatever their rights may be in the absence of the Secretary of State. The Secretary of State will not be affected by that determination if he comes to resume the lands or if he dismisses the present *ghatwal*. Anything that may be decided between the present *ghatwal* and the plaintiffs will not in any way prejudice or affect the rights of the Secretary of State. What the rights of the *ghatwal* in the lands are, it is not necessary in the present case to determine. It may be pointed out that, on the former occasion, when the case was before the learned District Judge, he came to the conclusion that the *ghatwal* was not a mere servant but that he had, in fact, an interest in the land. So far as the cases show, that seems to be in accordance with the current of authority as to the rights of the *ghatwals* in most of the Districts in Bengal. Of course we need not say anything which would fetter the hands of the learned Judge. All we need say in this case is that, although the Secretary of State might have been a proper party to the suit and the present defendant could not have objected if he had been there as a co-defendant, it is a very different thing to say that he is a necessary party and the suit cannot be decided in his absence. There is no reason, whatever the rights of the parties may be, why these rights should not be ascertained by the learned District Judge in the absence of the Secretary of State. The decree of the learned District Judge must, therefore, be set aside and the case must go back to him to re-hear the appeal on the merits. Costs of this hearing will abide the result of the re-hearing before the lower Appellate Court.

TEUNON, J.—I agree.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2382 OF 1913.

August 11, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

BHAVANI *alias* RUKMANI AMMA—PLAINTIFF—APPELLANT

versus

ANANTHA KAMTHI AND OTHERS—DEFENDANTS NOS. 2 TO 7—RESPONDENTS.

Contract Act (IX of 1872), ss. 124, 125—Indemnity, contract of—Agreement to indemnify against loss of possession—Breach—Damages, suit for, if lies when title impaired and possession not actually lost—Measure of damages.

In a suit for damages based on a contract to indemnify the plaintiff against loss of possession it is not necessary for plaintiff to prove that possession has *actually* been lost. The sale of the property in auction at the instance of a decree-creditor of the promisor and the consequent impairment of title constitute a valid and sufficient cause of action. Where the promisee's title is lost, he suffers nonetheless because he has yet sustained no practical inconvenience or has not had occasion to sell the property and estimate the damage sustained with reference to any actual diminution in the price obtainable. [p. 791, col. 1.]

In such a case the sums necessary to be expended by the plaintiff in order to cure the defect in or the loss of title so caused would be the measure of damages. [p. 791, col. 2.]

BHAWANI v. ANANTHA KAMTHI.

A right to damages on account of the future determination of the plaintiff's possession by reason of the purchase of the property at auction sale by strangers will not be sustained. Nothing short of actual disturbance of possession will justify the claim. [p. 791, col. 1.]

Putti Narayanamurthi v. *Marimuthu Pillai*, 26 M. 322; *Pundi Doraisami Tevar* v. *Lakshmanan Chetty*, 14 M. L. J. 285, distinguished.

Howard v. *Maitland*, 11 Q. B. D. 695, 53 L. J. Q. B. 42; 48 J. P. 164, *Kingdon* v. *Nottle*, 4 M. & S. 53; 16 R. R. 379; 105 E. R. 755; *In re Law Guarantee Trust and Accident Society*, 83 L. J. Ch. 25, referred to.

Second appeal against the decree of the District Court, South Canara, in Appeal Suit No. 85 of 1912, preferred against that of the District Munsif, Karkal, in Original Suit No. 531 of 1910.

Mr. *K. Ramanatha Shenai*, for the Appellant.

Messrs. *B. Sitarama Rao* and *K. P. Lakshmana Rao* (for Mr. *K. Y. Adiga*), for the Respondents.

JUDGMENT.

OLDFIELD, J.—The necessary facts are as follows:—

Plaintiff's husband, now deceased, started a Kuri fund and in 1892 executed Exhibit R to the members, pledging property as security for the amount which would be payable to them. On his death plaintiff succeeded to his estate, and her father, as her guardian, in 1893 took steps to transfer the management of the fund to 1st defendant by a Power-of-Attorney and obtained from him and his brothers an indemnity bond, Exhibit B, with the plaint property as security for an amount not exceeding Rs. 2,500 against any damage resulting to plaintiff and her property, including that bond, by Exhibit R. Two members of the fund afterwards obtained decrees on Exhibit R against plaintiff, 1st defendant being a party, and (neither decree-holder being a party to the other decree) both in succession brought the property to sale, the purchasers being different individuals. Plaintiff has now sued 1st defendant and others representing the other executants of Exhibit B to recover Rs. 2,500 by sale of the properties specified therein as security. The question is, whether the lower Courts were right in deciding that her suit was premature.

The lower Appellate Court reached the decision, on what, notwithstanding its tentative method of expression, may be accepted as findings of fact, that plaintiff had enjoyed the suit property since 1898 by mortgaging it with possession to P. W. No. 2, one of the two decree-holders above referred to has continued to enjoy it until the date of suit by receiving from him the annual payment of grain, for which his mortgage provides; and is accordingly in spite of the two Court sales still in possession. It has referred also to other circumstances such as the connection between plaintiff and P. W. No. 2 as indicating that the two have combined to defeat two auction-purchasers' attempts to get possession. But that, if true, is not material at present. For the only issue is whether plaintiff's retention of possession, however effected, is inconsistent with her having been damnified by the two Court sales, which have occurred. It is urged that the lower Appellate Court's consideration of the case was defective, because, though the grounds, on which damages are claimed, were in no way defined or limited in the plaint, it regarded the continuance of plaintiff's possession to the date of suit as decisive and did not deal with plaintiff's right to compensation on account of (1) the future determination of her possession, which the Court sales would entail in the ordinary course, (2) the effect on her title to the property. These two claims are differently founded and call for separate discussion. Apart from that, however, the cases, *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai* (1) and *Pundi Doraisami Tever* v. *Lakshmanan Chetty* (2), on which defendants mainly rely as showing that the suit is premature, are irrelevant. For they relate to the right of action on contracts to discharge a promisee's debts, and there is no analogy between the event in which the promissor in them would become liable, the discharge by the promisee under compulsion and the grounds alleged for defendants' liability in the present case.

First as to the cause of action alleged as arising in respect of the future determination of plaintiff's possession. There is, for all that appears, no doubt that the auction-purchasers may still claim delivery through

(1) 26 M. 322.
(2) 14 M. L. J. 285.

Court, oust P. W. No. 2 and determine plaintiff's enjoyment. But it is not alleged that they have done so or taken any step in that direction. No Indian authority has been shown for the opinion that judicial recognition of a stranger's right to possession or anything short of actual disturbance of it by him justifies a claim to damages; and that opinion was negatived in *Howard* v. *Maitland* (3), a decision which is in point, though the claim was made on a covenant for quiet enjoyment. Plaintiff's claim, so far as it relates to her enjoyment, past or future, must be held premature.

There remains her claim in respect of damage to her title, defendants arguing that she has not yet sustained any loss and that, subject to her retaining possession, she will never do so. No Indian authority has been referred to. But the merits of the case are clear. For two Court sales have been held and have not been set aside; and, though neither purchaser has yet obtained possession, there is still time for one or the other to do so. Plaintiff's title accordingly has been lost and she has suffered nonetheless because so far she has sustained no practical inconvenience and because she has not had occasion to sell the property and cannot yet estimate the damage sustained with reference to any actual diminution in the price obtainable. *Kingdon* v. *Nottle* (4) is in point, thought it was a case of breach of covenant for title; and it is clear authority since in the particular circumstances proof of special damage was necessary. Such damage was held established on the ground that, the title being impaired, the plaintiff would not be able to depose of the estate. Plaintiff's suit, therefore, so far as it is founded on detriment to her title, cannot be held premature.

The lower Court's decisions are, therefore, set aside and the District Munsif is directed to re-admit the suit and re-hear it in the light of the foregoing remarks with particular reference to plaintiff's right to damages on account of the loss of her title. Costs to date in this and the lower Courts will follow the result and will be provided for in the decree to be passed.

SADASIVA AIYAR, J.—I agree. There are, no doubt, several decisions which hold that before actual loss is incurred, a suit brought on a contract of indemnity for recovery of the damages which are likely to be incurred by the default of the guarantor would be premature. [See *Pundi Doraisami Tever* v. *Lakshmanan Chetty* (2).] Especially in the case of an indemnity given by a principal debtor to a surety would this doctrine apply. [See *Putti Narayanamurthi* v. *Marimuthu Pillai* (1).] But the doctrine is qualified very appreciably by the rulings in several decisions, which hold that an action for specific performance of a contract to indemnify can be sustained before actual loss is incurred by the promisee [see *In re Law Guarantee Trust and Accident Society Ltd.* (5)], and that an action on the covenant by the defendant to do a particular thing, *if it is an absolute promise*, "at once gives rise to a cause of action in which substantial damages are recoverable and a plea of *non-damnificatus* is not maintainable." [See *Ramalingathudayan* v. *Unnamalai Achi*(6).] The distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do the act is, no doubt, sometimes a fine distinction but such a distinction, is in most cases not difficult to perceive.

Even if the covenant in question in the present case (which is not the case of a principal debtor promising to indemnify a security) is only one to indemnify the plaintiff against the loss caused by the neglect of the 1st defendant to fulfil his promise, the loss of the plaintiff's legal title to the lands caused through the defendant's said breach of his promise is a substantial present loss and the plaintiff's suit for recovery of the damages incurred on account of such loss of title cannot, therefore, be held premature. The sums necessary to be expended by the plaintiff in order to cure the defect in or the loss of title so caused would be the measure of damages and the lower Courts ought to have come to a finding on that question before deciding the suit. The decisions of the lower Courts, which

(3) 11 Q. B. D. 695; 53 L. J. Q. B. 42; 48 J. P. 164.
(4) 4 M. & S. 53; 16 R. R. 379; 105 E. R. 755.
(5) 83 L. J. Ch. 25; (1913) 2 Ch. D. 604; 109 L. T. 152; 29 T. L. R. 776.
(6) 24 Ind. Cas. 873; 38 M. 791.

dismissed the suit on a preliminary point, (namely, whether the suit was premature) ought to be set aside and the case remanded to the Court of first instance for fresh decision with reference to the above observations. Costs to be costs in the cause. Fresh evidence might be allowed on the question of the *quantum* of damages.

Appeal allowed; Case sent back.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 461 OF 1914.

June 1, 1916.

Present:—Mr. Justice Teunon and Mr. Justice Sheepshanks.

Srimati JAGATTARINI DASI—PLAINTIFF No. 2—APPELLANT

versus

PRAFULLA CHANDRA GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Partition, suit for—Prayer for declaration only of right and not for possession—Dismissal of suit, legality of—Plaint, amendment of—Executors, suit against, as such and personally—Cause title, omission to designate as executors in—Defect, whether fatal—Election, order for, between reliefs claimed—Civil Procedure Code (Act V of 1908), O. II, r. 5.

A Court is not justified in dismissing a suit for partition on the ground that it contains only a prayer for declaration of the properties sought to be partitioned and none for possession. The defect may be allowed to be remedied by an amendment of the plaint. [p. 793, col. 2.]

A suit against executors, which contains a claim against them personally, should not be dismissed merely because in the title portion of the plaint the executor defendants have not been described as such, when in the body of the plaint they have been so described. [p. 793, col. 2.]

If in a suit for construction of a Will and for administration of the estate of the testator, a claim for certain ornaments, not belonging to the estate of the testator but of which possession was obtained by the executors as such, is joined with claims for other properties in the hands of the executors, it is unnecessary to put the plaintiffs to their election in respect of their claim for the ornaments. [p. 794, col. 1.]

Hafizaboo v. *Mahomed Cassum Murad*, 31 B. 105; 8 Bom. L. R. 384, referred to.

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Hooghly, dated the 30th July 1914.

FACTS material to the report are briefly as follows, as they appeared from the judgment of the Subordinate Judge, Hooghly:—

One Rai Baroda Prosonno Shome Bahadur died in May 1912, leaving no other issue and heir than three daughters, the plaintiffs Nos. 1 and 2 and the defendant No. 8. He had executed a Will, dated 9th *Aswin* 1317 *B. S.*, appointing the eldest son and 2nd son of the eldest daughter, the defendant No. 8, as executor and assistant executor respectively. He further provided that on attaining majority the eldest sons of the 2nd and 3rd daughters should also become assistant executors. The three daughters, the plaintiffs Nos. 1 and 2 and the defendant No. 8, jointly executed an *ekrarnama*, dated 27th *Jaistha* 1317 *B. S.*, in favour of their father in respect of certain properties mentioned in the schedule to the plaint belonging to their mother Promodini Dassi. Some ornaments belonging to the said Promodini Dassi deceased had also come into the possession of the defendants Nos. 1 and 2.

Probate of the Will of Rai Baroda Prosonno was taken out in the first instance by the two sons of the eldest daughter, the defendant No. 8, and the eldest son of the 2nd daughter was afterwards joined with them as co-executor.

The two younger daughters of the testator Baroda Prosonno brought this suit. The defendants No. 1 to 3 were the sons of the eldest daughter of the testator, the defendants Nos. 4 to 7 were the sons of the plaintiff No. 1, the defendant No. 8 was the eldest daughter of the testator, the defendants Nos. 9 and 10 were the sons of the plaintiff No. 2, the defendant No. 11 was the son of the defendant No. 1, and the defendant No. 12 was the Professor of a Sanskrit College for which certain provisions were made in the Will. The plaintiffs' prayers in the present suit substantially were for (1) a construction of the Will; (2) a preparation of a scheme for administration of the properties disposed of by the Will; (3) cancellation of the *ekrarnama* executed by them in favour of their father after a declaration that it was fraudulent and invalid; (4) a partition between them and the defendant No. 8 (*a*) of the residue of the properties of their father not disposed of by the Will, (*b*) of the properties mentioned in the aforesaid *ekrarnama* and (*c*) of the ornaments mentioned in the schedule *gha* of the plaint; these ornaments and the properties mentioned in the *ekrarnama* being the pro-

perties of their mother over which their father had no disposing power.

The lower Court dismissed the suit, on the grounds that by reason of the provisions of section 42 of the Specific Relief Act the suit was not maintainable, and that in the title portion of the plaint the executor-defendants were not described as such.

Hence this appeal by the plaintiffs.

Babus *Dwarka Nath Chakravarty* and *Karunamoy Ghose*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babus *Satcowri Pati Roy*, *Mohini Nath Bose* and *Shib Chandra Palit*, for the Respondents.

JUDGMENT.—In this case it appears that one Rai Baroda Prosonno Shome Bahadur died on the 7th of May 1912. He had executed a Will dated 9th *Aswin* 1317= 26th September 1910, appointing the eldest son and the 2nd son of his eldest daughter Ushabati executor and assistant executor respectively. He further provided that on their attaining majority the eldest sons of his 2nd and 3rd daughters should also become assistant executors.

Probate of this Will was taken out in the first instance by the two sons of Ushabati, and the eldest son of the 2nd daughter has since been joined with them as a co-executor.

On the 24th of September 1912, the two younger daughters brought the present suit substantially for the construction of the Will, and for the administration of the estate. They also prayed for the partition of certain specified landed properties. The contesting defendants are the eldest daughter Ushabati and her two sons, Prafulla Ghose and Hem Chandra, the executor and assistant executor first named in the Will.

After the framing of issues, and the disposal of a number of interlocutory applications and the examination of a number of witnesses on commission, the taking of evidence in Court began on the 11th and closed on the 17th of June 1914.

On the 30th of June the learned Subordinate Judge delivered judgment dismissing the suit on two specific grounds, *viz.*, (1) that by reason of the provisions of section 42 of the Specific Relief Act the suit is not maintainable, and (2) that in the title portion of the plaint the executor-defendants have not been described as such.

We are of opinion that on neither ground can the dismissal of the suit be supported. On the 1st ground it is stated that while there is a prayer for a declaration of title in respect of the properties sought to be partitioned, there is no prayer for possession. But we are of opinion that such a prayer is to be found in paragraph 16, sub-clause (5), of the plaint and if anything more specific was required, then the amendments sought to be made by the plaintiffs in their applications of 7th July 1913, "paragraph 8 (*ka*)", and of the 19th July and of the 2nd November of the same year should not have been disallowed. Apart from this it is to be observed that even if we had agreed with the Subordinate Judge in his view of the plaint, we still could not have held him justified in dismissing the whole suit.

The 2nd ground is even less defensible. That defendants Nos. 1, 2 and 4 are executors to the Will in question is clearly stated in the 2nd paragraph of the plaint. Order II, rule 5 of the Code of Civil Procedure, permits in certain circumstances the joining of claims against executors with claims against them personally and the difficulty which the Subordinate Judge apprehends in the drawing up of the decree in accordance with the findings of the Court appears to us to be imaginary.

We have been urged by the respondents to affirm the decision under appeal on the ground that section 167 of Act X of 1865 is a bar to the suit. But this is a question that has not been considered by the Subordinate Judge and in the absence of any findings of fact, we are unable to determine to what extent and in what manner the provisions of section 167 and the following sections of Act X of 1865 will affect the suit and the action to be taken by the plaintiffs.

We have next been asked by the appellant to set aside the order of the Subordinate Judge dated the 17th July, in so far as it puts the plaintiffs to their election in respect of their claim for certain ornaments and in respect of the other properties, the subject-matter of the suit. The plaintiffs protested against the order but finally on the 21st July in compliance therewith elected to withdraw the claim for ornaments. It appears to be the case of both parties that these ornaments belonged to the estate not

of the deceased testator, but of his wife Promodini. But it was also the case of the plaintiffs that it was as executors to the estate of the husband that they succeeded in obtaining possession of the ornaments in question. That being so, on the authority of the case of *Hafizaboo* v. *Mahomed Cassum Murad* (1), we hold that it was unnecessary to put the plaintiffs to their election in respect of that claim. We, therefore, set aside that part of the order and direct that the prayer for ornaments be reinstated in the plaint.

We need only say further that in our judgment it is lamentable that suits on which there has been much expenditure of public and private time and much expenditure of money, or indeed any suits should be thrown out on such insufficient grounds.

We decree the appeal and remand the suit to the Subordinate Judge [to be tried out on all the issues and determined in accordance with law. Costs will abide the result.

Appeal allowed; Case remanded.

(1) 31 B. 105; 8 Bom. L. R. 384.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 29 OF 1915.

July 25, 1916.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

TANGYA FALA—PLAINTIFF—APPELLANT

versus

TRIMBAK DAGA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 70—Compensation, liability for, by person enjoying benefit of non-gratuitous act—Act done without knowledge of person benefited—Mortgage—Payment of mortgage amount by stranger—Subrogation—Transfer of Property Act (IV of 1882), s. 95.

The question which Courts have to decide under section 70 of the Contract Act is almost entirely, if not entirely, a question of fact. [p. 796, col. 1.]

No right to compensation under the section arises when there was no intention to benefit the person who is alleged to have enjoyed the benefit of the non-gratuitous act and when the act was done without the consent or knowledge of such person. [p. 795, col. 2.]

Suchand Ghosal v. *Balaram Mardan*, (*Mohendra Ghoshal* v. *Bhuban Mardana*), 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566, referred to.

The equitable doctrine of the subrogation of a mortgage in English Law, though not in terms contained in the Transfer of Property Act, is not inconsistent with any provision of that Act. [p. 796, col. 2.]

The doctrine, which is applicable to India, is that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. The mortgagor's consent to the payment is not necessary to entitle the person paying to be subrogated to the position of the mortgagee, for the mortgagor's position is in no wise substantially altered, except that, instead of owing money to one creditor, he owes it to another. [p. 796, col. 2.]

Butler v. *Rice*, (1910) 2 Ch. 277; 103 L. T. 94; 79 L. J. Ch. 652; *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, 11 I. A. 126; 10 C. 1035; 4 Sar. P. C. J. 543, referred to.

One *A* obtained a mortgage-decree against the 1st defendant and, in execution, applied for sale of the hypotheca. The 2nd defendant, who held a simple money-decree against 1st defendant, meantime brought the property to sale in execution of his decree and purchased it himself. About two years afterwards, the property was again put up for sale by the Collector at the instance of the mortgagee. The 1st defendant borrowed Rs. 2,463 from plaintiff, paid off the mortgage amount and averted the sale. He then executed a sale-deed of the property to the plaintiff for the consideration already advanced, *plus* Rs. 1,500 which he had received from the plaintiff from time to time. The plaintiff, who was already in possession under a ten years' lease from 1st defendant, was ejected by 2nd defendant in a suit filed by him for recovery of possession. Plaintiff brought the present suit for recovery of Rs. 4,000, the consideration for the sale-deed, from 1st defendant and prayed that Rs. 2,463 thereof, which was applied in discharge of the mortgage, be recovered from 2nd defendant personally and by sale of the mortgaged land. The Subordinate Judge decreed all but a small portion of the claim against the 1st defendant and dismissed the claim against the second, holding that the 1st defendant had no saleable interest in the land when he conveyed it to the plaintiff. On appeal to the High Court, it was urged for the plaintiff that the second defendant was liable under section 70 of the Contract Act, or in the alternative, by virtue of plaintiff's being subrogated to the rights of the original mortgagee:

Held, (1) that plaintiff was not entitled to compensation under section 70 of the Contract Act as the payment was not made by him to benefit 2nd defendant, nor with his knowledge or consent; [p. 795, col. 2.]

(2) that plaintiff stood in the mortgagee's shoes and was entitled to enforce the claim for sale of the property for the amount of the mortgage. [p. 797, col. 1.]

Per *Batchelor, J.*—The plaintiff, in making the payment behind the back of the 2nd defendant, was depriving the 2nd defendant of an option which the law allowed him to exercise. For, to the 2nd defendant it was open either to pay off the mortgage or to stand by and let the property be sold. When therefore, the plaintiff, without reference to the 2nd defendant, intruded himself in order to make the payment without the 2nd defendant's knowledge it cannot be said that such payment was made for the 2nd defendant. [p. 796, col. 1.]

TANGYA FALA *v.* TRIMBAK DAGA.

Per *Shah, J.*— The mortgage-decree was against 1st defendant and was being executed against him at the time. He was, therefore, clearly interested in satisfying the decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so, and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage-decree to the mortgagee at the instance of defendant No. 1. [p. 797, cols. 1 & 2.]

First appeal from the decision of the first class Subordinate Judge, Dhulia, in Civil Suit No. 302 of 1912.

Mr. *G. S. Rao*, for the Appellant.

Mr. *M. V. Bhat*, for Respondent No. 2.

JUDGMENT.

BATCHELOR, J.—In 1893, the property in suit and certain other properties were mortgaged by their owner Daga Lahnu to one Atmaram to secure a sum of Rs. 2,250. In 1904, the mortgagee, Atmaram, brought a suit on his mortgage and obtained a decree for payment of Rs. 2,247 and costs within six months, or in default, the sale of the property. On the 12th June 1905, Atmaram as decree-holder presented an application for sale of the mortgaged property. This application was transferred for execution to the Collector. On the 27th June 1905, the present second defendant, in execution of a money-decree which he had obtained against Daga, brought the property to sale and purchased it himself. On the 13th April 1907, in execution of Atmaram's decree on the mortgage, the Collector put the property to sale. Thereupon, Daga Lahnu, who was the first defendant in the suit, borrowed a sum of Rs. 2,463 from the plaintiff in order to pay off Atmaram's decretal amount, and, with the money so borrowed from the plaintiff, Atmaram's decree was, in fact, satisfied and the threatened sale was averted. On the 17th December 1907, Daga executed a sale-deed in the plaintiff's favour in regard to the property now in suit, namely, a moiety of Survey No. 172. The total consideration of the sale-deed is Rs. 4,000, made up of Rs. 2,463 advanced in April 1907 by the plaintiff together with other sums lent to Daga personally. In 1905, the plaintiff went into possession of the lands on a ten years' lease from Daga, but in 1908 he was ejected from possession on a suit filed by the second defendant for the recovery of possession. Thereafter the plaintiff brought the present suit in which he claimed to recover Rs. 4,000, the consideration of the sale-deed, from the first defendant, while as against the second defendant the claim was that since Atmaram's mortgage had been paid off with the plaintiff's moneys, the plaintiff should be decreed to stand in the shoes of the mortgagee, Atmaram, with the result, that his advance of Rs. 2,463 should be recoverable by the sale of the mortgaged land in the hands of the second defendant. There was also a prayer that the sum should be decreed from the second defendant personally. The learned Judge of the lower Court has given the plaintiff a decree for Rs. 3,113 against the first defendant only, and the claim against the second defendant has been rejected.

In this appeal Mr. Rao, on behalf of the plaintiff-appellant, raises two contentions, the *first* being that, under section 70 of the Indian Contract Act, defendant No. 2 is personally liable to repay to the plaintiff Rs. 2,463 advanced by the plaintiff to the first defendant. Section 70 of the Indian Contract Act makes provision for the compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done shall be lawfully done, that the intention shall not have been to do gratuitously, and that the other person shall enjoy the benefit. I will assume in the plaintiff's favour that these three conditions are, in the present case, satisfied. There remains the condition expressed in the first words of the section, which are "where a person lawfully does anything *for* another person." The plaintiff's case here is that the payment of Atmaram's mortgage was the thing done by him for the second defendant. I am of opinion, however, that that claim is not substantiated. There is no doubt about the facts, which are that the payment was made not only without the consent, but without the knowledge, of the second defendant. On the evidence on the record I am of opinion that the object of the payment was to benefit the plaintiff himself. Moreover, while it does not appear that the second defendant would not have paid off the mortgage himself if the matter had been brought to his attention, it does

appear that the plaintiff, in making the payment behind the back of the second defendant, was depriving the second defendant of an option which the law allowed him to exercise. For to the second defendant it was open either to pay off the mortgage or to stand by and let the property be sold. When, therefore, the plaintiff, without reference to the second defendant, intruded himself in order to make the payment without the second defendant's knowledge, I am of opinion that it cannot be said that such payment was made for the second defendant. That is the view of the learned Judge of the lower Court. As was observed by Sir Lawrence Jenkins in *Suchand Ghosal* v. *Balaram Mardana* (*Mohendra Ghoshal* v. *Bhuban Mardana*) (1), the question which the Courts have to decide under section 70 of the Indian Contract Act is almost entirely, if not entirely, a question of fact. I may add that the case before us is on its facts readily distinguishable from *Suchand's* case (1), inasmuch as there the person who paid the money had an incontestable tenant's right and the payment was made for the benefit both of himself and of the other tenants who were liable under the decrees and had no alternative but to pay the decretal debts. I agree with the learned Trial Judge that upon the facts of this case the plaintiff's claim to compensation under section 70 of the Indian Contract Act is not established.

There remains Mr. Rao's *second* contention, which is based upon the equitable doctrine allowing a stranger who pays off a subsisting mortgage to be subrogated to the position of the mortgagee. The facts, here again, are not in dispute. The mortgage of Atmaram was paid off with the help of the plaintiff's moneys by the first defendant, and it cannot, in my opinion, be doubted that the first defendant had an interest in paying off that mortgage. Therefore, if the doctrine is made out, the first defendant could claim to stand in the mortgagee's shoes, and if that be so, the same position would be occupied by the plaintiff, who claims through the first defendant and whose moneys were advanced to the first defendant precisely in order that Atmaram's mortgage should be discharged. That the legal doctrine, for which Mr. Rao contends, is established is illustrated, I think, by Mr. Justice Warrington's decision in *Butler* v. *Rice* (2). There is no objection to our reference to this English decision for the purpose of verifying a doctrine which, though not in terms contained in the Transfer of Property Act, is not inconsistent with any provision of that Act. Indeed section 95 of the Act suggests that the doctrine was at least in part formally accepted by the Indian Legislature. Reference may also be made upon this point to the decision of their Lordships of the Judicial Committee in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3). Now *Butler* v. *Rice* (2) was a case where the plaintiff Butler upon an agreement to receive a mortgage for £ 300 advanced a sum of money to Rice in order that Rice might pay off certain mortgages of property belonging to Mrs. Rice. The money was, accordingly, paid and the mortgages were released, but all this was done without the knowledge of the mortgagor Mrs. Rice. It was contended in argument that mortgages in these cases are only kept alive where the charge is paid off at the express or implied request of the mortgagor. That argument, however, was rejected by Mr. Justice Warrington, who observed that the statement of claim, or as we should say the plaint, proceeded on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. I pause to observe that in our own case we have not only that presumption, but the sworn testimony of the plaintiff that such was, in fact, his intention. As to the argument that Mrs. Rice's knowledge was essential, the learned Judge observed that her concurrence was immaterial inasmuch as her position was not affected, for the only alteration in her position was that instead of owing the money to one creditor, she owed it to another, and in the first words of the judgment, in language which is perfectly apt to our present case, the learned Judge said that the question he had to determine was whether the mortgagor was entitled to hold the property discharged from the debt of £ 450, not one penny of which

(1) 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566.

(2) (1910) 2 Ch. 277; 103 L. T. 94; 79 L. J. Ch. 652.
(3) 11 I. A. 126; 10 C. 1085; 4 Sar. P. C. J. 543.

she had paid off herself, or whether the person who paid it was entitled to treat the charge as still on foot in his favour. As the learned Judge answered that question against the mortgagor, so we must answer in the present case, where the similar question is whether the second defendant is entitled to hold this land free of an incumbrance of Rs. 2,463, not one rupee of which he has ever paid himself but every rupee of which has come from the pockets of the plaintiff. I may add that the plaintiff's position is, if there be any difference, somewhat stronger than was Butler's position, for while Butler was a mere stranger, the plaintiff is claiming through a person with a clear interest in releasing the mortgage. On these grounds I am of opinion that Mr. Rao's *second* contention must be conceded and that the land in possession of the second defendant must be held chargeable with the sum of Rs. 2,463.

In my opinion, therefore, we should reverse the lower Court's decree and substitute for it a decree allowing the plaintiff the sum of Rs. 2,463 to be recovered with interest at 6 per cent. from the date of suit to the date of payment by the sale of one-half of Survey No. 172. Any deficiency between this sum and the total of Rs. 3,113 should be recovered from the first defendant, being made payable in annual instalments of Rs. 800 until complete satisfaction, the first such instalment to be due three months after the amount of the deficiency has been ascertained. The plaintiff must have his costs here and in the Court below. The sum, if not paid by the second defendant within six months, may be recovered by sale of the property.

SHAH, J.—I agree. I desire to add a word with reference to Mr. Bhat's argument that neither the plaintiff nor defendant No. 1 was interested in satisfying the mortgage claim of Atmaram at the time, when the sum of Rs. 2,463 was paid by the plaintiff. It is clear that, in spite of the previous purchase by defendant No. 2 at a Court-sale of the two survey numbers, the equity of redemption in the other property mortgaged to Atmaram was vested in defendant No. 1 at the time. The mortgage-decree in favour of Atmaram was against him and was being executed against him at the time. He was, therefore, clearly interested in satisfying Atmarm's decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so; and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage-decree to Atmaram at the instance of defendant No. 1.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 504 OF 1916.

July 14, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

BAGALA SUNDARI DEBI—PLAINTIFF—PETITIONER

versus

PROSANNA NATH MOOKERJEE—DEFENDANT—OPPOSITE PARTY.

Court-fee—Declaration, suit for, that certain ex parte *decree is invalid.*

In order to determine the amount of the Court-fee payable in a suit the Court has to look at and see in each particular case what is the nature of the relief claimed and, for that purpose, it must look at the allegations that are contained in the plaint. [p. 798, col. 2.]

The Court-fee payable in a suit for a declaration that a certain *ex parte* decree, declaring that certain alienations were not valid, is not binding on the plaintiff, is Rs. 10, and not an *ad valorem* Court-fee on the amount of the decree sought to be declared invalid. [p. 799, col. 1.]

Zinnatunnessa Khatun v. *Govindra NathMukerjee*, 30 C. 788, followed.

Rule against the order of the Sub-Judge, 2nd Court, Burdwan, in Declaratory Suit No. 62 of 1915.

FACTS material to the report will appear from the following order of the Subordinate Judge:—

"This is a suit for a declaration that the *ex parte* decree obtained by the defendant against plaintiff is fraudulent, inoperative and not binding upon the plaintiff as well as for setting aside that decree. The plaintiff paid a Court-fee of Rs. 10 only.

The defendant contended *inter alia* that the Court-fee paid is insufficient.

In my opinion the defendant's objection must prevail. The prayer for setting aside the *ex parte* decree is a prayer for a consequential relief. That being so, upon the authority of the decision in the case of *Thakur Prosad* v. *Punkal Singh* (1) I am of opinion that the suit should be valued at the amount for which the decree sought to be set aside was obtained. The amount of the decree is Rs. 21,500. The plaintiff is, therefore, to pay *ad valorem* fee on that amount, *viz.*, Rs. 815 *minus* Rs. 10 already paid *i. e.*, Rs. 805 within a fortnight. In default this plaint will be rejected."

The plaintiff then moved the High Court and obtained this Rule upon the opposite party, the defendant in the suit.

Babu *Baidyanath Datta* (with him Babu *Bhupendra Kumar Ghose*), for the Opposite Party.—My points are two:—(1) The order is not revisable under section 115, Civil Procedure Code, and (2) *ad valorem* Court-fee should be paid on the plaint, as held by this Court, inasmuch as there was a prayer for setting aside the previous decree, which was consequential relief. Besides the decree contained an order for an injunction. Cites *Harihar Prasad Singh* v. *Shyam Lal Singh* (2), *Ganesh Bhagat* v. *Sarada Prasad Mukerjee* (3), *Musammat Deokali Koer* v. *Babu Kedar Nath* (4), *Thakur Prosad* v. *Punkal Singh* (1) and *Gour Mohun Gouli* v. *Dinonath Karmokar* (5).

[FLETCHER, J.—We have ample power for revision under section 15 of the Charter Act.]

Babu *D. N. Bagchi*, for the Petitioner.—Your Lordships have ample power under the Charter Act at any rate, if not also under section 115 of the Civil Procedure Code to revise the order, and this Hon'ble Court has revised such interlocutory orders on the question of Court-fee. Cites *Collector of Maldah* v. *Nirode Kamini Debya* (6) and *Ramrup Das* v. *Mohunt Sujaram Das* (7).

As regards the second objection, a prayer for setting aside a decree is not necessarily a prayer for consequential relief. In *Thakur Prosad* v. *Punkal Singh* (1), relied upon by the opposite party and the Court below, the original decree was a decree for a certain amount of money and in all the other cases cited the original decrees were decrees for specific amounts, whereas in the present case the original decree itself was a purely declaratory decree and the injunction granted was a mere surplusage not called for at all after the declaration. In the present suit, the prayer is for a declaration that the original declaratory decree is null and void on the ground of fraud, and further for setting aside the decree as inoperative and not binding upon the plaintiff. These are prayers for no consequential relief. Cites *Shrimant Sagajirao Khanderav Naik Nimbalkar* v. *Smiths* (8) followed in *Zinnatunnesa Khatun* v. *Govindra Nath Mukerjee* (9).

JUDGMENT.—This is a Rule obtained by the petitioner, the plaintiff in a suit pending before the Subordinate Judge of the second Court at Burdwan, calling on the opposite party, the defendant in that suit, to show cause why the order complained of should not be set aside. The order complained of is the order of the learned Subordinate Judge as to the amount of the Court-fee to be paid on the plaint in the suit instituted. Many cases have been cited on the section of the Court Fees Act dealing with the point; but they are not uniform. It may be, as the learned Vakil who appears for the defendant says, that it is difficult to reconcile them. But after all, the Court has got to look at and see in each particular case what is the nature of the relief claimed and, for that purpose, it must look at the allegations that are contained in the plaint. Now, what do we find in this case? The plaintiff asks for a declaration that a certain decree is invalid. What is the nature of the decree that she asks to be declared invalid? The decree is purely a declaratory decree. It was an *ex parte* decree declaring that certain alienations were not valid, and all that the plaintiff asks in this suit is for a declaration that the declaration made in the former suit is not valid or binding on her. The decree in the former suit apparently contains no mandatory words and is not, as they say in this country, fit for execution. There is nothing in the former decree that can be executed;

(1) 8 C. L. J. 485.
(2) 21 Ind. Cas. 404; 40 C. 615.
(3) 30 Ind. Cas. 111; 42 C. 370; 19 C. W. N. 895.
(4) 15 Ind. Cas. 427; 16 C. W. N. 838; 39 C. 704.
(5) 25 C. 49; 2 C. W. N. 76.
(6) 15 Ind. Cas. 621; 17 C. W. N. 21.
(7) 7 Ind. Cas. 92; 14 C. W. N. 932, 12 C. L. J. 211.
(8) 20 B. 736.
(9) 30 C. 788.

there simply remains a declaration of the Court as to the right of the parties. In this suit, all that the plaintiff asks is that the declaration in the former suit be declared not to be binding on her. She does not want any mandatory order as a consequence of that declaration, because the former decree contains in itself no mandatory words. Moreover, although the cases are difficult to reconcile, this case is clearly covered by the decision of this Court in *Zinnatunnessa Khatun* v. *Govindra Nath Mukerjee* (9). It may be that some later decisions are not easy to reconcile with that decision; but that decision has never been overruled. That decision, being a decision of this Court and the earliest on the point, is binding on us; and, as it is not distinguishable from the present case, we must follow it rather than the later authorities, if they do in fact cover this case, which we are not satisfied that they do, because, in the subsequent cases, consequential relief was sought for. In this case, no consequential relief was sought and we must follow the decision in *Zinnatunnessa Khatun* v. *Govindra Nath Mukerji* (9).

In the result, the present Rule must be made absolute. The order complained against is accordingly set aside and the Subordinate Judge is directed to admit the plaint on a Court-fee of Rs. 10. The defendant must pay to the plaintiff her costs in this Rule. We assess the hearing-fee at two gold *mohurs*.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 50 OF 1915.

February 2, 1916.

Present:—Mr. Lindsay, J. C.

RAM KARAN—DEFENDANT—APPELLANT

versus

ACHAL SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 7, 8—Payment of money—Possession—Oudh Rent Act (XXII of 1886), s. 108 (15)—Suit for profits accrued between date of deposit of mortgage-money and delivery of possession, maintainability of.

Where certain co-sharers, who had mortgaged with possession their share of the property to a *lambardar*, got back its possession by virtue of a redemption decree and then sued the *lambardar* in the Rent Court for their share of the profits, which arose out of the collections of rents made by the *lambardar* during the period intervening between the dates of the deposit of money mentioned in the preliminary decree and the delivery of possession as directed by the final decree, and about which there had been no accounting in the redemption suit:

Held, that the co-sharers were entitled to the profits claimed by them, inasmuch as their right to the profits accrued from the date on which they deposited the money for redemption in Court, and not from the date on which they obtained possession of the mortgaged share. [p. 800, cols. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 16th September 1915, modifying that of the Assistant Collector, Unao, dated the 15th July 1915.

Babu *Girja Saran Lal* holding brief of Babu *Puttoo Lal*, for the Appellant.

Babu *Hargovind Das*, for the Respondent.

JUDGMENT.—This is an appeal which has arisen out of a suit brought to recover profits for the years 13 9 *Fasli* to 1321 *Fasli*. The appellant in this Court is the defendant Ram Karan, and the point which is raised here on his behalf is that the plaintiffs were not entitled to recover profits for the *kharif kist* of the year 1319 *Fasli*. In order to understand this plea it is necessary to state that up till the month of March 1911 Ram Karan, the appellant, was the mortgagee of the plaintiffs' share in this village. In March 1911 a preliminary decree for redemption was passed and the money payable by the plaintiffs in that suit was to be deposited in or before the month of September. As a matter of fact the money was paid into Court in August 1911. It is true that proceedings under Order XXXIV, rule 8, were not taken till a later date and that actual possession over the share was not delivered to the plaintiffs until a date in November, which fell after the date when the profits for the *kharif kist* became payable under the rules made by the Board of Revenue. Relying on this latter circumstance, the defendant-appellant pleaded that the plaintiffs were not entitled to have any profits for the *kharif kist* of 1319 *Fasli*. It is admitted here by Mr. Girja Saran Lal who is supporting the appeal on behalf of the appellant, that there was no accounting for *kharif* profits on the redemption suit in which the preliminary decree was passed in the month of March 1911. It follows, therefore, that what the defendant is

asking here is that, not having given any account for the *kharif* profits for the year 1319 in the redemption suit, he should also be allowed to refuse to account for them in the present suit which was brought in the Rent Court. *Prima facie* this would be most unjust to the plaintiffs. I agree with the view which is taken by the Court below, namely, that the plaintiffs' right to these profits accrued from the date upon which they deposited the money for redemption into Court. Under Order XXXIV, rule 7, the preliminary decree, which admittedly is a declaratory decree, lays down that a plaintiff in a redemption suit is entitled to possession as soon as he has deposited the money. It is clear to me, therefore, that the plaintiffs' title to the profits in the present case arose from the date on which the mortgage-money was put into Court. This is the only point which is raised in the appeal on behalf of the defendant-appellant and it must be determined against him. The appeal fails and is dismissed with costs.

Cross-objections have been filed by the plaintiffs. These relate to two points. The *first* point taken is that the learned District Judge was wrong in holding them liable to pay *haqq lambardari*. It is admitted that the defendant-appellant is the *lambardar* of the village. The law, as laid down in the Land Revenue Act, 1901, is that the *lambardar* is entitled to *haqq lambardari*, not exceeding 5 per cent., on the revenue subject to such rules as the Board of Revenue may make in this behalf. The case which was put up on behalf of the plaintiffs was that there was an agreement or arrangement in this village by which *haqq lambardari* was not paid. I have been referred in this connection to an order passed by an Assistant Commissioner in the year 1884 in the course of some partition proceedings relating to this village. It seems that there was some difficulty about making a satisfactory partition, but in the end the Assistant Commissioner recommended that two *mahals* should be made and that the *pattidars* should not pay *haqq lambardari*, the ordinary procedure being that the *pattidars* were to pay their land revenue direct to Government and not through the *lambardar*. There is nothing on the record to show whether this arrangement, which was proposed by the Assistant Commissioner and which it appears was submitted for sanction to the Deputy Commissioner, was ever, as a matter of fact, sanctioned. The next document to which I have been referred is an extract from the *dastur dehi* prepared at the time of the last revision of settlement. In this, it is said, that although *haqq lambardari* is to be at the rate of 5 per cent. no such dues are being paid for the time being. There is also another entry in this document which shows that the land revenue is paid through the *lambardar*. It has been pointed out that under the rules framed by the Board of Revenue in connection with the payment of *haqq lambardari*, it is recognized that the co-sharers in the village may agree among themselves not to pay it and that where such an agreement is made, the rule which entitles the *lambardar* to this remuneration does not operate. I am not at all satisfied that in the present case it can be held that there is any agreement which ousts the operation of the ordinary rule of law which is laid down in section 144 of the Land Revenue Act. It seems clear that the *lambardar* does pay revenue; that is stated in the *dastur dehi*, and that being the case, it would require very strong evidence on the part of the other co-sharers to satisfy me that he is not entitled to his dues. I think the Court below was right in making the plaintiffs-respondents liable to pay *lambardari* dues to the defendant-appellant.

The *other* point raised in connection with the cross-objections relates to a sum of Rs. 21. The plaintiffs apparently claim that they paid a sum of Rs. 21 as land revenue. As regards this contention the learned Judge remarks that there was no proof of such payment. I asked the learned Counsel who appears for the respondents to satisfy me that there was any proof of this payment. He refers to a document which was filed and which purports to be a receipt signed by a Tahsildar, but I have searched the record in vain for any proof to show that this paper was in fact signed by the Tahsildar or that this is a genuine document which might be accepted as proof that any such payment as is alleged has been made. The cross-objections also fail and are dismissed. With regard to costs I think the proper order is to make the parties bear their own costs in this Court.

Appeal and Cross-objections dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 374 OF 1916.
CRIMINAL REVISION PETITION No. 269 OF 1916.

August 11, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

In re T. S. KRISHNAMURTHI AYYER—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 222, 234, 439—Joinder of charges—Committal to Sessions on distinct charges—Form of order—Joint trial, illegality of Sessions Judge, discretion of, to try separately—High Court, jurisdiction of, to revise the committal order—Revision.

A Magistrate ordered that the accused do stand his trial before the Sessions Court on three distinct charges of breach of trust and of falsification of accounts in respect of each breach of trust. The accused moved the High Court in revision to quash the commitment on the ground that he could not be tried at one and the same trial for six charges:

Held, that the order was not materially defective as the charges were distinctly specified and that it would be premature for the High Court to interfere with it at that stage as the Sessions Judge could try separately each of the charges. If a joint trial on all the six charges was intended, it was illegal and opposed to sections 222 and 234, Criminal Procedure Code.

Kasi Viswanathan v. *Emperor*, 30 M. 328; 5 Cr. L. J. 341; 2 M. L. T. 177; 17 M. L J. 141; *Raman Behary Das* v. *Emperor*, 22 Ind. Cas. 729; 41 C. 722; 15 Cr. L J. 153; 18 C. W. N. 1152; *Emperor* v. *Mata Prasad*, 30 A. 351; A W. N. (1908) 152; 5 A. L. J. 450; 8 Cr. L. J. 4, followed.

In the matter of Govinda, 26 M. 592; 2 Weir 297, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Town 2nd class Magistrate, of Trichinopoly, in P. R. C. No. 3 of 1916.

Mr. *K. Bashyam Aiyangar*, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—At first sight, the committal order of the Magistrate reads as if he intended that all the six charges mentioned by him, namely, three of criminal breach of trust and three of falsification of accounts—all within a year—should be tried at one and the same trial by the Sessions Judge. Of course, if such a trial takes place before the Sessions Judge, namely, a trial upon all the six charges at one and the same trial, certainly it would be opposed to sections 222 and 234 of the Criminal Procedure Code. That is the view taken in all the High Courts. See *Kasi Viswanathan* v. *Emperor* (1), *Raman Behary Das* v. *Emperor* (2) and *Emperor* v. *Mata Prasad* (3). I have had the advantage of looking into the charges framed by the Magistrate and I find that he has framed three distinct charges, each one containing a case of criminal breach of trust and one of falsification of accounts in respect of that breach of trust; and the committal is in respect of those three charges.

Under section 222 of the Criminal Procedure Code, the Sessions Judge can exercise his discretion of trying separately each of the three charges. As pointed out by this Court in *In the matter of Govinda* (4), it would be interfering with the discretion of the Sessions Judge if this Court should at this stage interfere with the order of the Magistrate. That is not what is expected of the High Court.

There is, in my opinion, nothing wrong in the order of commitment. I dismiss the petition.

Petition dismissed.

V.R.P.

(1) 30 M. 328; 5 Cr. L. J. 341; 2 M. L. T. 177; 17 M. L J. 141.

(2) 22 Ind. Cas. 729; 41 C. 722; 15 Cr. L. J. 153; 18 C. W. N. 1152.

(3) 30 A. 351; A. W. N. (1908) 152; 5 A. L. J. 450; 8 Cr. L. J. 4.

(4) 26 M. 592; 2 Weir 297.

PATNA HIGH COURT.
FULL BENCH.

CRIMINAL REVISION No. 180 OF 1916.

August 7, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Roe.

PARMESSAR SINGH—1ST PARTY—APPLICANT

versus

KAILASPATI AND OTHERS—2ND PARTY—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 435 Revision—Power of High Court to interfere with order passed under s. 145, Criminal Procedure Code—Government of India Act, 1915 (5 & 6 Geo. 5, C.

PARMESSAR SINGH *v.* KAILASPATI.

61), *s.* 107—*Superintendence, meaning of—Jurisdiction—Irregularity—Prejudice, meaning of—Decree of Civil Court, effect of, in proceedings under s.* 145, *Criminal Procedure Code.*

High Courts in India which have no statutory power of superintendence cannot, under section 435 of the Criminal Procedure Code, send for the record of proceedings which are in substance and in fact proceedings under Chapter XII of the Code and were conducted by a Magistrate who had jurisdiction. [p. 804, col. 1; p. 804, col. 2.]

A Chartered High Court has power under section 107 of the Government of India Act to interfere with an order passed by a Magistrate under section 145 of the Criminal Procedure Code, where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction. It will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but it can and will interfere where there has been a material irregularity, which amounts to a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings. In order to establish prejudice it is not sufficient to show that there has been an erroneous decision on a question of law or fact, but it must be shown that the irregularity has prevented a party from having a fair trial. [p. 803, col. 2; p. 805, col. 1; p. 808, col. 2]

Krishna Kamini v. *Abdul Jubbar*, 30 C. 155; 6 C. W. N. 737 (F. B), approved.

Shiva Nathaji v. *Joma Kushinath*, 7 B. 341 at p. 363 (F. B.), referred to.

No hard and fast rule can be laid down that a Magistrate in proceedings under section 145 of the Code must give effect to a recent decision or proceeding of a Civil or Criminal Court. [p. 804, col. 1; p. 805, col. 2; p. 809, col 1.]

Kulada Kinkar Roy v. *Danesh Mir*, 33 C. 33 at pp. 47, 48; 10 C. W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 (F. B.), referred to.

Per *Sharfuddin, J.* - The High Court cannot under the Criminal Procedure Code interfere with any order passed by a Subordinate Magistrate in a proceeding under section 145 of the Code, but it can interfere under section 107 of the Government of India Act, 1915. [p. 804, col. 2]

In a proceeding under section 145 of the Code, a Magistrate is bound to respect a Civil Court decree; if he does not do so, he acts without jurisdiction. But he is not blindly to follow the decree. If after the passing of the decree the Magistrate finds on evidence that a party's possession has been disturbed or that possession has changed hands, he has jurisdiction to pass orders under the section. [p. 805, cols 1 & 2.]

But in all such cases the Magistrate is bound to refer to the Civil Court decree and give reasons in his judgment why he passes an order against the party who has obtained that decree. [p. 805, col. 2.]

Per *Roe, J.*—The power of superintendence in section 107 of the Government of India Act is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial, however erroneous in law or fact that decision may appear to be. [p. 808, col. 2.]

Lekhrajram v. *Debi Pershad*, 12 C. W. N. 678; 7 Cr. Cr. L. J. 499; *Nilmoni Singh Deo* v. *Taranath Mukerjee*, 9 C. 295; 2 C. L. R. 361; 4 Ind. Dec. (N. S) 846; 9 I. A. 174; 4 Sar. P. C. J. 392; 5 Shome L. R. 130; 6 Ind. Jur. 547; *DaCosta, J.* v. *M. M. Hall*, 5 W. R. Misc. App. 2 ; *Sudjaun Ostagar* v. *Promothonath Ghose*, 6 W. R. Misc. Rul. 77; *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee*, 9 W. R 309; *Gopal Singh* v. *Court of Wards on behalf of the Maharajah of Durbhangah*, 7 W. R. 430; *Greesh Chunder Lahooree* v. *Kasheessuree Debia*, 8 W. R. 26; *In the petition of Moonshee Oodiut Zuman*, 8 W. R. 109; *Nuffur Chunder Paul* v. *Nadiroonissa Beebee*, 9 W. R. 387; *Kasheenath Roy Chowdhry* v. *Shabitree Soonduree Dossee*, 11 W R. 402; *Tej Ram* v. *Harsukh*, 1 A. 101; *Manisha Eradi* v. *Siyali Koya*, 11 M. 20 (F. B); *Kristamma Naidu* v. *Chapa Naidu*, 17 M. 410 (F. B.); *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*, 26 C. 188; 3 C. W. N. 49; *Raj Chunder Sen* v. *Ganga Das Sen*, 31 C. 487 at p. 488; 1 A. L. J. 145; 8 C. W N. 442; 31 I. A. 71 (P. C.); 14 M. L. J. 147; *Kulada Kinkar Roy* v. *Danesh Mir*, 33 C. 33 at pp 47, 48; 2 C. L. J. 271; 2 Cr. L. J. 670; 10 C. W. N. 257 (F. B.); *Sukh Lal Sheikh* v. *Tara Chand Ta*, 33 C. 68; 2 C. L J. 241; 2 Cr. L. J. 618; *Malik Protap Singh* v. *Khan Mahomed*, 3 Ind. Cas. 861; 36 C. 944; 10 Cr. L. J. 385; 11 C. L. J. 50; 13 C. W N. 22 ; *Sardari Sha* v. *Hukum Chand*, 22 Ind. Cas 848; 41 C. 876; 18 C. W. N. 662; *Doulat Koer* v. *Rameswari Koeri*, 26 C. 625; 3 C. W. N. 461; *Kunja Behari Das* v. *Khetra Pal Singh*, 29 C. 203; 6 C. W. N. 38, referred to

Criminal application for revision of an order of the Sub-Divisional Magistrate, Barh.

Messrs. *Krishna Sahay* and *Kulwant Sahay*, for the Applicants.

Messrs. *P. K. Sen*, *Atul Krishna Ray* and *Abani Bhushan Mukherji*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This is an application under section 107 of the Government of India Act, 1915, for revision of an order of the Sub-Divisional Magistrate of Barh in proceedings taken under section 145 of the Code of Criminal Procedure, deciding that the respondents are in possession of 29 *bighas* of land, declaring that they are entitled to possession of the same until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction.

PARMESSAR SINGH *v.* KAILASPATI.

The applicants' case was and is that they purchased the land in execution of a decree obtained against one Kailaspati, and that it was his *khud-kasht* land, that by their purchase they acquired a right to *khas* possession of the land, and that in fact they were placed in possession by the Civil Court in June 1915.

The respondents' case was and is that the land was not the *khud-kasht* of Kailaspati but was *raiyati* land, that they were and are in possession of it as *raiyats*, that the applicants did not by their purchase acquire a right to *khas* possession, and that the applicants were not in fact placed in *khas* possession by the Civil Court.

Three points are urged on behalf of the applicants, namely, that the Magistrate was bound to respect and maintain the possession delivered by the Civil Court, that the respondents claimed only 21 *bighas* of the land and, therefore, the Magistrate was wrong in declaring them to be entitled to 29 *bighas*, and that there was no evidence to support the finding that the land was *raiyati* land.

A Special Bench was constituted to hear this application because it was said that great uncertainty prevailed as to the grounds on which this Court could interfere in cases of this kind, and it was felt that the practice of the Court should be settled.

Under section 107 of the Government of India Act, 915, "Each of the High Courts has superintendence over all the Courts for the time being subject to its appellate jurisdiction." These words take the place of similar words in section 15 of the Indian High Courts Act, 1861. The word "superintendence" in common parlance means supervision or care and oversight for the purpose of direction. In one case it was said that this provision authorised the High Courts to interfere for the purpose of remedying any wrong suffered by a party to a proceeding in a Court by reason of an erroneous finding of fact or law. If this provision bears this interpretation, the High Courts are by it invested with all the powers of an Appellate Court as well as with all the powers of a Court of Revision. A superintending jurisdiction has been exercised from ancient times by the King's Bench and Court of Chancery and it may, I think, be safely assumed that the Legislature when passing the Indian High Courts Act, 1861, did not intend to confer on the Indian High Courts a wider superintending jurisdiction than that enjoyed by the King's Bench or Court of Chancery.

I have examined a large number of reported cases, in addition to those cited during the arguments, and I have had the advantage of reading the judgments which my learned colleagues have prepared.

Here and there a discordant note may have been struck, but I consider that the decisions of the Chartered High Courts, and particularly those of the Calcutta High Court, taken as a whole, lay down the rule that a High Court can and will interfere in a case of the kind now before us where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction, that it will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but that it can and will interfere when there has been a material irregularity which amounts o a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings. In order to establish prejudice, it is not sufficient to shew that there has been an erroneous decision on a question of law or fact but it must be shewn that the irregularity has prevented a party from having a fair trial.

The object of the law is to prevent a breach of the peace by determining the actual possession of land etc., in dispute between certain parties who are likely on this account to break the peace [see *Krishna Kamini* v. *Ab lul Jubbar* (1)]. Section 145 of the Code of Criminal Procedure shews that the Legislature intended that the party dissatisfied with the order of the Magistrate should obtain a final decision of the question in dispute elsewhere. The High Court, therefore, as West, J., said in *Shiva Nath ujt* v. *Joma Kashinath* (2), will not promote uncertainty and restlessness by an overnice scrutiny of proceedings that aim at promptness rather than refinement. The policy of the Indian Legislature in this matter is shewn by the provision in section 435 of the Code of Criminal Procedure, 1898, which prevents the High

(1) 30 C. 155; 6 C. W. N. 737 (F. B.).
(2) 7 B. 311 at p. 333 (F. B.).

Courts as Courts of Revision under Chapter XXXII of the Code from sending for the record of proceedings under Chapter XII. The result is that High Courts in India which have no statutory power of superintendence cannot send for the record of proceedings which were in substance and in fact proceedings under Chapter XII of the Code and were conducted by a Magistrate who had jurisdiction.

In the application of the rule which the High Courts have laid down for themselves in matters of this kind there have no doubt been differences of opinion. For instance at one time it was said that a High Court could examine the information that there was a likelihood of a breach of the peace, on which the Magistrate initiated the proceedings, with a view to testing its reliability or sufficiency, but it is now well settled that the sufficiency of the information is entirely a matter for the Magistrate and that the High Court will not require it to be furnished to him in any particular form. There is a reported case in which the refusal of a Magistrate to examine a host of witnesses on each side seems to have been treated as equivalent to a refusal to examine any witnesses at all. The better opinion seems to be that a refusal of the latter kind might be overruled by the High Court as a grave irregularity resulting in obvious prejudice to the parties, but that it is within the Magistrate's discretion to refuse to allow parties to produce a host of unnecessary witnesses. Judges have at times attempted to lay down a hard and fast rule to the effect that a Magistrate in proceedings under section 145 of the Code of Criminal Procedure must give effect to a recent decision or proceeding of a Civil or Criminal Court. It appears, however, that no such rule can be laid down [see the remarks on this subject made by Rampini and Mookerji, JJ., in *Kulada Kinkar Roy* v. *Danesh Mir*(3)]. Difficulties have also arisen regarding the powers of the Magistrate to add parties, the necessity for initiating fresh proceedings when this is done, and the power of the Magistrate to decide a question of possession between disputing parties, when other persons not parties to the proceedings or concerned in the dispute are interested in part of the land. The Full Bench decision in *Krishna Kamini* v. *Abdul Jubbar* (1) has set at rest several of these questions.

In the great majority of cases, however, the Courts have felt little difficulty in applying the rule set out above and that is the rule which, in my opinion, this Court should follow.

To come to the facts of the case now before us, the Magistrate has distinctly found that *khas* possession did not pass to the applicants under the proceedings of the Civil Court relied upon by them. We must accept this finding as correct. The second contention is not borne out by the record and as regards the third it is sufficient to say that there is evidence which has been believed by the Magistrate that the land was *raiyati* land. It is not suggested that the Magistrate exceeded his jurisdiction or that his proceedings were irregular. In my opinion the applicants have failed to establish any ground on which this Court should interfere in exercise of its power of superintendence.

I would dismiss this application.

SHARFUDDIN, J.—This Special Bench has been formed for the purpose of deciding whether the High Court has jurisdiction to interfere with an order passed under section 145, Code of Criminal Procedure, by a competent Magistrate.

Section 435 of the Code vests in the High Court certain powers of supervision. It may call for and examine the record of any proceeding before any Criminal Court for the purposes of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order and as to the regularity of any proceedings of inferior Courts.

There is no doubt that the provisions of this section give extensive powers to the High Court, but under clause (3) of that section it is provided that proceedings under Chapter XII are not proceedings within the meaning of that section. It is clear that the High Court cannot under the Code interfere with any order passed by a Subordinate Magistrate in a proceeding under section 145 of the Criminal Procedure Code. But under section 107 of the Government of India Act of 1915, a general power of

(3) 33 C. 33 at pp. 47, 48; 2 C. L. J. 271; 2 Cr. L. J. 670; 10 C. W. N. 257 (F. B.).

superintendence over the Subordinate Courts has been given to the High Court, which is somewhat analogous to the power of the King's Bench Division in the Supreme Court in England to interfere by mandamus. The literal meaning of the expression to "superintend" is to have oversight of. The meaning given in the dictionary is to oversee with powers of direction.

On a review of the case-law on the subject I have no doubt that in the exercise of its power of superintendence a Chartered High Court is justified in interfering with an order under section 145 of the Criminal Procedure Code if the order complained of has been passed without jurisdiction, and the High Court may also interfere in cases of grave and material irregularity where the party has been prejudiced or there has been a failure of justice. For instance if a Magistrate refuses to examine the witnesses cited by the parties, he acts without jurisdiction and in such a case this Court ought to interfere.

In the present case the grievance is that there was a Civil Court order in favour of the applicants which the lower Court has refused to respect and has passed an order directly in conflict with it. An order passed under section 145 is in its nature a summary order and it is a preventive measure. The Magistrate gets jurisdiction if there is an apprehension of a breach of the peace with regard to "any land or water," and the party found to be in possession may be declared entitled to remain in possession until evicted therefrom by a competent Court. A Civil Court decree in favour of a party will become infructuous if the Magistrate interferes with it, but the Magistrate is not bound to maintain it blindly. If after the passing of the decree the Magistrate finds on evidence that the party's possession has been disturbed or that the possession has changed hands he has jurisdiction, but this will be a matter of fact which the Magistrate has to decide. If he comes to a finding, which would be a finding of fact, that such possession has been disturbed since the decree was passed, he has jurisdiction in a proceeding under section 145 to pass orders irrespective of the Civil Court decree. In the case of a Civil Court decree of very recent date where there is no evidence to show disturbance or change of possession since the decree, the Magistrate is bound to respect the Civil Court decree and if he does not do so he acts without jurisdiction.

In the present case Parmessar Singh purchased at an auction in execution of a Civil Court decree the property of one Kailashpati Sahai in a *mauzah*. This was on the 2 rd January 1915 and on the 3rd June he obtained delivery of possession through Court. His case was that what he purchased was an area of 58 *bighas*, that the whole area was *khud-kasht* of the outgoing *malik* and that he was entitled to retain possession of the entire area; on the other hand the other party, consisting of some tenants, contended that out of the entire area 29 *bighas* were *raiyati* land and that they were *raiyats* of those lands and were in possession. It was on the initiation of the purchaser that proceedings under section 145 were instituted by the Magistrate. The Magistrate, after the perusal of written statements of both sides, recording evidence and hearing arguments, passed an order against the applicant. The applicant now contends that we ought to interfere with that order on the ground that the Magistrate had failed to respect the delivery of possession by the Civil Court. As already observed, it is the duty of a Magistrate to consider whether in the circumstances of a particular case and on the evidence before him he should or should not maintain the order of a Civil Court. I am of opinion that on that ground only we cannot interfere, but at the same time I am of opinion that in all such cases a Magistrate is bound to refer to the Civil Court decree and give reasons in his judgment why he passes an order against the party who has obtained that decree. There are other circumstances as well in which the Court ought to interfere. It is impossible to give an exhaustive list, but I may refer to some of them. For example, (1) if a Magistrate passes an order not on the evidence recorded but only on a perusal of the written statements, or (2) if he refuses to summon witness, or where he has already issued summonses he refuses without reason to issue fresh summonses on the non-appearance of the witnesses, or (3) if he acts on his

own information, this Court could interfere.

In the present case nothing has been done by the Magistrate which can be called without jurisdiction. I am, therefore, of opinion that the application should be rejected

R. E, J.—On the 23rd January 1915, Parmessar Singh purchased at auction-sale in execution of a Civil Court decree the 16-annas proprietary interest of Kailaspati Sahai in *Mauzah* Aima.

On the 3rd June, he obtained delivery of possession.

He contends that included in the proprietary interest was the *khud-kasht* right to cultivate the whole of the land, 58 *bighas*, in which possession was delivered to him by the Civil Court.

He was obstructed in an attempt to enter into cultivating possession of 29 *bighas* out of these 58 *bighas* and instead of going to the Civil Court under Order XXI, rules 97 and 98, he asked the Criminal Court to issue an order under section 144 of the Criminal Procedure Code.

The Magistrate after hearing the parties drew up proceedings under section 145 and after taking evidence declared that certain tenants, whom Parmessar Singh alleged were mere dummies of Kailaspati Sahay, were in possession of the 29 *bighas* in dispute.

Parmessar Singh now asks this Court to revise these proceedings, on the ground that the Civil Court having delivered possession to him of the property in dispute and a Revenue Court having made a decision in his favour, the Criminal Court should not have declared the opposite party to be in possession.

Before considering the case on its merits I propose to consider what jurisdiction this Court has over proceedings under section 145.

It is conceded at the Bar that we can only interfere under section 107 of the Government of India Act in the exercise of our powers of superintendence.

In *Lekhrajram* v. *Debi Pershad* (4) Woodroffe, J., states that there is no form of judicial injustice which the Court, if need be, cannot reach under this power but in the commentaries of Messrs. Woodroffe and Ameer Ali on the Code of Civil Procedure, section 115, it is conceded that certain limitations have been laid down which will ordinarily govern the Courts. That in the exercise of its powers of superintendence a Chartered High Court may interfere, if the order complained of is one passed without jurisdiction, is certain [*Nilmoni Singh Deo* v. *Taranath Mukerjee* (5)]. It is necessary only to enquire within what limitations this power has ordinarily been exercised by the four Chartered High Courts of India.

When these Courts were established they had under section 35 of Act XXIII of 1861 no power of revision over Courts of first instance. In the early Volumes of Sutherland's Weekly Reporter there is no suggestion that the Fort William Court felt the need of such powers, until on the 13th February 1866, the case of *DaCosta J.* v. *M. M. Hall* (6) came before a Full Bench composed of Peacock, C. J., and Bayley, Seton-Karr, Shambhu Nath Pandit and A. G. Macpherson, JJ. The issue was, in a sale in execution, in which a Court of first instance has made an order outside its jurisdiction, can the High Court set that order aside? The decision was:—"We have gone carefully through the Charter and there is nothing in it which induces the Court to think that it has any power to give relief to the parties."

In *Subjaun Ostagar* v. *Promothonath Ghose* (7), on the 31st August 1866, Mr. Justice Jackson declined to exercise judicially a power of superintendence.

Before Norman and Seton-Karr, JJ., on the 25th January 1867, came a case in which a Sadar Amin had insisted upon adding unnecessary parties to the record and on refusal by the plaintiff to add those parties had dismissed his suit. Both Judges were of opinion that the action of the Sadar Amin was not justified by law. They disagreed upon the question whether they had power to interfere.

Seton Kerr, J., having refused to sign

(4) 12 C. W. N. 678; 7 Cr. L. J. 291.

(5) 9 C. 295; 4 Ind. Dec. (N. S.) 916; 12 C. L. R. 361; 9 I. A. 174; 4 Sar. P. C. J. 392; 5 Shome L. R. 130; 6 Ind. Jur. 547.

(6) 5 W. R. Misc. App. 25.

(7) 6 W. R. Misc. Rul. 77.

the order made by Norman, J., that order was an order by a single Judge. Under Letters Patent it came before Peacock, C. J., and Jackson and A. G. Macpherson, JJ.

On the 25th February 1868 these three Judges agreed [*Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (8)], that under section 15 of the High Courts Act they had power to interfere.

Peacock, C. J., and A. G. Macpherson, J., were parties to the decision in *DaCosta J.* v. *M. M. Hall* (6). Jackson, J., had denied his power to interfere in *Subjan Ostagaur* v. *Promothonath Ghose* (7).

Sir Barnes Peacock gives no explanation of his change of front save that it had been suggested by one of his learned brothers whether if the Sadar Amin had made an order that the suit should not be heard for 20 years, such an order would be binding. Mr. Justice A. G. Macpherson merely concurred with the Chief Justice. Sir Louis Jackson wrote a separate judgment. He too gave no reasons for his altered view.

Their reasons are, I think, to be found in *Gopal Singh* v. *Court of Wards on behalf of the Maharajah of Darbhangah* (9). All that could be said on the subject had been said there by Mr. Justice Norman on the 2nd May 1867, and had been followed on the 7th June 1867 by Mr. Justice Jackson [*Greesh Chunder Lahooree* v. *Kasheessuree Debia* (10)] and on the 9th June [*In the petition of Moonshee Oodiut Zuman* (11)] Mr. Justice Jackson had doubted the correctness of the Full Bench decision in *DaCosta J.* v. *M. M. Hall* (6). For the reason possibly that the two Judges sitting with Norman, J., refused in that case to exercise the power of superintendence over a Revenue Court, this judgment of Norman, J., has never been referred to in subsequent decisions. Nonetheless, it had, I believe, most important results and is itself of such interest that this extract at least is worthy of reproduction. Norman, J.,—"The term 'superintendence' is one not only quite intelligible in itself, but it has a legal force and signification which are perfectly well-known to the Legislature.

"In 3 Blackstone's Commentaries, page 110, it is pointed out that 'it is the peculiar business of the Court of King's Bench to *superintend* all inferior tribunals, and therein to enforce the due exercise of those judicial and ministerial powers with which the Crown or Legislature have invested them, and this, not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.' * * * *

"In Bacon's Abridgment, title Prohibition, it is said: 'As all external jurisdiction, whether ecclesiastical or civil, is derived from the Crown, and the administration of justice is committed to a great variety of Courts, hence it has been the care of the Crown that these Courts keep within the limits and bounds of their several jurisdictions prescribed to them by Laws and Statutes of the Realm.' 'The superior Courts at Westminster, *having a superintendence* over all inferior Courts, may, in all cases of innovation, award a prohibition. In this the power of the Court of King's Bench has never been doubted, being the superior Common Law Court of the Kingdom.' * * * * *

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. *If the inferior Court, after hearing the parties, comes to an erroneous decision, either in law or fact, on a matter within its jurisdiction, the Court having power of superintendence never interferes.* The only mode of questioning the propriety of such a decision is by appeal."

This strict definition was emphasised by Sir Louis Jackson, on the 25th March 1868 in *Nuffur Chunder Paul* v. *Nadiroonissa Beebee* (12), and on the 28th April 1869 in *Kasheenath Roy Chowdhry* v. *Shabitree Soonduree Dossee* (13) Jackson, J., and Markby, J., approved these limitations. Thenceforth and for many years the Fort William Court observed strictly the limitations set by Mr. Justice Norman to its power of superintendence.

In *Tej Ram* v. *Harsukh* (14) it will be seen

(8) 9 W. R. 209.
(9) 7 W. R. 430.
(10) 8 W. R. 26.
(11) 8 W. R. 109
(12) 9 W. R. 387
(13) 11 W. R. 402.
(14) 1 A. 101.

that the Allahabad Court set itself to follow strictly the rules of superintendence laid down by Mr. Justice Norman and Mr. Justice Jackson.

The leading case on superintendence in Bombay is that of *Shiva Nathaji* v. *Joma Kashinath* (2). This is a Full Bench case in which Raymond West, J., laid down seven broad principles upon which the High Court would interfere under section 622 of the old Code of Civil Procedure read with section 15 of the Charter Act. The following passage in the judgment indicates that West, J., regarded superintendence from much the same point of view as Norman, J.

"In such a conflict of opinion as has arisen on the subject we are now considering, it may be useful to see how similar questions have been dealt with by the Courts in England. Their decisions can, of course, only afford analogies, not precedents, for Courts so differently constituted as those in India: but these analogies point to principles of general application and thus repay our attentive consideration. A superintending and visitatorial jurisdiction has been exercised from ancient times by the Queen's Bench and by the Court of Chancery. The powers of the former Court have been executed through the writs of mandamus and prohibition." I have not been able to find any case in which the Madras Court in its early days had recourse to the Charter Act. That Court was content with section 622 of the Code of 1877 [*Manisha Eradi* v. *Siyali Koya* (15), *Kristamma Naidu* v. *Chapa Naidu* (16)] and the invariable practice was to interfere only when there had been an error in jurisdiction.

We have, therefore, in all the earlier decisions a *cursus curiæ* throughout the Chartered Courts. The High Court would interfere when the Subordinate Court had acted without jurisdiction, or when, having jurisdiction, the Subordinate Court h d refused to exercise it or made any colourable pretence of exercising it.

That modern decision, in Calcutta is in accordance with the early view, is clear from *Hurhullubh Narain Singh* v. *Luchmeswar Prosad Singh* (17), *Raj Chunder Sen* v. *Ganga Das Seal* (18), *Kulada Kinkar Roy* v. *Danesh Mir* (3), *Sukh Lal Sheikh* v. *Tara Chand Ta* (19), *Malik Protap Singh* v. *Khan Mahomed* (20) and *Sardari Sha* v. *Hukum Chand* (21). Of these I would quote only a few lines from Maclean, C. J.'s judgment in the Full Bench case of *Sukh Lal Shaikh* v. *Tara Chand Ta* (19): "Section 15 of the Charter Act, in giving this Court a general power of superintendence over the Subordinate Courts, vests in it a power somewhat analogous to that of the King's Bench Division in the Supreme Court in England to interfere by mandamus."

I am satisfied upon this investigation that the power of superintendence is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction, or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity had been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial, however erroneous in law or fact that decision may appear to be.

The only question for decision in the case before us is: Had the Magistrate jurisdiction to make an order under Chapter XII? There is no question of any irregularity in the form of his proceedings.

(15) 11 M. 220 (F. B.).
(16) 17 M. 410 (F. B.).

(17) 26 C. 183; 3 C. W. N. 49.
(18) 31 C. 487 at p. 488; 1 A. L. J. 145; 8 C. W. N. 412; 31 I. A. 71 (P. C.); 14 M. L. J. 147.
(19) 33 C 68; 2 C. L. J. 241; 2 Cr. L. J. 618.
(20) 3 Ind. Cas. 861; 36 C. 994; 10 Cr. L. J. 385; 11 C. L. J. 50; 13 C. W. N. 1221.
(21) 22 Ind. Cas. 848; 41 C. 876; 18 C. W. N. 662.

KRISHNA, KERING & CO. v. J. R. MILLER.

From the petition of Parmessar Singh himself it is clear that there was a likelihood of the breach of the peace. The Magistrate had materials before him upon which he had jurisdiction to take action under Chapter XII. His proceedings were in order. His jurisdiction under Chapter XII was complete. In the allegation that the Magistrate's orders deal with more land than is covered by the claim of the opposite party, there is no substance whatever. Our attention has been called to the case of *Doulat Koer* v. *Rameswari Koeri* (22), in which Prinsep, J., and Wilkins, J., held that a Magistrate had no jurisdiction to interfere in cases in which the Civil Courts had recently made a pronouncement in respect of title. This ruling was followed in *Kunja Behari Das* v. *Khetra Pal Singh* (23).

On the strength no doubt of these decisions the Calcutta High Court in *Atul Hazra* v. *Uma Charan Chazgdar* (24) set aside as without jurisdiction an order made in similar circumstances. But that this is not the universal practice of the Calcutta Court is clear from the case of *Kulada Kinkar Roy* v. *Danesh Mir* (3): "There is no inflexible rule of law that a Magistrate in deciding the question of possession under section 145 of the Criminal Procedure Code is concluded by every previous order of a Civil or Criminal Court relating to the subject of dispute and that the weight to be attached to any such previous order must depend upon the facts and circumstances of the particular case."

With this view I entirely agree.

The weight to be attached to each order is a question for the consideration of the Magistrate and as laid down in *Shiva Nathaji* v. *Joma Kashinath* (2), "The Court will not substitute its own appreciation of evidence or its own judgment thereon for the determination of the inferior Court in any matter committed by the Legislature to the discretion of such Court."

I am of opinion that we have no authority to go into the merits of the case.

I would, therefore, reject this application.

Application dismissed.

(22) 26 C. 625; 3 C. W. N. 461.
(23) 29 C. 208; 6 C. W. N. 3[illegible].
(24) 38 Ind. Cas. 822; 17 Cr. L. J. 18[illegible]; 20 C. W. N. 796.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 2 OF 1916.

SUIT NO. 818 OF 1915.

August 24, 1916.

Present:—Sir Stanley Batchelor KT., Acting Chief Justice, and Mr. Justice Heaton.

KRISHNA, KERING & Co.,—PLAINTIFF

versus

J. R. MILLER—DEFENDANT.

Criminal Procedure Code (Act V of 1898), s. 195 cl. (6)—Sanction, expiry of time for currency of—Extension of time—High Court, power of.

The High Court has power to extend the time of a sanction to prosecute, even after the expiry of the six months for which it remains current. [p. 810, col. 1]

Kali Kinkar Sett v. *Dinobandhu Nandy*, 32 C. 379; 9 C. W. N 321, not approved.

Karuppana Servagaran v. *Sinna Gaundan*, 26 M. 480; 2 Weir 201, followed.

Mr. *F. S. Taleyarkhan*, for the Defendant-Applicant.

Mr. *Strangman*, for the Plaintiff-Opposite Party.

JUDGMENT.

BATCHELOR, AG. C. J.—This is an application to extend the time for the prosecution of the appellant in respect of an offence of giving false evidence said to have been committed during the hearing of a suit before Mr. Justice Beaman. Sanction was granted under section 195 of the Criminal Procedure Code on the 6th December 1915, and by virtue of sub-section (6) of that section, the sanction could not remain in force for more than six months from the date on which it was given. Consequently the period of the currency of the sanction has expired several months ago. It is, I think, clear that if we have the power now to extend the time, we ought to extend it, seeing that the responsibility for the delay which has occurred does not rest with the present respondent, but with the appellant himself. But it is contended that, under section 195, it is not competent to this Court to make an order extending the period, when in fact the six months' time has elapsed. When that time has elapsed, it is said, there is nothing to extend, and support for this contention is found in the observations of the Calcutta High Court in the case of *Kali Kinkar Sett* v. *Dinobandhu Nandy* (1). Those

(1) 32 C. 379; 9 C. W. N. 321.

observations were, however, admittedly *obiter*, and the contrary view appears to have been accepted by the Madras High Court: see the decision in *Karuppana Servagaran* v. *Sinna Goundan* (2). I am conscious of the weight of Mr. Strangman's argument that the words of section 195 of the Criminal Procedure Code may be contrasted, to his advantage, with the words of section 12 of the Arbitration Act (IX of 1899) and paragraph 8 of the Second Schedule of the Code of Civil Procedure. In these two latter provisions power is given in express terms to extend the original period at any time even after the lapse of that period. In the Criminal Procedure Code it must be admitted that the power is not so expressly conferred, and the words are susceptible of the narrower construction for which Mr. Strangman presses. At the same time, as it seems to me, there is nothing in the words which requires that construction, and they are equally patient of the more liberal reading. I am in favour of the more liberal reading, because, in my opinion, the contrary view, not being imposed by the words of the Act, would tie the hands of the Court very inconveniently, would produce inequality and even caprice in actual results, and would lead to graver inconveniences in practice than it is likely that the Legislature could have contemplated. It is not denied that if the application to extend the time, though made during the currency of the sanction, were heard and decided after the expiry of the original period, the Court would have power to grant it; and I do not think that the Court is necessarily deprived of jurisdiction merely because the six months had expired before the application was made. I think, therefore, that we have the power now to extend the time *nunc pro tunc*, and I would extend it by a further period of one fortnight from this date. Notice absolute. No order as to costs.

HEATON, J.—I agree.

Notice absolute.

(2) 26 M. 480; 2 Weir 201.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 347B OF 1915.

February 15, 1916.

Present:—Mr. Justice Twomey.

TOK GYI—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code Act XLV of 1860), *ss.* 441, 447—*Criminal trespass—Possession, physical and juridical, distinction between—Notice of ejectment, failure to obey, consequences of—Trustee, possession of.*

The possession contemplated under section 441, Indian Penal Code, is actual physical possession and not merely a power of control such as a trust scheme vests in a trustee. Where property is held in actual physical possession by one person and in juridical possession by another, it is the person in actual physical possession whose feelings have to be considered under section 441, Indian Penal Code. Failure to obey a notice of ejectment does not of itself constitute criminal trespass. [p. 811, cols. 1 & 2.]

Mr. *Robertson*, for the Applicant.

Mr. *Eggar*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused, Tok Gyi, keeps cattle under one of the Kyaungs in Thayettaw Kyaungdaik, Godwin Road. This is a group of many Kyaungs on a piece of land measuring 12 acres, which was granted by Government in 1862 in trust for religious purposes. The prosecution for criminal trespass was instituted by U Pyinnya and U Pyinnya Thiha, the present trustees of the Kyaungdaik, who are said to have been elected under a new trust scheme lately sanctioned by the Chief Court.

The allegations are that the accused was ordered by the trustees, in June and September last year, to leave the precincts of the Kyaungdaik, that he refused to go, that his presence with his cattle in the Kyaungdaik is an annoyance to the monks in general, and that he is staying on with the intention of insulting and annoying the trustees and other monks.

The Eastern Sub-Divisional Magistrate found these allegations proved and convicted Tok Gyi of an offence under section 447, Indian Penal Code, and sentenced him to a fine of Rs. 10 or rigorous imprisonment for 10 days in default.

It is admitted by the trustees that the accused has been keeping his cattle in the Kyaungdaik for 10 or 15 years and that he has done so with the consent of the Pongyi

under whose Kyaung the cattle are kept. The trustees say that some of the Pongyis are trading in cow-dung and taking money from the cattle-owners. It is admitted that no complaints have been made by other monks in the Kyaungdaik of annoyance owing to the keeping of the cattle.

The Eastern Sub-Divisional Magistrate remarks that it is against the Buddhist Ecclesiastical Law for laymen and their property to remain within the precincts of monastic land, and that a Pongyi who tolerates such a state of affairs ought to be ashamed of himself.

But the only question in this case is whether the accused has committed the offence of criminal trespass under the Indian Penal Code.

The trustees who preferred the complaint are admittedly not in physical possession of the portion of the Kyaungdaik where the accused keeps his cattle, but are only in physical possession of their own individual Kyaungs. The trustees have been invested with certain powers and duties under the trust scheme and, according to one of its clauses, they may evict any laymen or women residing in the Kyaungdaik. But such eviction must be according to law, and the trust scheme could not and does not empower the trustees to issue eviction orders disobedience of which would amount to criminal trespass. Criminal trespass is an offence committed by entering into or remaining on property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession. The possession contemplated is actual possession and, in my opinion, is not merely a power of control, such as the trust scheme vests in the trustees. As trustees they are the successors-in-title of the original trustees who received the grant from Government in 1862, but the possession of this document does not necessarily imply actual possession of the individual Kyaungs within the Kyaungdaik. Mr. Eggar, the learned Assistant Government Advocate, argues in support of the conviction that the trustees are in juridical possession of the whole Kyaungdaik, but it is not disputed that the Pongyi under whose Kyaung the accused's cattle are kept is in actual physical possession of that Kyaung and its site, and where property is held in actual physical possession by one person I think that is the only person whose feelings have to be considered under section 441, Indian Penal Code. Otherwise we might have the juridical possessor prosecuting for criminal trespass and the actual possessor compounding the offence under section 345, Code of Criminal Procedure, a result which, in my opinion, could never have been contemplated by the Legislature.

I think it is clear, moreover, that the accused did nothing to insult or annoy either the trustees or the Pongyi in actual possession. The latter admittedly authorised him to keep the cattle at the Kyaung. As regards the trustees and other Pongyis, the accused has only done what he has been doing for 10 or 15 years without let or hindrance and without complaint. It is not contended that his original entry was unlawful and the mere fact that notice of ejectment was issued by the trustees does not convert him into a criminal trespasser.

However undesirable it may be that cattle-keepers and other laymen should remain within the Kyaungdaik precincts, it is clear that the trustees have not taken the right course to remedy this state of affairs by prosecuting those undesirable denizens for criminal trespass.

The conviction and sentence are set aside and the fine paid by the accused Tok Gyi will be refunded to him.

Revision accepted; *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 515 OF 1916.

July 25, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

MOHAMMAD KAZI AND OTHERS—ACCUSED —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 224, 225—Escape from custody—Obstructing apprehension—Opium Act (I of 1878), ss. 9, 15—Arrest by Excise Officer, of a person selling a black substance alleging it to be opium, if legal.

An Excise Officer acting under section 15 of the Opium Act has lawful authority to arrest a person who sells a black substance (not opium), alleging it

to be opium, though its possession is not an offence under section 9 of the Act. Consequently the escape of such a person as well as his rescue from the custody of the Excise Officers are offences under sections 224 and 225, Indian Penal Code, respectively. [p. 815, col. 1]

Mr. *S. R. Das* and Babu *Chandra Sekhar Sen*, for the Petitioners.

Mr. *Camell*, Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case the first accused Mohammed Kazi was charged with an offence under section 224 of the Indian Penal Code, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or escaping from any custody in which he is lawfully detained for any such offence; and the other accused were charged with an offence under section 225, that is to say, with intentionally offering resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescuing any other person from any custody in which that person is lawfully detained for an offence. All of them were also charged under section 147 of the Indian Penal Code, the common object alleged being to rescue Mohammad Kazi from lawful custody.

Now, the facts of the case may shortly be recapitulated as follows: The accused Mohammad Kazi was suspected of being in possession of opium contrary to the Opium Act, and certain persons were put forward by the Excise Officer as apparent purchasers of opium from the accused No. 1 Mohammad Kazi, and in pursuance of such apparent purchases, certain balls of black substance changed hands. Thereupon the first accused Mohammad Kazi was arrested by the Excise Officer. On the way to the place where the *Sampon* was moored, the Excise Officer and the others who were with him were attacked by a body of men who were carrying *lathis*; and that body of men included the accused other than Mohammad Kazi. The result was that the accused No. 1 was rescued by force.

A case was then made against the first accused Mohammad Kazi under section 9 of the Opium Act, alleging that he was unlawfully in possession of opium. He was convicted. On revision by this Court, that conviction was set aside on the ground that the substances, which Mohammad Kazi purported to sell to those persons who were put forward by the Excise Officer, was not in fact opium; the black substance which was sold did contain a very small percentage of opium; but we came to the conclusion, that what he had sold and had been in possession of, was not in fact opium within the meaning of the Act; and consequently the conviction against Mohammad Kazi under section 9 of the Act was set aside.

What he had really been doing, as far as I can understand the facts, was that he was attempting to pass off this black substance as opium, purporting to sell it to the persons who were put forward by the Excise Officer as the apparent purchasers.

Then the present charge came to be investigated. The charge against the first accused was under section 224 and against the other accused under section 225, and against all of them under section 147.

A point was then taken that Mohammad Kazi not having committed any offence under section 9 of the Opium Act was not in lawful custody at the time of his rescue.

Now, the Excise Officer was acting under section 15 of the Opium Act. That section provides first of all that any officer of the said department "may seize, in any open place or in transit, any opium or other thing which he has reason to believe to be liable to confiscation under section 11 or any other law for the time being in force relating to opium" and "detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him and any other persons in his company." It was the latter portion of the section under which the Excise Officer acted, namely, "if such person has opium in his possession, arrest him and any other persons in his company." Mohammad Kazi had purported to sell what he alleged was opium, and consequenty the Excise Officer arrested him acting under section 15 of the Opium Act If the substance had in fact been opium, Mohammad Kazi would have been guilty of an offence under section 9 of the Act; and there could be no doubt whatever

about the legality of the Excise Officer's act in arresting him. How then can Mohammad Kazi, being himself responsible for his arrest by alleging that the substance which he was selling was opium, turn round and say that his arrest was illegal alleging that what he was selling was not opium, although at the time he made the sale he passed it off as opium? To give effect to such an argument would lead to a conclusion which is ridiculous. Consequently we are of opinion that the arrest was legal and that Mohammad Kazi was in lawful custody at the time of the rescue.

In support of this conclusion I may refer to the case of *Deo Sahai Lal* v. *Queen-Empress* (1), where Mr. Justice Pratt and Mr. Justice Brett, said: "Having regard to the contest" (they are dealing with section 224) "we think that the words 'for any such offence' must mean 'for any offence with which he is charged or of which he has been convicted.' So that it would be an offence for a man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not be convicted of such latter offence."

For these reasons I am of opinion that the first accused was in lawful custody, he was lawfully detained and when he effected his escape he committed an offence under section 224.

It follows from this that the other accused who rescued the first accused from the above-mentioned lawful custody were guilty of an offence under section 225. The learned Judge in concluding his judgment said this: "The evidence shows that Mohammad Kazi, after escaping from the hold of the two excise peons, joined in beating the excise men. The other appellants were members of an unlawful assembly with the common object of rescuing Mohammad Kazi from lawful custody and joined in inflicting injuries on members of the excise party in order to effect and to safeguard his escape. The convictions are, therefore, within the scope of sections 224, 225 and 147 of the Indian Penal Code. The attack was of a dangerous nature and shows that the perpetrators have little regard for law and order. The sentences are not too severe." I entirely agree with this summary of the learned Judge.

(1) 28 C. 253; 5 C. W. N. 289.

For these reasons I think that this Rule should be discharged.

WALMSLEY, J.—I agree.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 260 OF 1916.
(CRIMINAL REVISION PETITION NO. 215 OF 1916.)

August 17, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

In re KAKUMARA ANJANEYALU AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 499, Exceps. (8) (9)—Defamation—Complaint to Police Constable—Privilege—Burden of proof—Evidence Act (I of 1872), s 105.

A complaint to a Police Constable is not privileged. The rule of law that parties before the Court, Counsel and witnesses are absolutely privileged, cannot be extended to the case of complaints to a Police Constable. [p. 814, col. 2.]

Muthusawmi Naidu v. *Emperor*, 14 Ind. Cas. 757; 37 M. 110 at p. 111; 11 M. L. T. 431; 13 Cr. L. J. 293, distinguished.

An accused person, who in a charge of defamation pleads privilege under exception 8 of section 499, Indian Penal Code, has to establish affirmatively two ingredients which alone will bring him within that exception, *viz.*, (1) the preferring of a complaint in good faith and (2) preferring it to a person who has authority over the person complained against. This is what section 105 of the Evidence Act lays down. [p. 815, col. 1.]

Venkata Narasimha v. *Kotayya*, 12 M. 374, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Guntur Division, in Criminal Appeal No. 45 of 1915, preferred against that of the Court of the Sub-Divisional Magistrate, Tenali, in Calendar Case No. 45 of 1915.

Mr. *T. Richmond*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The charge against the 1st accused is this (I use the language employed in the charge sheet):—"That you (referring to the accused) on or about the 18th June 1915 at Tenali defamed Bollee Ramanajayya (complainant) by giving information to prosecution 3rd witness, Railway Head Constable, and the Railway Station Master, pro-

section 2nd witness, that the complainant Ramanajayya was bringing illicit *ganja* by the train, which led to the search of the person of the complainant and another." The charge against the 2nd accused is "that you (referring to the accused) on the said date gave a written information to the prosecution 3rd witness that", etc.

As regards the 1st accused, the charge is simply that he gave information to the Station Master and the Head Constable that the complainant was bringing illicit *ganja* by train.

The cases of the two accused have been separately argued before me. As regards the 1st accused, I am constrained to differ from the Courts below and must hold that there is no legal evidence upon which the conviction against him can stand. The Sessions Judge as well as the Magistrate refer to the evidence of the prosecution witnesses Nos. 2 and 3 as substantiating the case against the 1st accused. This is what the Station Master states: "He told me he had given information to the Police that he expected some parties by the train to bring smuggled *ganja*". No mention of the person who was coming by the train and who was suspected of bringing the *ganja* was made. The Head Constable P. W. No. 3 says: "When Exhibit B was written, the 1st accused was present. The 2nd accused came to me first and then 1st accused came. It was only the 1st accused who gave me the information." He does not say what the information was which was given by the 1st accused. It is a gratifying feature of that case that the cross-examining Pleader has put a restraint upon himself in not supplementing the evidence for the prosecution, as very often happens in such cases. The evidence, as it stands, is altogether insufficient to bring home any offence to the 1st accused. I must, therefore, reverse the conviction against him and direct that the fine, if paid, be refunded to him.

As regards the 2nd accused the matter stands altogether on a different footing. He undoubtedly gave a written complaint to P. W. No. 3.

I may first of all refer to the objection raised by Mr. Richmond that the written complaint is not in accordance with the actual charge that has been laid against the 2nd accused. After looking into the complaint, I do not think that there is any substance in this contention. Exhibit B says (referring to the complainant and another) that they "are both suspected of bringing *ganja* without license." Mr. Richmond wants me to infer from this that there was a bare suspicion and that was all that was mentioned to the Head Constable; but having regard to what happened, namely, the search of the person of the complainant, I feel no doubt that the 2nd accused actually intended to convey the information to P. W. No. 3 that the complainant was coming with smuggled *ganja* in his possession. The more serious contention of the learned Counsel is this, that the complaint preferred by the 2nd accused is privileged. He relies in support of his contention upon a decision in *Muthusami Naidu* v. *Emperor* (1), where it was held that a complaint to a Magistrate was absolutely privileged. I do not think that the principle of this decision can be extended to a complaint to a Police Constable. It is true, as pointed by Mr. Richmond, that just as section 211 would cover the case of a false complaint to a Magistrate, section 182 may be availed of, if there is a false complaint to a Police Head Constable. But nonetheless, the principle enunciated in *Muthusawmi Naidu* v. *Emperor* (1) proceeds upon the basis that parties before the Court, Counsel and witnesses are all absolutely privileged, following earlier decisions of this Court. That principle cannot be extended to the case of the complaint to a Constable.

Another objection of the learned Counsel is that the burden of proof has been wrongfully thrown on his client to show that he came within exceptions 8 and 9 of section 499, Indian Penal Code. Apart from authorities, I feel no doubt that the procedure adopted by the Courts below is perfectly correct, having regard to the language of the Indian Penal Code. Section 499 says: "whoever by words, either spoken etc....., makes or publishes any impu ation....., is said, except in the cases hereinafter excepted, to defame that person." If we turn to exception 8 of the section, it is therein stated:

(1) 14 Ind. Cas. 757; 37 M. 110 at p. 111; 11 M. L. T. 431; 13 Cr. L. J. 293.

"It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person....." The two ingredients to be established are the preferring of a complaint in good faith and preferring it to a person who has authority over the person complained against. Both these ingredients should be affirmatively established by the person who wants to bring himself within exception 8, and that is what section 105 of the Evidence Act lays down.

Apart from the authorities, there can, therefore, be no doubt upon that matter. The learned Counsel for the petitioner relies very strongly upon a decision of Muttusami Aiyer and Shephard, JJ., in *Venkatanarasimha* v. *Kotayya* (2). In the *first* place, the observations of the learned Judges in that case refer to a suit in a Civil Court for damages. In the *second* place, the learned Judges found that the occasion for writing the petition was a privileged one. The occasion was this: the Magistrate had gone to the place where the accused were residing to enquire into certain charges against the Village Munsif, and the accused who were the *ryots* of the village preferred a petition to him on the spot. The learned Judges held that the occasion was privileged. It is for the party who says that the petition is defamatory to show that the privilege has been exceeded. That I take to be the *ratio decidendi* of the decision in *Venkata Narasimha* v. *Kotayya* (2). The learned Judges had not to deal with the construction of section 499. This decision is no authority for a case under the Indian Penal Code. I am, therefore, of opinion that the Courts below are right in holding that the charge against the 2nd accused has been made out. I sustain the conviction so far as the 2nd accused is concerned and dismiss his petition.

Conviction against 2nd accused upheld;
1st accused acquitted.

(2) 12 M. 374.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 120 OF 1916.

July 13, 1916.

Present:—Mr. Justice Batchelor and Mr. Justice Shah.

SHIVBHARAN AYODHYAPRASAD—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s 289—Ingredients of offence—Negligent management of animal—Allowing vicious animal at large—Grievous hurt—Knowledg of results—Presumption.

The essentials of an offence under section 289, Indian Penal Code, are that there should be probable danger to human life or limb or danger of grievous hurt from the negligence shown in the custody of the animal. [p. 815, col. 2.]

If a person allows an animal in his custody to be at large in spite of its previous vicious character, the presumption is that he does so with knowledge that there is probable danger to human life or limb. [p. 815, col. 2; p. 816, col. 1.]

Criminal application for revision from conviction and sentence passed by a Bench of Magistrates, Second Class, Thana.

Mr. *D. W. Pilgaonkar*, for the Accused-Applicant.

JUDGMENT.—The applicant here has been convicted under section 289 of the Indian Penal Code, in that he negligently omitted to take such order with a bull in his possession as was sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from the animal.

Mr. Pilgaonkar has contended, and we think rightly, that the essential ingredient of this offence is that there should be probable danger to human life or limb from the negligence shown in the custody of the animal. That is the point upon which section 289 turns, and that is the point to which Magistrates in administering this section should devote their attention. We are not clear that the point received sufficient attention in this case, where the evidence goes to show no more than that the applicant's bull had on previous occasions fought with the complainant's bull. But in view of this evidence and the other circumstances on the record, we think it right in this particular case to draw for ourselves the inference that the applicant, in allowing this bull to be at large in spite of its previous charac-

In re MANNAR KRISHNA CHETTY.

ter, did so with knowledge that there was probable danger to human life or limb.

Therefore we discharge the Rule.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 152 AND 154 OF 1916.

CRIMINAL REVISION PETITIONS NOS. 126 AND 128 OF 1916.

CRIMINAL REVISION CASE NOS. 164 OF 1916.

TAKEN UP NO. 10 OF 1916.

September 4, 1916.

Present:—Mr. Justice Sadasiva Aiyar.

IN CR. R. C. NO. 152 OF 1916

In re MANNAR KRISHNAN CHETTY—ACCUSED NO. 4—PETITIONER.

IN CR. R. C. NO. 154 OF 1916

In re ARUNACHELLAM PILLAI—ACCUSED NO. 3—PETITIONER.

IN CR. R. C. NO. 164 OF 1916

In re RANGIAH CHETTY AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 237, 238, 423, 439, 537—Appellate Court, powers of, to alter finding—Omission to frame charge, on which altered finding to be given, effect of—Revision, whether ground for—Opium Act (I of 1878), s. 9 (c), (f)—Conviction under s. 9 (c), alteration of, by Appellate Court into one under s. 9 (f)—Legality—Prejudice to accused—Possession of opium on behalf of master—Offence.

An Appellate Court has unqualified power to alter the finding of the trial Court on appeal while maintaining the conviction, and its omission to frame a charge on which it gave its altered finding and call on the accused to meet it will not render its proceedings illegal unless the accused was prejudiced by the omission [p. 817, col. 2.]

Golla Hanumappa v. *Emperor*, 10 Ind. Cas. 372; 21 M. L. J. 805; 10 M. L. T. 66; (1911) 2 M. W. N. 106; 35 M. 243; 12 Cr. L. J. 269, *Yakub Ali* v. *Lethu Thakur*, 30 C. 288, referred to.

An omission to frame a charge is not a ground for revision unless there has been consequent miscarriage of justice. [p. 818, col. 2.]

Where the master is himself not entitled to be in possession of opium, the servant cannot plead possession on behalf of the master to a charge under section 9 (*c*) of the Opium Act. [p. 817, col. 1.]

Where a conviction under section 9 *c*) of the Opium Act was altered by the Court of Appeal into one under section 9 (*f*) of the Act taken with section 114, Indian Penal Code, and no charge was framed under the latter section, but the conviction and sentence of the trial Court were maintained:

Held, that there was no case for interference by the High Court, as the accused was not misled in his defence and no miscarriage of justice was caused by the failure to frame a charge, the facts to be proved having been disclosed in the trial under section 9 (*c*) of the Opium Act. [p. 818, col. 2.]

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Trichinopoly, in Criminal Appeals Nos. 70 and 69 of 1915, confirming the sentences passed on the 4th and 3rd accused, in Calendar Case No. 95 of 1915, on the file of the Court of the Sub-Divisional 1st Class Magistrate of Trichinopoly; and

Case taken up by the High Court on perusal of the Calendar with regard to 1st and 2nd accused in the said Calendar Case No. 95 of 1915 on the file of the said Sub-Divisional 1st Class Magistrate of Trichinopoly.

Dr. *S. Swaminathan* and Mr. *K. Jagannatha Aiyar*, for the Petitioners.

Mr. *E. R. Osborne*, Public Prosecutor, for the Government.

ORDER.—The convicted 3rd accused is the petitioner in Criminal Revision Case No. 154 of 1916 and the convicted 4th accused is the petitioner in Criminal Revision Case No. 152 of 1916, their convictions having been affirmed by the Sessions Judge on appeal. The remaining Case No. 164 of 1916 was taken up by this Court on its own motion for the revision of the order of discharge passed by the Sub-Divisional Magistrate in favour of the accused Nos. 1 and 2.

Having heard full arguments, I might at once state that there is no evidence worth the name against the 2nd accused and as regards the 1st accused, though there is grave room for suspicion against him that he committed (or abetted the commission of) an offence under the Opium Act I of 1878, I do not think that the evidence of his guilt is so clear and sufficient as to justify interference in revision with the Magistrate's order of discharge. Criminal Revision Case 164 of 1916 is, therefore, dismissed.

As regards the 3rd accused's revision petition (No. 154 of 1916), the evidence against him that he was in possession of 9 seers of opium in an unauthorized place and was trying to sell it unlawfully and that

neither he nor his master (the 1st accused) was entitled to be in possession of that excessive quantity in that place, is clear and convincing. Dr. Swaminadhan argued that the third accused's possession was the possession of his master (the 1st accused) and hence he (the third accused) could not be convicted under clause 9 (*c*) of the Opium Act of illegal possession of opium. The learned Counsel quoted certain cases under the Arms Act, in which it was held that *if the master was entitled to be in possession of arms the possession of arms by a servant for the master* was not illegal and no offence was committed by the servant. Those decisions have no application to this case for two reasons.

(*a*) There is no sufficient evidence to show that the 3rd accused's possession of the 9 seers was on behalf of the 1st accused;

(*b*) *The master* (*the 1st accused*) *was himself not entitled* to be in possession of the opium.

I, therefore, dismiss the 3rd accused's Revision Petition No. 154 of 1916.

Coming lastly to the fourth accused's Revision Petition No. 152 of 1916, he was convicted by the Sub-Divisional Magistrate under clause 9 (*c*) of illegal possession of opium. On appeal, the Sessions Judge altered the finding to the offence of abetting the illegal sale of opium under clause 9 (*f*) of the Opium Act and section 114, Indian Penal Code, maintaining the sentence. As regards the facts found by the Sessions Judge to have been proved in the case, I see no reason to differ. Dr. Swaminadhan argued, however, that the facts necessary to be proved to establish an offence under clause (*c*) of section 9 are so materially different from the facts to be established for an offence under clause (*f*) that an Appellate Court cannot alter the conviction from one under clause (*c*) to one under clause (*f*). He relied principally on an incidental passage found in the judgment in *Golla Hanumappa* v. *Emperor* (1). That passage (at page 808)* is as follows: – "In cases not falling under sections 237 and 238 of the Code of Criminal Procedure, no doubt the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court." Section 423 (*b*) (2) of the Criminal Procedure Code makes, however, no reference to sections 237 and 238 and unqualifiedly gives the power to the Appellate Court to "alter the finding" on appeal, and I am not disposed to qualify the powers so given by the Legislature, unless, of course, prejudice was likely to have been caused to the accused and injustice might have resulted by his not having had the opportunity to meet the altered charge. In *Yakub Ali* v. *Lethu Thakur* (2) Prinsep and Mitra, JJ., laid down (if I may say so with respect) the true principle, namely that where "*the accused have been prejudiced by the omission*" to frame the charge on which the Appellate Court wishes to give the altered finding, that is, where if the altered charge had been framed in the first Court, "the defence made" and the evidence adduced for the defence "might have been of an entirely different character," the Appellate Court should not use the power vested in it by section 423 to give such an altered finding. My opinion, following *Yakub Ali* v. *Lethu Thakur* (2), is based entirely on the language of section 423 and I do not think it necessary to rely on section 537 of the Criminal Procedure Code, which says that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during trial or in any enquiry or other proceedings." I might, however, state that even if the omission to frame an alternative charge cannot be called an "error *in* the charge" (as argued by Dr. Swaminadhan), it seems to come under the very comprehensive words "error or irregularity in any inquiry or other proceedings" [see also *Emperor* v. *Tribhovandas Brijbhukandas* (3)].

Further, section 535 directly contemplates "the omission to frame a charge" and it

(1) 10 Ind. Cas. 372; 21 M. L. J. 805; 10 M. L. T. 66; (1911) 2 M. W. N. 106; 35 M. 243; 12 Cr. L. J. 269.

*Page of 21 M. L. J.—*Ed.*

(2) 30 C. 288.

(3) 26 B. 533; 4 Bom. L. R. 271.

provides that "if the Court of Appeal or Revision thinks *that a failure of justice has been occasioned* by an omission to frame a charge, it shall order that a charge be framed", etc., showing that if no failure of justice has taken place, the lower Court's order ought to be confirmed in appeal or revision. Lastly, section 232 of the Criminal Procedure Code says that if "the High Court, in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence *was misled in his defence by the absence of a charge or by an error in the charge*, it shall direct a new trial," again showing that omission to frame a charge is not a ground for revision unless there has been consequent miscarriage of justice. In the present case, I am satisfied that the 4th accused was not misled in his defence and there was no miscarriage of justice caused by the non-framing of a charge under clause 9 (*f*) of the Opium Act in the 1st Court, as the facts to be proved were disclosed in the examination of the prosecution 1st witness himself who was cross-examined at great length on every point. The 4th accused's petition is also, therefore, dismissed.

Petitions dismissed.

V.R.P.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 13 AND APPEAL No. 427 OF 1916.

July 20, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

TORAP ALI AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Motive, proof of, if necessary, in upholding conviction.

Where two accused *T* and *G* were convicted of murder and sentenced to death by the Sessions Judge and the motive of one of them, *T*, for the murder was satisfactorily proved, while as against the other accused, *G*, there was no satisfactory evidence of any such motive, the High Court upheld the conviction, and confirmed the sentence, holding that although if it had to rely to any great extent upon motive being proved to its satisfaction, its conclusion might have been different in the case of the accused *G*, still as it was satisfied upon the evidence that the Sessions Judge was right in his conclusion that *G* was actually present with *T* at the time the murder was committed it was not necessary for the High Court to come to any definite conclusion as to what the motive was on the part of *G*. [p. 818, col. 2; p. 819, col. 1.]

Babus *Kshitish Chandra Chakravarty* and *Amir Chand Pal*, for the Appellants.

Mr. *Comell*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case the appeal is by both the accused Gohar Ali and Torap Ali against the conviction of murder by the learned Additional Sessions Judge of Bakarganj. The assessors apparently had some difficulty in coming to a conclusion. But the learned Sessions Judge after asking them questions came to the conclusion that the first assessor had really arrived at the conclusion that the two accused committed the murder and that the second assessor had arrived at the conclusion that there was not sufficient evidence to convict the two accused of murder. The learned Additional Sessions Judge, as I have already said, agreeing with the first assessor and differing from the second, found both the accused guilty.

Now, after listening to the argument of the learned Vakil who appeared for both the accused and who put the case very clearly before us, and reading the evidence, my learned brother and I have come to the conclusion that as regards Torap Ali there is no doubt that the conviction was right, and I need not say anything more about him.

As regards the other accused Gohar Ali this caused us some anxiety. We have, however, come to the conclusion that the conviction ought to be upheld. The evidence with regard to the motive in the case of Gohar Ali is by no means as strong as that in the case of Torap Ali, and, if we had to rely to any great extent upon motive being proved to our satisfaction in this case, our conclusion might have been a different one. But in a case of this kind, where we are satisfied upon the evidence

that the learned Judge was right in his conclusion that Gohar Ali was actually with Torap Ali at the time the murder was committed, it is not necessary for us to come to any definite conclusion as to what the motive was on the part of Gohar Ali. The learned Judge says, that he probably had a grudge against the *naib*, the deceased man. It is quite possible he may have heard that the *naib* had provided the Police officer with information and materials which might have led to a prosecution against Gohar Ali, under section 110 of the Criminal Procedure Code; it is quite possible that in a small village like this, the fact of the *naib* having given such information might easily become public property and may have come to the ears of Gohar Ali as well as to the ears of other people. But as I have said before, in the circumstances of this case, we do not think it is necessary for us to come to any definite conclusion as to what the motive was which actuated Gohar Ali in committing this murder.

Now, as regards the question of identity, we are satisfied, first of all, that the learned Judge came to a right conclusion upon the point as to the light. The evidence seems to be satisfactory upon that point. It does not depend upon the evidence of Sarat alone. His evidence seems to be corroborated by the evidence of everybody who could speak upon that question. Judging from the evidence, as far as we can judge when it is in the form of writing, we think the learned Judge was quite justified in coming to the conclusion that there was a light from the hurricane lantern hanging in the *cutchery* practically over the north-east corner of the bed upon which Sarat was sleeping. Then the next point to be considered is that this conviction of Gohar Ali really depends upon the evidence of Sarat. That is quite true. The question first of all is whether Sarat's evidence taken by itself should be accepted as the evidence given by an honest man. Speaking for myself, I think Sarat's evidence, judging as far as I can when the evidence is put merely in the form of a written document, is that of a man who was honestly trying to give a true account of what he had seen. I am confirmed in that conclusion by the statement of the learned Judge who had the great advantage of seeing him, *viz.*, "Sarat struck me as being a very careful and reliable witness, and I am satisfied that he gave his evidence with a due sense of responsibility, and that he would not have named Gohar Ali if he had not been quite certain that it really was he."

One further remark I have to make in this connection; and that is that nothing has been suggested, as far as I remember, which would make one suspect in any way that Sarat had any reason for saying that the second man was Gohar Ali, if, in fact, he was not Gohar Ali. Sarat apparently had no grudge against Gohar Ali. There is no suggestion in the evidence either in the examination-in-chief or in the cross-examination that there was any bad feeling between Sarat on the one hand and Gohar Ali on the other.

Now, Sarat's evidence, to my mind, is corroborated in several very material respects. It is corroborated by the evidence of the two peons who were outside in the verandah. If I may here say, on reading the evidence of the two peons I am satisfied, as far as one can be satisfied when one has only a written record to rely upon, that they were telling a true story They said that they were sleeping on the verandah and as soon as Sarat called out they got up, crying "who is it." Sarat at once said there were Torap Ali and Gohar Ali going away. That is certainly a material corroboration of Sarat's evidence.

Another thing which strikes us as corroboration of Sarat's evidence is this. It must be remembered that Sarat said that when he was roused by the cry of the *naib* and a bump on the floor, he saw within about 9 feet of him Gohar Ali in the act of getting out backwards through the "sindh" and Torap Ali standing, and what the two peons said was that when they got up and looked into the office through the railings they did not see Gohar Ali going through the hole, but saw Torap Ali going through the hole. That is just what would have happened if Sarat's story was a correct one. In that respect I think Sarat's evidence is corroborated by the evidence of the two peons.

Another thing that struck me is this that the two peons, when the door was opened, immediately went into the office and they found the body of the murdered man lying

on the ground and his legs were still twitching, although he died almost immediately afterwards. There again is striking corroboration of Sarat's story, who said that he heard the cry of the murdered man—he must have cried immediately after he was attacked, and he, Sarat, waked up and called out to the peons, who immediately entered the room and then found the body of the murdered man actually moving just before he died.

Then again, as soon as the neighbours were called, Sarat said that the two men whom he saw in the office were Torap and Gohar.

Another thing which I wish to mention is that these two men, Torap and Gohar, were both neighbours of Sarat, and as I have said before, against whom he had no grudge whatever. He must have known them by sight; they were both within about 9 feet from him, perhaps one of them was within less than nine feet, and I am satisfied that there was a lamp burning in the office at that time. He, therefore, had ample opportunity of recognising both these men. He says that he saw Torap Ali and Gohar Ali, Gohar Ali in the act of getting out through the hole. The peons say that their attention was drawn by Sarat and they saw Torap Ali, so that the peons' evidence corroborates Sarat's story in that respect. At all events, it shows that Sarat's recognition of Torap was right, and, if his recognition of Torap was right, I see no reason why he should not be right as regards the other man, Gohar Ali, because both these men were only a few feet from him at the time his attention was drawn to them.

The last point is one to which I have already referred and to which I attach great importance and it is this, the learned Judge, who had an opportunity of seeing the witnesses and who evidently paid the greatest attention to the evidence, has come to the conclusion that the witness Sarat was a man upon whom he could rely. I gather that he was careful in his answers, anxious not to say more than what he was really convinced he could say, and this is a matter which this Court must take as most important in considering whether the learned Judge was right in arriving at the conclusion that Gohar Ali was one of the murderers.

For these reasons, I am of opinion that the conviction of Gohar Ali for murder ought to be upheld as well as the conviction of Torap Ali.

Having regard to the brutal nature of the offence, a murder committed without any extenuating circumstance, I see no reason why the sentence of death passed upon these two men should not be confirmed.

The result is that the appeal of these two accused persons, Gohar Ali and Torap Ali, is dismissed and the sentence of death passed upon them by the learned Sessions Judge is confirmed.

WALMSLEY, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 137 OF 1916.
(CRIMINAL REVISION PETITION No. 114 OF 1916).

July 14, 1916.

Present: Mr. Justice Seshagiri Aiyar

In re KATARI VEERANNA—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 476, scope of—Person not party to proceeding nor examined as witness, whether can be sent to nearest Magistrate—Penal Code (Act XLV of 1860), s. 196—Using evidence known to be false, what constitutes—Abortive attempt to secure medical certificate, whether offence under s. 196.

A Magistrate has no jurisdiction to send a person, who has not been a party to any proceedings before him and who has not been examined as a witness in a case, to the nearest Magistrate under section 476 of the Criminal Procedure Code. Nor can he direct an enquiry under that section into an offence under section 161, Indian Penal Code, as that section is not mentioned in section 195, Criminal Procedure Code. [p. 821, col 1.]

In order to constitute an offence under section 196, Indian Penal Code, there must be some evidence *in existence* which the party is either using or attempting to use. A mere attempt to get a medical certificate, which is refused, does not fall under section 196. [p. 821, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Head-quarters Deputy Magistrate of Anantapur, in M. Dis. No. 20 of 1916, and to issue an order directing that, pending disposal of this criminal revision case, all further proceedings in the Court of the District Magistrate of Anantapur in

pursuance of the said order of the Court of the Deputy Magistrate of Anantapur be stayed.

Dr. *Swaminathan* and Mr. *P. M. Srinivasa Aiyangar*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—I have serious doubts whether the Magistrate has jurisdiction to send a person, who has not been a party to any proceedings before him and who has not been examined as a witness in the case, to the nearest Magistrate under section 476, Criminal Procedure Code. But apart from that, there are serious objections to the maintainability of his order. In the first place as regards the direction to enquire into the offence under section 161, Indian Penal Code, it is clear, as pointed out by Dr. Swaminathan, that that section is not one of those mentioned in section 195, Criminal Procedure Code. The learned Public Prosecutor does not press this portion of the case. Then as regards the prosecution under section 196, Indian Penal Code, it is clear from a reading of that section that there must be some evidence in existence which the party is either using or attempting to use. The evidence in this case taken at its best shows that the accused has been attempting to get from the Medical Officer a certificate which may be used on a subsequent occasion. The certificate was never given. Under those circumstances no evidence was in existence which could have been utilised by the accused for improper purposes. I, therefore, think that the order directing an enquiry under section 476 with reference to these two references was passed without jurisdiction. I set aside the order and all the proceedings taken subsequent to the passing of the order.

Petition allowed; Order set aside.

V.R.P.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 205 OF 1916.
(CRIMINAL REVISION PETITION No. 170 OF 1916.)
CRIMINAL MISCELLANEOUS PETITION No. 320 OF 1916.

September 6, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

IN CR. R. C. No. 205 OF 1916

ALLURI SUBBARAJU, DECEASED—PETITIONER

IN CR. M. P. No. 320 OF 1916

ALLURI VENKATASOMARAJU—PETITIONER

versus

ALLURI RAMBHADRA RAJU *alias* VARAHALU RAJU—RESPONDENT IN BOTH.

Criminal Procedure Code (Act V of 1898), s 145 (7) —Charter Act (24 & 25 Vic. C. 104), s. 15—High Court—Revision—Death of party pending revision—Abatement—Power to deal suo motu on merits in absence of questions affecting jurisdiction.

Clause 7 of section 145, Criminal Procedure Code, regulates only proceedings under the section and its purview cannot be extended to others, such as revisional proceedings before the High Court under the Charter Act. [p. 822, col. 1.]

On the death, therefore, of the petitioner, pending disposal of a revision petition in the High Court under the Charter Act against an order passed under section 45, the proceedings abate and his son will not be permitted to be brought on the record to prosecute it. [p. 822, col. 1.]

The High Court will not deal, in revision, with the Magistrate's order *suo motu* when the Magistrate had complied with all the formalities essential to his having jurisdiction. [p. 822, col. 1.]

Kamal Kutty v. *Udayavarma Raja Valia Raja of Chirakal*, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 429; (1912) M. W. N. 1154; 23 M. L. J. 499; 13 Cr. L. J. 753, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the proceedings of the Court of the Sub-Divisional Magistrate, Rajahmundry, in Miscellaneous Case No. 8 of 1915, and

Petition praying that the High Court will be pleased to direct that the petitioner (Alluri Venkatasomaraju) be brought on record as the legal representative of the deceased Alluri Subbaraju, petitioner in Criminal Revision Case No. 205 of 1916 on the file of the High Court.

Mr. *P. R. Narayanaswami Aiyar*, for the Petitioner.

EMPEROR *v.* MUNNA.

Mr. *B. Narasimha Rao*, for the Respondent.

ORDER.—The respondent against whom this order under section 145 of the Code of Criminal Procedure was passed, died after presenting this petition for revision under section 15 of the Charter Act, and his son has now applied to be brought on the record in order to prosecute it.

His application has been supported solely by reference to section 145 (7). But that clause statedly regulates only proceedings under the section and we have been shown no authority for extension of its purview to others, such as the proceedings before us under the Charter Act. No authority has been adduced which is in point; and in these circumstances we cannot place the applicant on the record or hear his Vakil.

It is also impossible for us, consistently with the decision of *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal* (1), to deal with the Magistrate's order by way of revision of our own motion, since we have satisfied ourselves that he complied with the formalities essential to his having jurisdiction.

The Criminal Revision Petition No. 170 of 1916 (Criminal Revision Case No. 205 of 1916) filed by the deceased respondent is, therefore, dismissed. His son's application, Criminal Miscellaneous Petition No. 320 of 1916, is also dismissed.

Petitions dismissed.

V.R.P.

(1) 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439 (1912) M. W. N. 1154; 23 M. L. J. 499; 13 Cr. L. J. 753.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 586 OF 1916.

August, 15, 1916.

Present:—Mr. Justice Walsh.

EMPEROR—PROSECUTOR—APPLICANT

versus

MUNNA—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Magistrate—Jurisdiction—Bad character—Person resident of place beyond jurisdiction—Proceedings, legality of.

Under section 107 of the Criminal Procedure Code, a Magistrate can deal with persons who have a general reputation as bad characters and who happen to be within his jurisdiction, no matter whether they are residents of a place within his jurisdiction or not.

Criminal revision by the Local Government against the order of acquittal passed by the Sessions Judge, Bareilly, dated the 22nd May, 1916.

Mr. *A. E. Ryves*, Government Advocate, for the Crown.

JUDGMENT.—This case is a revision on the application of the Government Advocate. I think the learned Sessions Judge has come to an erroneous conclusion, founding himself upon a decision of this Court under section 107 which does not apply and upon a decision of the Calcutta High Court reported as *Ketaboi* v. *Queen-Empress* (1). The latter decision, which is certainly in point, has been dissented from by the Bombay High Court and also by the Madras High Court in a decision reported as *In re Kora Rangan* (2), which I adopt. In cases of this kind arguments *ab inconvenienti* can always be produced on either side. On the one hand, it may be said that a man accused of an evil reputation outside his residence might be subjected to a great inconvenience in having to summon witnesses from a distance. It may be that that is one of the risks that travellers run in this country, but if they are persons of good character it does not strike me as a very serious one. On the other hand, it is obvious that a notorious thief who had made the continent too hot for himself might remain at liberty enjoying a notorious reputation as a thief and in his defence set up residence in France. The safer course is to look at the Statute. The section is perfectly plain. The Magistrate is given power to deal with persons who have a general reputation as bad characters, who happen to be within his jurisdiction. Nothing is said and no language is used in the section bearing upon the question of residence at all. The case will have to go back to the Sessions Judge to confirm the order of the Magistrate or to deal with it as he thinks fit according to law. I may say that although the Government Advocate was not present I had the assistance of the Government Pleader.

Case sent back.

(1) 27 C. 993.

(2) 17 Ind. Cas. 413; 36 M. 96; 23 M. L. J. 535; 13 Cr. L. J. 751.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 16 OF 1916.

February 14, 1916.

Present:—Mr. Justice Twomey.

MAUNG PO HLA—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 337 (3), 339—Pardon, tender of, to approver · Forfeiture of pardon—Wilfully concealing anything essential or giving false evidence—Absconding before cross-examination, effect of.

Section 339, Criminal Procedure Code, must be construed strictly, and a person to whom pardon has been tendered can only be tried for the offence in respect of which he was pardoned, if it is shown that he has forfeited the pardon either (*a* by wilfully concealing anything essential, or (*b*) by giving false evidence

Absconding before conclusion of cross-examination does not amount to wilful concealment.

JUDGMENT.—The appellant, Po Hla, was tendered a pardon as an approver in a dacoity case, and he has now been convicted and sentenced to seven years' transportation for the dacoity in respect of which the pardon was tendered to him, the Sessions Judge holding that he forfeited his pardon.

There seems to be no doubt that Po Hla absconded after his examination-in-chief because, as one of the assessors puts it, "the offence he committed was a serious one and he did not quite trust the pardon granted to him."

A pardon is tendered to an approver "on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof." Section 339 lays down the circumstances in which a person to whom a pardon has been tendered may be tried for the offence in respect of which he was pardoned. It must be shown that he has forfeited the pardon, either (*a*) by wilfully concealing anything essential, or (*b*) by giving false evidence.

It is not contended that Po Hla gave false evidence. But the learned Sessions Judge has held that "by deliberately withdrawing himself from cross-examination he has concealed something essential, to wit, the whole of the answers which he would have been compelled to give in cross-examination." This view, in my opinion, involves an unwarranted straining of the provisions of section 339. Po Hla had made a full disclosure before two Magistrates and it lay on the prosecution in the present case to prove strictly that he had concealed something essential. The prosecution had to show definitely that he had withheld evidence of some particular fact which was within his knowledge, and the prosecution was clearly unable to do this. It is a pure assumption, unsupported by any proof, that there are unknown facts which the accused persons at the trial could have compelled Po Hla to disclose in cross-examination. They had cross-examined him in the previous June in the Sub-Divisional Magistrate's Court but nothing essential came out in that cross-examination.

The Legislature has not expressly provided for the case of an approver who after being examined for the prosecution absconds without submitting himself to cross-examination, and the reason no doubt is that such a case is nearly impossible where the provisions of section 337 (3), which were disregarded in this case, are duly complied with. But I think it is clear that section 339 must be construed strictly and that according to the provisions of that section the appellant has not forfeited his pardon.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 797 OF 1915.

(CRIMINAL REVISION PETITION No. 645 OF 1915.)

July 13, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

In re SAMBA PILLAI AND OTHERS—

ACCUSED NOS. 4, 5, 11 AND 12—PETITIONERS.

Penal Code (Act XLV of 1860), s. 148—"Lawfully in possession," significance of—Going armed with sticks to recover possession from trespasser, whether amounts to rioting.

A person who has been found to have reaped the crops and to have been in possession of the property must be deemed to be lawfully in possession, and anybody who disturbs his possession must be taken to be a trespasser. [p. 824, col. 1.]

Where, therefore, the accused had sown the crops and harvested them and the complainant's party having after the harvest entered upon the land and ploughed it the accused party went to the field armed with sticks:

EMPEROR *v.* MENDAI.

Held, that the conduct of the accused party in going to the field with a number of people armed with sticks did not constitute them members of an unlawful assembly, and they were not guilty of an offence under section 148, Indian Penal Code. [p. 824, col. 2.]

Fateh Singh v. *Emperor*, 20 Ind. Cas. 140; 14 Cr. L. J. 380; 41 C. 43, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Madura Division, in Criminal Application No. 38 of 1915, preferred against the judgment of the Court of the Sub-Divisional 1st class Magistrate, Usilampatti, in Calendar Case No. 148 of 1914.

Mr. *K. R. Guruswami Aiyar* for Mr. *K. S. Jayarama Aiyar*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—In this case, the facts found are that in the early part of the year the accused had sown the crops and harvested them. Subsequently, after the harvest, the complainant's party entered upon the land and began to plough it. The accused party thereupon went to the field armed, as it is said by the Magistrate, with deadly weapons for the purpose of getting possession from the opposite party. The Magistrate says that the complainant's party was lawfully in possession. I am unable to follow him in this. The learned Public Prosecutor says that, if a party during the absence of the person who was previously in possession has possession of the property, he must be deemed to have been lawfully in possession. That would mean that unless the party who was entitled to the property and who was in possession also is always on the land, anybody can enter upon it and say that he is in peaceful possession. A person who has been found to have reaped the crops and to have been in possession of the property must be deemed to be lawfully in possession; and any body who disturbs his possession must be taken to be a trespasser. Under those circumstances the question is whether the accused were justified in going to the field with sticks, because I take the term 'deadly weapon' to be synonymous with 'sticks' in this case, as it is not urged that they had any other weapon. Of course if the accused had been charged with causing hurt, that would have been a different matter. They are only charged under section 148. Following the ruling in *Fateh Singh* v. *Emperor* (1), which shows that in maintaining the right to possession the accused are entitled to go armed with *lathis*, I am of opinion that the conduct of the accused party in going to the field with a number of people armed with sticks does not constitute them members of an unlawful assembly. They took the sticks to protect themselves and not to use it on the opposite party without provocation. I must, therefore, reverse the conviction of the accused; the fines, if paid, must be refunded.

Petition allowed; *Conviction set aside.*

V. R. P.

(1) 20 Ind. Cas. 140; 41 C. 43; 14 Cr. L. J. 380.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 178 OF 1915.

November 2, 1915.

Present:- Mr. Lindsay, J. C.

EMPEROR—PROSECUTOR—APPLICANT

versus

MENDAI *alias* SITA RAM *alias* RAM PRASAD—ACCUSED—OPPOSITE PARTY.

Criminal Tribes Act (III of 1911), s. 23—Punishment, enhanced—Accused being member of criminal tribe at subsequent and not at previous conviction, effect of.

Section 23 of the Criminal Tribes Act applies to the case of a previously convicted accused who is a member of a notified criminal tribe at the time of his present conviction, although his tribe had not been notified as such at the time of his previous conviction. [p. 825, col. 1.]

Application against the order of the Assistant Sessions Judge, Sultanpur, dated the 16th July 1915.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application on behalf of the Local Government for enhancement of punishment in the case of one Mendai *alias* Sita Ram *alias* Ram Prasad, who was convicted in the Court of the Assistant Sessions Judge of Sultanpur on the 16th of July last. The accused was convicted of an offence under section 57 and he was also charged under section 5 by reason of his having been previously convicted of a similar offence in the year 1913. Mendai's appeal to this Court was dismissed on the 26th of August last. The case on behalf of the Local Government is that this man named Mendai

was a member of a criminal tribe and about this there can be no dispute. Mendai is proved to have been a Pasi, resident of the Bara Banki district, and in the judgment of the Assistant Sessions Judge it is stated that persons belonging to the Pasi tribe and residing in the village of Barawan in the Bara Banki district in which this accused resided were notified under section 3 of the Criminal Tribes Act (III of 1911) in the Gazette of the 31st of January 1914. This matter was brought to the attention of the Assistant Sessions Judge at the time of the trial, but he held that section 23 of the Act did not apply to the case, inasmuch as at the time when the accused Mendai was previously convicted the tribe to which he belongs had not been notified as a criminal tribe. Section 23 renders a member of such a tribe on a second conviction for certain offences liable to a period of imprisonment which is not to be less than seven years. The period of imprisonment awarded by the Assistant Sessions Judge was five years only. The reason given by the Assistant Sessions Judge was that the notification had not a retrospective effect, but it is pleaded that the learned Assistant Sessions Judge has misinterpreted the section. The section declares, "whoever, being a member of any criminal tribe, and having been convicted of any of the offences under the Indian Penal Code specified in the schedule, is hereafter convicted of the same shall, in the absence of special reasons to the contrary, be liable to certain periods of punishment." The Assistant Sessions Judge seems to have read this section in the sense that in order to make it applicable the accused must, at the time of his previous conviction, have been a member of a notified criminal tribe. That is not the meaning of the section at all. It is a matter of indifference whether the tribe had been notified at the time of the previous conviction. All that the section declares is that once the tribe has been notified under section 3, any member of that tribe who is convicted subsequent to the date of the notification and who has had a previous conviction is liable to the enhanced punishment provided by the section. I must, therefore, allow this application and I, therefore, direct that Mendai accused be sentenced to rigorous imprisonment for a period of seven years.

Application accepted.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 154 OF 1916.

August 17, 1916.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

In re RAMA BAPU PUJARI AND ANOTHER—APPLICANTS.

Criminal Procedure Code (Act V of 1898), s. 514—Forfeiture of surety-bond in default of accused's appearance—Suicide by accused—Mistaken admission that accused was alive, effect of.

On the death of an accused person by suicide before the date fixed for his appearance, the sureties are discharged from liability, and they cannot be penalised in the forfeiture of their bonds by reason of their mistaken admission that he was alive. [p. 825, col. 2; p. 826, col. 1.]

Per *Beaman, J.*—The object of the surety-bonds is, as far as possible, to ensure that an accused person shall not evade justice in the ordinary sense, that is to say, by flying the country or the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts. [p. 826, col. 1.]

Criminal application for revision against an order of the District Magistrate, Sholapur, confirming that of the second class Magistrate, Madha.

Mr. *P. V. Kane*, for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

BEAMAN, J.—The man for whom the two applicants stood sureties was to have been tried on the 19th. He was found dead on the 24th No one knows the date of his death. But both Magistrates are of opinion that the cause was suicide. We see no reason to conclude that he must necessarily have died after the 19th. There is a medical affidavit to the contrary and the District Magistrate most certainly ought to have given careful attention to this point. But in any event we can find no sufficient ground for penalising the sureties in a case of this kind. Even if the accused person had only committed suicide on the 19th or the 20th, it is clear that he must have had that act in contemplation, and that was the only reason why he did not present himself for trial. To call in surety-bonds in circum-

stances of that kind appears to us to evidence a complete lack of discretion, and we think it might also tend to bring our administration on that point into general disrepute. Surely the object of these surety-bonds is, as far as possible, to ensure that the accused person shall not evade justice in the ordinary sense, that is to say, by flying the country or the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts.

We think, therfore, that the order of the District Magistrate should be set aside and the amount of these bonds, if it has been recovered, should be refunded to the sureties.

HEATON, J.—I concur. On the proceedings as they are before us, what was known to the Court at the time that it made the order penalising the sureties was that the accused person had died, and that the two sureties admitted that he had not died until after the 19th November. That was the date on which he ought to have appeared, but did not. The record does not suggest that these sureties had any personal knowledge whatever of the death of the accused. It was represented by a Police Officer that the accused had committed suicide. The sureties accepted that fact apparently and came to the conclusion that he must have committed suicide after the 19th. That, however, so far as I can see from the record, is pure conjecture. I should have thought, that being so, that if the Magistrate had contemplated exacting the penalty from these sureties, he would have at least taken the precaution of ascertaining or attempting to ascertain when it was that the accused had actually died. He did not do so. He acted on the admission of the sureties themselves, who apparently had no personal knowledge whatever. That seems to me to be a very harsh proceeding on the Magistrate's part and one that I feel ought to have been corrected by the District Magistrate when the matter came before him. We have now corrected it.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 291 OF 1916.
CRIMINAL REVISION PETITION No. 243 OF 1916.

August 17, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

SANKARALINGA TEVAN AND OTHERS—ACCUSED—PETITIONERS

versus

AVUDAI AMMAL COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 197, 254, 439—Scope of s. 197—Protection afforded by section, applicability of—'Acting as such public servant,' meaning of—Public servant acting ultra vires*—Sanction—'Talayari' of village, whether public servant under s. 197—Charge, framing of—Revision by High Court.*

The protection afforded by section 197, Criminal Procedure Code, applies to all cases where, in the professed exercise of an official's duties, an offence is committed. [p. 828, col. 2.]

Where the initial jurisdiction is wanting and a jurisdiction is assumed by an official who, in such assumed capacity, acts to the prejudice of a person, he is not acting 'as such public servant' within the meaning of section 197. Where, however, the official has jurisdiction to take cognizance of a matter, and in professedly exercising that jurisdiction commits an offence or acts *ultra vires* of his powers, he is acting 'as such public servant' within the meaning of the section. If he simply uses his position as a public servant to commit an illegal act, he is not within the protection afforded by the section. The test is, not whether the particular act is within his powers, but whether he acted in the capacity with which he is clothed. [p. 827, col. 2; p. 828, col. 1.]

Mangapathi Naidu, In re, 2 Weir 221; *Palaniandy Pillai* v. *Arunachellum Pillai*, 3 Ind. Cas 387; 32 M. 255; 4 M. L. T. 373; 9 Cr. L. J. 89; *Municipal Commissioner for the City of Madras* v. *Major Bell*, 25 M. 5; *Kandasami Chetti* v. *Soli Goundan*, 23 M. 540; *Sheikh Abdul Khadir* v. *Emperor*, 7 Cr. L. R. 466, referred to.

Where a Village Munsif, in the trial of a civil suit, ordered the attachment before judgment and subsequent removal of a cart belonging to the defendant, who thereupon lodged a complaint of theft against the Village Munsif:

Held, that though the Village Munsif acted *ultra vires* of his powers, he acted as a Judge and could not be prosecuted without the sanction required by section 197. [p. 827, col. 2.]

A *Talayari* is not within the protection afforded by section 197, Criminal Procedure Code, and no sanction is necessary under it for his prosecution. [p. 827, col. 1.]

The High Court will not interfere in revision with an order framing a charge against an accused person. [p. 827, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying

SANKARALINGA TEVAN *v.* AVUDAI AMMAL.

the High Court to revise the order of the Court of the Stationary Sub-Magistrate, Koilpatti, in Calendar Case No. 13 of 1915, now transferred to the file of the Court of the Taluq 2nd class Magistrate, Koilpatti, in Calendar Case No. 9 of 1916.

Mr. *C. Veeraragava Aiyar*, for the Petitioners.

Mr. *K. R. Guruswami Aiyar*, for the Respondent.

The Public Prosecutor, for the Crown.

JUDGMENT.—Accused Nos. 3, 4, 5 and 9 in this case filed civil suits against the complainant before the 8th accused, the Village Munsif of Ettaiyapuram. Pending the suits, the 3rd and 9th accused applied to the 8th accused to attach the *jutka* and pony of the complainant before judgment. This was ordered, and the *jutka* and the pony were removed from the house of the complainant. The *talayari* who carried out the orders of the 8th accused and the persons who assisted in the removal of the properties are the other accused. The complaint is one of theft and of abetment thereof. A charge was framed against all the accused on the 1st April 1916. After that, this Court was moved to stay proceedings and to cancel the charge against the accused. As regards accused Nos. 1 to 7 and 9 this Court has no right to interfere at this stage. It was sought to be argued that the evidence let in does not disclose any offence against them. I refused to listen to this argument, because that is not a matter which, even if I had the power, I desire to pronounce any opinion upon. These accused will have every facility of putting forward their case in the Court below.

As regards the 10th accused, the *talayari*, he is not a public servant not removable from his office without the sanction of the Government of India or the Local Government and consequently no sanction is necessary under section 197 of the Code of Criminal Procedure for prosecuting him.

The case of the 8th accused is different. It is common ground that he had no power to order attachments before judgments in suits pending before him. It is clear that he was a Judge in respect of the suits filed before him. This position was not disputed by the learned Public Prosecutor. It was strenuously contended before me that as in ordering the attachment he was doing an act *ultra vires* of his powers, he was not acting "as such Judge" within the meaning of the section. Broadly put, the contention is that when a Judge or public servant exceeds the limit of his power, he is not within the protective provisions of section 197. I am unable to accept this contention. If this argument is pushed to its logical conclusion no public servant or Judge can have the safeguard of a sanction, as it is not within the powers conferred upon such an officer to commit an offence. Any offence committed by such a person must *prima facie* be beyond his official rights and duties. I do not think that such a result is the necessary consequence of the language employed by the Legislature.

It seems to me that in all cases where a public servant purports to exercise his functions as such, he must be deemed to be acting "as such, public servant." The test is not whether the particular act is within his powers, but whether he acted in the capacity with which he is clothed. Of course, if he simply uses his position as public servant to commit an illegal act he will not be acting as such public servant. That is what happened in the case of *Mangapathi Naidu, In re* (1). There a Village Munsif used his position to extort money. He was not acting as public servant, but he was taking advantage of his position to commit an offence. He is not beyond the pale of section 197. Again where a Judge commits an offence not in discharging his duties as such, nor in the belief that he is discharging such duties, the object being to bring another man into trouble, section 197 has no application. See *Palaniandy Pillai* v. *Aruñachellum Pillai* (2). Justice Miller points out that in fabricating a false record with reference to a case that was never before him, and with reference to which he was not asked to take any action, the accused did not act as a Judge. Some observations of Justice Moore in *Municipal Commissioner for the City of Madras* v. *Major Bell* (3)

(1) 2 Weir 221.

(2) 3 Ind. Cas. 387; 32 M. 275; 4 M. L. T. 373; 9 Cr. L. J. 89.

(3) 25 M. 15.

were relied on by the learned Public Prosecutor. The learned Judge quotes with approval a dictum of Field, J., that the requirement of sanction applies only to "cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which being a public servant is a necessary element in the offence." If I understand the proposition aright, the protection extends only to offences where the powers inherent in the official are used to oppress or annoy. In other words, there must be complete competency to use the powers, but the powers must be used not legitimately, but with the object of gaining an illegal advantage. Such cases are conceivable, but I am not able to construe the section in this narrow sense. There are cases in which the initial jurisdiction may be wanting. If in such cases a jurisdiction is assumed and the official acts to the prejudice of a person, I am willing to admit that he is not acting "as such public servant." See *Kandasami Chetti* v. *Soli Goundan* (4). But where an official has the initial jurisdiction to take cognizance of a matter, and in professedly exercising that jurisdiction commits an offence, I am not able to see that he is not acting as such public servant or Judge. The decision of Coutts Trotter, J., in *Sheik Abdul Khadir* v. *Emperor* (5) is not against my conclusion. It is pointed out in that case, that where the offence is complete, the fact that holding the position of a public servant renders the offender liable to enhanced punishment, would not enable the accused to plead that he committed the offence as such public servant. I take my learned brother's reasoning to be that it was in the capacity of a public servant, the additional penalty was incurred and that the offence was construed otherwise. I do not think this proposition militates against the view I am holding.

Mr. Guruswami Aiyar suggested a distinction which I am not able to accept. According to him, the applicability of the section must depend upon the language used by the complainant in charging the official. If he chooses to say that the offender in his capacity of a public servant committed the offence, then section 197 must apply and not otherwise. This would have the effect of throwing a public servant on the mercy of the complainant.

In my opinion the protection afforded by section 197 would apply to all cases where, in the professed exercise of an official's duties, an offence is committed. I, therefore, hold that as no sanction has been obtained for the prosecution of the 8th accused, the charge against him must be set aside.

Petition allowed in part;
Charge against 8th accused set aside.

V.R.P.

(4) 23 M. 540.
(5) 7 Cr. L. R. 466.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 660 OF 1916.

July 21, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

In the matter of BALAI LALL MOOKERJEE —PETITIONER

versus

PASHUPATI CHATTERJEE — OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 202—Complaint, dismissal of—Right of accused to appear before issue of process—Order for investigation by Police Officer without recording reasons—Irregularity—Revision, High Court's discretion to interfere in.

Magistrates should follow the procedure clearly laid down in Chapter XVI of the Criminal Procedure Code dealing with complaints to Magistrates. [p. 829, col. 1.]

A Magistrate who is not satisfied as to the truth of the complaint of an offence of which he is authorised to take cognizance, when he takes action under section 202, Criminal Procedure Code, must record his reasons. [p. 829, col. 1.]

An accused person cannot be represented by a Pleader before a Magistrate to argue the points which arise in the case of a complaint, until the Magistrate has made up his mind to issue process for compelling his attendance. [p. 829, col. 2.]

Where on a complaint a Magistrate directed a previous local investigation to be made by a Police Officer without recording his reasons under section 202, Criminal Procedure Code, and on the report of the investigation allowed the accused to be represented by a Pleader to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied, and then dismissed the complaint:

BALAI LALL MOOKERJEE *v.* PASHUPATI CHATTERJEE.

Held, that the procedure adopted by the Magistrate was quite inconsistent with the scheme of the Criminal Procedure Code, and that although it was discretionary with the High Court to set aside or not the order of dismissal in such a case, the order must be set aside and the matter must go back to a different Magistrate for disposal in accordance with law. [p. 829, col. 2; p. 830, cols. 1 & 2.]

Baidyanath Singh v. *Muspratt*, 14 C. 141, referred to.

Mr. *E. Norton* and Babu *Narendra Kumar Bose*, for the Petitioner.

Mr. *C. R. Das* and Babus *Manmotha Nath Mukerjee* and *Probodh Chandra Chatterjee*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—This is a Rule which was granted to show cause why the order of the Magistrate by which he dismissed the complaint should not be set aside.

The grounds upon which the Rule has been supported are two: *first*, that the procedure which is laid down by the Code of Criminal Procedure has not been followed by the learned Magistrate and, *secondly*, that if the procedure had been followed by the Magistrate, and if he had confined himself to the materials which he would have had before him if such procedure had been followed, then upon such materials he ought to have issued process.

With regard to the *first* point, we are both of opinion that the procedure laid down by the Criminal Procedure Code has not been followed in two material respects, and we wish to say that we think it is most desirable that Magistrates should follow the procedure which is quite clearly laid down in Chapter XVI dealing with complaints to Magistrates. It is not necessary for me to recapitulate here what is laid down, as plainly as it could possibly be, in sections 200, 201, 202 and 203. The first irregularity was that the Magistrate directed an investigation to be made by a Police Officer, without having recorded his reasons for his not being satisfied as to the truth of the complaint. Section 202 says that if the Magistrate "is not satisfied as to the truth of a complaint of an offence of which he is authorised to take cognizance, he may, when the complainant has been examined, record his reasons, and may then postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or direct a previous local investigation to be made by any officer subordinate to such Magistrate, or by a Police Officer . . . " It is not necessary for me to dwell at any length upon this matter, because so long ago as 1886, this matter was dealt with by this Court in the case of *Baidyanath Singh* v. *Muspratt* (1), where the learned Judges said: "It is clear to us that under section 202 if he distrusts the statement of the complainant *he must record his reasons*. In any case he is bound to record his reasons for distrusting the complaint. That appears to us to be quite reasonable." I not only follow that ruling, but I think it is a perfectly right and reasonable ruling, and I do not see any reason why Magistrates should not follow that which is laid down by the Statute and by the decisions of this Court.

The second irregularity which is relied upon was that the learned Magistrate did not confine himself to the evidence of the complainant and the report which was made by the Police Officer, but that he allowed the accused to be repesented by a learned Pleader and to address him to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied.

To my mind, this procedure is quite inconsistent with the scheme of this Legislation: I do not understood how the accused person ever goes before the Magistrate until the Magistrate has made up his mind to issue process. The Magistrate is directed by the Statute to inquire into the case in certain specified ways, and then having investigated the matter in one or other of the specified ways, he is to decide whether process ought to issue, and then if he thinks that process ought to issue he should direct process to issue. Then the accused person appears, and if he has got a defence, his defence is investigated as well as the case for the prosecution. That being so, it appears to me that the learned Magistrate has not acted in this case in accordance with the procedure which is laid down by the Criminal Procedure Code.

Then arises the *second* point: The

(1) 14 C. 141.

learned Counsel appearing to show cause against this Rule has argued that possibly even if we think that the Magistrate has not followed out the procedure laid down in the Statute, we ought not to make this Rule absolute because it is a matter of discretion whether we should make the Rule absolute—as to which he is perfectly right, it is entirely in our discretion whether we should make the Rule absolute and because it is obvious, as he argues, that even if the learned Magistrate had confined himself to the materials which he might legitimately consider, the conclusion at which he had arrived, namely, the dismissal of the complaint was a right one. We have given full consideration to that argument, but we cannot accede to it, and we think that this matter must go back to a Magistrate to investigate in the ordinary way. Inasmuch as it is going back to the Magistrate, it is advisable for us to say as little as possible upon this *second* point, because if we were to embark upon the matter we might say something which might affect the Magistrate's mind and might prejudice either the one side or the other. I only say this, that broadly speaking, the case which was made by the complainant—I am not saying whether it is true or whether its untrue, and I desire again to guard myself by saying that whatever I say ought not to prejudice either side in any way,—the complaint was that as soon as the owner of this business died, the accused person who was the manager took into his possession all that represented that business. He changed the place of business, and as I have said, before took into his possession, I advisedly refrain from using the word "convert," all that respesented that business and then apparently entered into negotiations with the sons of the deceased person, proposing that they should enter into partnership of the new business which he intended to start, giving them four-annas share in the business. The Police Officer investigated this matter, set out the facts in a full and careful report, and finished his report by saying that this was all a question of the intention of the accused, or words to that effect, and I say that this is in all probability one of the main questions which the Magistrate will have to investigate in this case. We have not the evidence of the complainant before us and upon the materials that we have we are unable to say that it is so absolutely clear that there was no such intention, that in the exercise of our discretion we ought to refuse to make the Rule absolute.

For these reasons we think that the Rule should be made absolute and the matter should be investigated further. But inasmuch as Mr. Swinhoe has already passed an opinion about it, he will not hear this case again. Therefore we will ask him to refer the case to either the second or the third Presidency Magistrate. The Magistrate should investigate the complaint in the ordinary way and come to his own conclusion upon it.

WALMSLEY, J.—I agree

Rule made absolute.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 258B OF 1915.

May 6, 1916.

Present:—Mr. Justice U. Kin

BABA KHAN—APPLICANT

versus

MAUNG BA NAING—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859), s. 2—Applicability of Act—Artificer, labourer or workman—Contractor, whether belongs to any of these classes.

The Workman's Breach of Contract Act applies only to persons falling within the definition of "artificer, labourer or workman." To make the Act applicable the relation between the parties to the contract must be that of labourer and employer of labour. A contractor is not ordinarily an artificer, labourer or workman, and the Act does not apply to a contractor of labour or an agent for the supply of goods, unless such person has contracted to supply his personal labour. [p. 831, col. 2; p. 832, col. 1]

Asgar Ali v. *Swami*, U. B. R. (1902-03) I, 3 Cr., *Gilby* v. *Subbu Pillai*, 7 M. 100; 1 Weir 690; *Caluram* v. *Chengappa*, 13 M. 351; 1 Weir 691; *Chinto, In re*, 2 Bom. L. R. 801, referred to.

Mr *Auzam*, for the Applicant.

JUDGMENT.—Respondent lodged a complaint against applicant under section 2 of the Workman's Breach of Contract Act, 1859, before the first Additional Magistrate, Rangoon. In his petition to the Magistrate the respondent stated that on October 25th, 1914, the applicant signed an agreement in writing whereby he promised to make bricks for the respondent, that in pursuance

thereof he took Rs. 200 by way of advance, that applicant had failed to fulfil his promise and that he had not returned the advance of Rs. 200. By the agreement the applicant agreed to make ten lakhs of raw bricks at the rate of Rs. 35 per 10,000 bricks during a period of one year from Nadaw Lazan. The agreement further has it that in consideration of the undertaking by the applicant, the respondent handed over and applicant received Rs. 200 by way of advance. The applicant denied having signed the agreement or having taken the advance as alleged. The Magistrate found that applicant executed the agreement and took the advance and with the consent of respondent the order was made for the return of Rs. 200 to respondent within seven days. The learned Magistrate appears to have taken it for granted that the case would come within the purview of section 2 of the Act, if respondent's allegations of facts were proved. He has not classed the applicant under one or the other of the three categories, that is to say, whether he was an *artificer*, *labourer or workman*. In my judgment it was the duty of the Magistrate to attend to the legal aspects of the case, though the applicant had only pleaded to the facts alleged. At the hearing of this application, the learned Advocate for the applicant contended that his client was not an artificer, labourer, or workman within the meaning of the Act and that the agreement itself showed that the man was a contractor, and relied upon the Upper Burma case of *Asgar Ali* v. *Swami* (1). In that case the accused was described as a coolie gaung and it appeared that he undertook to provide coolies to do earth work for which he received an advance of Rs. 75 and it was admitted that the accused was not a labourer but a provider of labour. It was held by the Judicial Commissioner, Mr. Copleston, that accused was not an artificer, workman, or labourer, and that the Act did not apply. The case of *Gilby* v. *Subbu Pillai* (2) was referred to as being very similar. In the latter case the learned Judges of the Madras High Court said: "The object of the Act was to provide a remedy for fraudulent breaches of contract by workmen, artificers, or labourers, who have received advances of money for work they have undertaken to perform or get performed, such persons being, for want of means, ordinarily unable to make compensation, when sued for damages. As the Act applies to cases in which the workman has undertaken to get work performed, as well as to cases in which he undertakes personally to perform it, there may be cases in which a contractor is liable to proceedings under the Act but.....the contractor must be himself a workman." Later in 1889, there was another case before the Madras High Court, namely, the case of *Calvram* v. *Chengappa* (3), in which accused was a boat-owner who plied his boat upon a canal. He took an advance from the complainant after engaging to carry salt, but afterwards broke the contract. The lower Courts held that he was a labourer within the scope of the Act. The learned Judges of that High Court held that there was nothing to show that he was himself to render personal labour and that the parties to the contract were not an employer of labour and a labourer respectively and that, consequently, the Act did not apply. In a Bombay case, *Chinto*, *In re* (4), it was held that a person undertaking to do work as a contractor or a commission agent does not make himself amenable to the penal provisions of the Act and that it makes no difference that he was seen on occasions taking part in the work contracted to be done. The learned Judges remarked: "The work undertaken was manifestly one requiring the labour of many persons, and some outlay on carts or other conveyance. The fact that petitioner may from time to time have lent a helping hand, would not render him a member of the class to which alone the Act is applicable, his ordinary status excluding him from that class." The wording of the Act seems to be quite clear also. It is against the artificer, workman or labourer that the Act is directed. The person who agrees to perform the work must himself be a person falling under one or the other of the three categories. The

(1 U. B. (1902-3) I, 3 Cr.
(2) 7 M. 100; 1 Weir 690.
(3) 13 M. 351; 1 Weir 691.
(4) 2 Bom. L. R. 801.

same is the case when he promises to get work performed. So that a contractor who is not himself a workman, skilled or otherwise, would not come within the operation of the Act. In the present case the applicant has undertaken to perform a rather extensive contract, to carry out which he would require skilled and other labourers. I do not think that the Court can conclude that applicant undertook actually to make bricks because the literal meaning of the Burmese word as used in the agreement is "to make." If you ask Ford to make a motor car, Ford would undertake to make you one on condition you pay him his price. Yet Ford does not thereby become an artificer or workman or labourer. So if a contractor undertook to make you a large quantity of bricks, so large that it would be necessary for the contractor to employ a number of labourers, you cannot, without proper materials before you, say whether the contractor comes within the purview of the Act or not. You would have to ascertain whether he is really a contractor. When satisfied that he is such a person, you would further ascertain whether that person would in the ordinary course of his business do the work that he had undertaken to do or to have done, and if he would so do the work, you would further ascertain whether that person would do it to such an extent as deprived him of the status of a contractor. In this case all these points must be determined in the interests of justice. There is so far no evidence on any of those points. I would, therefore, order the Magistrate to take evidence and return findings on the points above mentioned.

Case returned.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 217 OF 1916.

May 12, 1916

Present: Mr. Justice Walsh.

SHAMBHU NATH AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Charge against collective body of persons—Proof against each person, necessity of—General hostility, effect of.

In a charge under section 107 of the Criminal Procedure Code, 1898, against a collective body of persons it is insufficient to suggest that they are indulging in feelings of hostility towards another body of persons There must be definite evidence in the case of each and every person charged under this section that there is a danger of a breach of the peace by him.

Criminal revision from an order of the Sessions Judge, Cawnpore.

Messrs. *Nehal Chand* and *Baleshri Prasad*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case I have no doubt at all that the Magistrate totally misconceived his function under the section. I am content to rest my judgment on the decision in *Queen-Empress* v. *Abdul Kadir* (1). There must be definite evidence in the case of any and every person charged under this section that there is a danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that they are indulging in feelings of hostility towards another body of persons. Man is a gregarious animal and apt to associate himself with friends, and, when he has got nothing else to do, to indulge his feelings of hostility towards his rivals and his friends. These feelings are very much to be deplored; but they do not entitle a Magistrate to make orders wholesale under this section.

Order set aside.

(1) 9 A. 452.

HARI KUNWAR *v.* LAKHMI RAM JANI.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 137 OF 1914.

January 17, 1916.

Present:—Mr. Justice Tudball and Mr. Justice Piggott.

HARI KUNWAR - DEFENDANT—APPELLANT

versus

LAKHMI RAM JANI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (6) Sch. II, para 21—Arbitration, private—Award, filing of, order of—Appeal, maintainability of—Expression of opinion, effect of—Questions not referred, decision of—Withdrawal of question—Private agreement on referred question—Failure to decide question, effect of.

An appeal lies against an order directing an award, in an arbitration without the intervention of a Court, to be filed, although the Court has passed a judgment and a decree upon the award not in excess of or in accordance with the award. [p. 834, col. 1.]

Where an arbitrator merely expresses an opinion as to the law which would govern the inheritance to the property if a widow, party to the arbitration, were to die intestate and which point is not referred to the arbitrator, the award is not bad for deciding points not referred to the arbitrator, inasmuch as it is a matter which can be entirely separated without affecting the determination of other matters referred. [p. 835, col. 2.]

Where an arbitrator is given power to ascertain what is the divisible property of the family and to divide it up, as he thinks best among the members of the family he does not decide a point not referred to him if he allows the marriage expenses to an unmarried member of the family on finding that the marriage expenses of the other members of the family had been met out of the family income. [p. 835, col. 2; p. 836, col. 1.]

Where the parties to an arbitration deliberately withdraw certain questions from the arbitrator, they cannot be heard to say that there has been no decision thereon. [p. 836, col. 1.]

Where, in an agreement executed by the parties to an arbitration, it is distinctly laid down that the arbitrator is to decide as he pleases in regard to a widow's *stridhan*, maintenance and right of residence the arbitrator is not absolved from his duty to decide the question of the widow's right of residence on account of the parties coming to an agreement on the point, and his failure to do so vitiates the award. [p. 836, col. 2.]

First appeal from an order of the Subordinate Judge, Benares, dated the 8th April 1914.

Mr. *Haribans Sahai*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Rama Kant Malaviya*), for the Respondents.

JUDGMENT.—These two appeals arise out of an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure. They are heard together and this judgment will cover both appeals. The parties to this proceeding are one son of Gulab Ram Jani, eight grandsons of the same and the widow of a deceased son, Santokh Ram Jani. Disputes arose in the family and the members agreed to partition the property by means of arbitration. At the time of the first submission to arbitration in October 1911, Adit Ram Jani, one of the sons of Gulab Ram Jani, was alive. An agreement was drawn up on 11th October 1911 and signed by all. It set forth what the parties desired the arbitrators to do and the powers given. Three persons were appointed.

Before the latter were able to do anything, Adit Ram Jani and one of the arbitrators died. Therefore, a fresh agreement was executed submitting the matter to the decision of the two remaining arbitrators. Then one of these refused to act and so a third agreement was drawn up on September 25th, 1912, and signed by all submitting the matters to the decision of the third remaining arbitrator Pandit Lachmi Kant. This agreement contained a reference to the first agreement of October 1911 and set forth that the arbitrator was to act under the conditions set forth in the latter.

An award was made on 21st April 1913. The respondents, Lakhmi Ram Jani and his son Ganesh Ram Jani, then filed an application under paragraph 20 of the Second Schedule of the Code of Civil Procedure that the award be filed and that a judgment and decree be passed in term thereof.

Notice was issued to all the parties. Objections were filed by the appellants now before us. They were heard and decided, being disallowed, and the award was ordered to be filed. The Court, in the course of the same order, passed judgment on 8th April 1914 in accordance with the award and a decree followed in due course on 28th May 1914. The present appeals are directed against the order of the Court below that the award be filed.

A preliminary objection is taken that the appeal is incompetent in that a decree had been passed and there was no plea that it was in excess of, or not in accordance with, the award and, therefore, under paragraph

21, clause 2, no appeal can lie on any other ground.

In our opinion there is no force in this objection. The appellants are the 2nd and 5th parties to the submission to arbitration. The appeals in both substance and form are appeals against the order directing the award to be filed. Section 104 (*f*) of the Code, in plain and clear terms, grants a right of appeal against an order filing an award in an arbitration without the intervention of the Court. These appeals have been filed within the period allowed by law and it is manifest that the bare fact that the Court below has passed a judgment and a decree upon the award cannot take away the right of appeal from the order which the law allows.

The point is covered by the decision: *Khetter Nath Ganguly* v. *Ushabala Dasi* (1). It is obvious that if the order of the Court below filing the award be set aside, the judgment and decree based thereon must also fall to the ground; just as a final decree in a suit based on a preliminary decree falls, if on appeal the preliminary decree be set aside and the suit dismissed [*vide Kanhaiya Lal* v. *Tirbeni Sahai* (2)]. We, therefore, disallow the preliminary objection.

Coming to the grounds of appeal we note that they are the same in both appeals, except that *Musammat* Hari Kunwar takes the additional plea that it is not proved that she executed the agreement dated 12th December 1912 appointing Pandit Lachmi Kant Pandey sole arbitrator.

On this ground the Court below has held against her and we fully agree with that decision.

The two first agreements were drawn up in English and the third in Urdu. Admittedly it bears the lady's signature, which followed the signatures of all the other parties to the submission. The lady swears that she had never agreed that Lachmi Kant Pandey alone should act as arbitrator and that the document was blank when she signed it except for the signatures, that she was told that it was to bear a document on it which would merely expedite the decision of the dispute and she signed because the others had already signed.

Her allegation is disproved by the evidence of Pandit Lachmi Kant and of the witness Salig Ram. The latter is direct evidence of the execution by her, and the former shows that the arbitrator, when he examined her and recorded her statement, was careful enough to ask her beforehand if she had agreed to his acting as sole arbitrator. It is true that he made no record of her reply, but the witness is a man of good education and good position in life against whose honesty and honour not a word is said He is a member of the Bar in good practice at Benares, and we agree with the Court below that his word is to be trusted. It is urged that he wrote a letter to the second arbitrator on 26th December 1912, asking him to come and join in the arbitration and that the Court below wrongly refused to allow the appellant to prove this. This letter was put forward at a late stage of the proceeding in the Court below and moreover was not put to the witness in cross examination to enable him to admit and explain it or to deny it.

We hold that *Musammat* Hari Kunwar did execute the submission of 25th December 1912 and that she willingly and knowingly did so

The other grounds of appeal are—

(1) That the arbitrator made three separate awards and had no jurisdiction to do so, (2) that the award is so indefinite as to be incapable of execution, (3) that the award is bad in that the arbitrator has decided points not referred to him, and (4) that he has omitted to decide all the points referred to him.

These are common to both appeals. It will be noticed that they raise points of the nature of grounds mentioned or referred to in paragraphs 14 and 15 of the Second Schedule of the Code of Civil Procedure.

Paragraph 21 of that Schedule lays down that if any such grounds are not proved the Court shall order the award to be filed. It is obvious that if any such ground is proved, the Court cannot order the filing of the award but must leave the parties to their remedy by a regular suit.

(1) 22 Ind. Cas. 391; 18 C. W. N. 381.
(2) 24 Ind. Cas. 827; 12 A. L. J. 876; 36 A. 532 (F. B).

HARI KUNWAR v. LAKHMI RAM JANI.

The power of the Court to pass such an order is strictly limited by the terms of paragraph 21 of the Schedule.

We take the points *seriatim*.

(1) In regard to the so-called three awards we agree with the Court below that there was only one award, *viz.*, that of the 21st April 1913.

The arbitrator seems to have taken very great care and to have expended a great deal of trouble and time.

On the 31st March 1913 he drew up a long proceeding, setting forth the principles on which he intended to base his award and partition the property and his reasons therefor. This he showed to the parties whereupon some of them filed objections. On 20th April 1913 he drew up another long proceeding dealing with and disallowing these objections.

He then, on 21st April 1913, drew up his award which is the award in the case. The other two documents are not awards in the true sense of the word and there is no force in this point. We reject it.

(2) The next is the plea of indefiniteness. This is based on a small clerical error apparent on the face of the award, but which does not, in our opinion, make the latter either indefinite or incapable of execution.

In dividing the family property the arbitrator allotted a certain house to the second party to the submission to arbitration. This was in the possession of the first party at the time. The arbitrator further ordered the second party to pay a certain sum of money to the first party within a fixed period.

He then laid down a further condition that possession of the house in question was not to be taken by the second party, unless and until the latter had paid the said sum of money to the first party. In writing down these conditions in his award he made a slip and wrote "unless the '*third*' party pays this sum to the first party they will not be entitled to take possession of the house." This was clearly only a slip but the meaning of the word is clear. The house was allotted to the second party and the sum of money was ordered to be paid by that party to the first party who was in possession of the house.

There is no force in the appellant's contention.

(3) The next plea is that the award is bad, in that the arbitrator decided points not referred to him.

This plea relates to two matters entered in the award.

The first is as follows:—*Musammat* Hari Kunwar is the widow of one of the deceased sons of Gulab Ram Jani, and as a Hindu widow in a joint family is entitled to rights of maintenance and residence in the family house. There was also a dispute as to her *stridhan*. In the agreement to submit to arbitration it was set forth that she was entitled to *stridhan*, maintenance and right of residence, and the arbitrator was authorised to decide as to all these as he pleased.

The arbitrator awarded to the lady a lump sum to cover her *stridhan* and her maintenance, giving to her full power to deal with it as she pleased during her lifetime or by Will. In other words, he made her absolute owner thereof.

He then added that if she died intestate, leaving any portion of this sum, that balance would go to her husband's heirs in equal shares.

It is urged that he had no power to decide this question as to the inheritance of what she might thus leave on her dying intestate, as it was not a question in dispute.

In the first place, what he has thus stated is apparently merely what the Hindu Law lays down to be the law in case of this class of *stridhan*; and in the next place, it is a matter which can be entirely separated without affecting the determination of any of the matters referred.

It was, however, we consider, merely an expression of the arbitrator's opinion as to the law which would govern the inheritance to the property if she were to die intestate. We do not think that there is any force in this contention.

The second point relates to that part of the award where the arbitrator makes provision for the marriage expenses of Data Ram, one of the parties to the submission. It is urged that there was no reference on this point and there ought to have been no decision. With this we cannot agree. The arbitrator was given power to

ascertain what was the divisible property of the family, and to divide it up, as he thought best, among the members of the family. He saw that the marriage expenses of the other members of the family had been met, as is usual, out of the family income. He saw that Data Ram had not been married. He, therefore, thought it just when dividing the property to allot to Data Ram an extra sum to enable him to meet his marriage expenses. If he had given no reason for thus awarding this sum of money to Data Ram, his award could not have been touched. The bare fact that he gave his reason does not vitiate it, and he cannot be said to have decided a point not referred to him. We reject this plea also.

The *fourth* and last objection is that the arbitrator has failed to decide *all* the points referred. This plea is based on three points: (1) that he has failed to partition certain property at Jaipore, (2) that he has passed no award as to the expenses of the *Gaya shrad* and *Brahman bhojan* and (3) that he has failed to decide as to the widow's (*Musammat* Hari Kunwar's) right of residence.

As to the first, the arbitrator's evidence shows that when in the course of his inquiry he came to the Jaipore property, the parties all informed him that it no longer belonged to them, as they had created a *wakf*, dedicating this property to a certain god. He, therefore, did not partition that which was not divisible. In the agreement the parties gave him power to ascertain the divisible property and to divide it. They clearly all stated that this was not divisible having been dedicated. His evidence is clear on the point and can be trusted. He, therefore, has not failed to do his duty in respect to this property.

(2) In regard to the expenses of the *Gaya shrad* and *Brahman bhojan*, these are expenses which had been met in the past out of the moneys in the family chest. The arbitrator has testified (and we believe him as the Court below did) that the parties told him that he need pass no order in respect to these, as they would each separately spend what they could afford from time to time under these heads. Such expenditure is not fixed in amount. What a man spends under these heads depends on the length of his purse and his temperament. The parties having deliberately withdrawn the point cannot be now heard to say that there has been no decision thereon.

(3) *Lastly*, we come to the question as to the widow's right of residence. Here unfortunately we come to what we are forced to hold is a flaw in the award.

We have noted above that in the agreement executed by the parties it was distinctly laid down that the arbitrator was to decide as he pleased in regard to the widow's *stridhan*, maintenance and right of residence. The arbitrator's evidence shows that in the course of his inquiry he questioned *Musammat* Hari Kunwar. He asked her what she wished to be arranged for her benefit. She made many demands and in the course of her statement she said that she had always lived in the house, or that portion of the house, occupied by Ravi Ram Jani, the father of the appellant Harakh Ram Jani, that she wished to live in that household and would not live anywhere else. Ravi Ram Jani was questioned as to her demands. He did not agree to at least one of them, but in regard to her wish to live with him he expressed a full consent. None of the other parties expressed any objection. Admittedly the award is silent on the point and does not give the widow a right of residence in any part of the family house, nor allot to her any sum as compensation in lieu thereof.

It is urged that the parties having come to an agreement on the point, it was not necessary for the arbitrator to pass judgment on it and that there was a practical withdrawal of the point by the parties from his jurisdiction. With this it is impossible to agree. The fact that she asked for something and that Ravi Ram acquiesced in her demand and no one else objected made the arbitrator's task simple, but it did not absolve him from passing judgment. When parties to a suit compromise, either the suit is withdrawn or a decree passed in terms of the compromise. There was no withdrawal in the present case, but at the utmost a statement by the parties giving the terms of a compromise. Where there is no specific withdrawal of the suit, the Court must pass a decree in accordance with the compromise effected between the parties.

In our opinion the arbitrator ought in his award to have decided the question of the widow's right of residence and the manner in which it was to be satisfied.

*BRIJ BEHARI LAL *v.* SHEVANATH PRASAD.

As he has not done so, one of the matters referred has been left undetermined by the award and this being so the Court, in view of the language of paragraph 21 of the Second Schedule, ought to have rejected the application made under paragraph 20.

We, therefore, allow the appeal and set aside the lower Court's order and reject the application. The appellant will have her costs in both Courts.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 74 OF 1913.

June 8, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

BRIJ BEHARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEVANATH PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 92, 115—Suit dismissed for want of cause of action- Final decision—Appeal—Cause of action for suit under s. 92, when arises Jurisdiction in absence of misfeasance —Decision—Costs.

Where a suit is dismissed for want of cause of action, no appeal lies at the instance of the defendant against a finding of fact which is not in his favour. [p. 837, col. 2.]

Thakur Magundeo v. *Thakur Mahadeo Singh*, 18 C. 647; *Jamaitunnissa* v. *Lutfunnissa*, 7 A. 606, referred to.

Under section 92 of the Civil Procedure Code no cause of action arises, save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the administration of any such trust. When a Judge in a case under section 92 of the Civil Procedure Code comes to a decision that there has been no misfeasance, his jurisdiction in the matter ends. He cannot record a decision binding on the parties that the trust is a public trust, nor can he make an order for the payment of costs from the estate of the trust. [p. 838, col. 1.]

Appeal from a decision of the District Judge, Darbhanga, dated the 14th November 1912.

Dr. *Dwarka Nath Mitter* and Babus *Bejoy Kumar Bhattacharji* and *Baikuntha Nath Mitter*, for the Appellants.

Babu *Lachmi Narain Singh*, for the Respondent.

JUDGMENT.—This appeal is directed against a decree of the District Judge of Darbhanga dismissing the plaintiffs' suit. The appeal is by the defendants. A preliminary objection is taken that no appeal lies. We have examined the decree and find that the suit was dismissed because the plaintiffs had no cause of action. The appellant argues that he should be allowed to contest, in appeal to this Court, the findings of fact arrived at by the learned District Judge which are not in his favour. This is against the opinions expressed in *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1) and *Jamaitunnissa* v. *Lutfunnissa*(2): "The findings in a judgment upon the matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him, as declared by the decree, amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by section 2, clause 2, of the Civil Procedure Code." There is in the findings in this suit nothing which can be hereafter quoted against the defendants as *res judicata*. All that has been decided is that on the suit as framed the plaintiffs had no cause of action. There is nothing in the decree against which the defendant can appeal. The appeal must be dismissed with costs. In the special circumstances of the case we assess a special Pleader's fee Rs. 300.

It is next contended that that part of the decree which awards costs to the plaintiffs out of the estates in the hands of the defendant is open to revision. We are prepared to go into that question when an application for revision under section 115 shall have been filed. The decree for costs is not a part of the decree itself and no appeal lies against an order as to costs only.

[Next their Lordships took up the case in revision and gave the following]

JUDGMENT.—By this application we are invited to interfere with the decree for costs made by the District Court of Darbhanga.

(1) 18 C. 647.
(2) 7 A. 606 (F. B.).

The facts of the case briefly are that the plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the defendant for his removal from the management of a trust, which was alleged by the plaintiffs to be a public trust. The learned Judge after full enquiry into the facts found that the trust was indeed a public trust, but that the plaintiffs had failed to prove that the defendant had been guilty of misfeasance in connection with the trust. He, therefore, dismissed the plaintiffs' suit, but in view of the facts that the defendant had taken as one of his grounds of defence the plea that the trust was not a public trust he ordered that the costs of the plaintiffs should be paid from the trust estate. Under section 92 no cause of action arises save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the administration of any such trust. Before the learned Judge had jurisdiction to decide the nature of the position of the defendant, it was necessary for the plaintiffs to shew a cause of action in respect of some such breach or some necessity for a direction by the Court. From the moment the District Judge decided that there had been no misfeasance his jurisdiction in the matter ended. It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course. But when the Judge has come to a decision that there was no cause of action, he could not record a decision binding on the parties that the trust was a public trust. Therefore he could not make an order for the payment of costs from the estate as a public trust. Therefore within the meaning of section 115 the order for costs was without jurisdiction. It must, therefore, be set aside and, in lieu thereof, an order made that each side will bear its own costs. We make no orders as to the costs of the present application.

Order set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1072 OF 1914.

July 3, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

FANI BHUSAN SARKAR—DEFENDANT No. 1—APPELLANT

versus

PULIN CHANDRA MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885 B. C.), Sch. III, Art. 3—Dispossession by person holding dual capacity of landlord and auction-purchaser of holding—Limitation.

The dispossession of a tenant by a person who holds the dual capacity of the landlord and also of the auction-purchaser of the holding when he dispossesses, comes within Article 3 of Schedule III of the Bengal Tenancy Act. [p. 839, col. 2.]

Rudra Narain Maity v. *Natabar Jana*, 21 Ind. Cas 431; 41 C. 52 at p. 56; 18 C. L. J. 89; 18 C. W. N. 353; *Aminuddin Munshi* v *Ulfatunnissa Bibi*, 3 Ind. Cas. 315; 13 C. W. N. 108; 9 C. L. J. 131, *Pitambar Mahapatra* v. *Bhagabat Lal*, 24 Ind. Cas. 860, followed.

Kamal Dhari Thakur v. *Rameshwar Singh*, 19 Ind. Cas. 545; 17 C. W. N. 817, not followed.

The dispossession referred to in Article 3 of Schedule III need not be a dispossession by the landlord as such. [p. 839, col. 2.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 4th February 1914, reversing that of the Munsif, Birbhum, dated the 28th January 1913.

FACTS of the case appear from the judgment.

Babus *Ram Chandra Mozumdar* and *Jotindra Lal Banerjee*, for the Appellant.—The date of the dispossession is February 23rd, 1909, and the date of the institution of the suit is January 22nd, 1912. The Judge says that the rule of two years' limitation will not apply as the landlord was the auction-purchaser. But two years' rule does apply in this case, *vide Aminuddin Munshi* v. *Ulfatunnissa Bibi* (1), *Pitambar Mahapatra* v. *Bhagabat Lal* (2) and *Rakhit Mahanta* v. *Puddo Bauri* (3). In this case the plaintiffs admit that they were dispossessed by the *landlord*. Refers to *Nandkumar Dobey* v. *Ajodhya Sahu* (4). It is clear from the aforesaid decisions that the special rule of limitation contained in Article 3 of Schedule III of the Bengal

(1) 3 Ind. Cas. 315: 13 C. W. N. 108; 9 C. L. J. 131.
(2) 24 Ind. Cas. 860.
(3) 9 C. W. N. 54.
(4) 11 Ind. Cas. 465; 16 C. W. N. 351 at p. 353; 14 C. L. J. 292.

Tenancy Act would certainly apply. It does not matter in the least that the landlord who dispossessed was also the auction-purchaser. The dispossession falls within the terms of Article 3 of Schedule III of the Bengal Tenancy Act.

Babu *Baranashibashi Mookerjee*, for the Respondents.—The cases in our Courts have always held that the dispossession must be by the landlord as such. In this case the landlord was also the auction-purchaser when the dispossession took place, therefore, the dispossession cannot fall within Article 3 of Schedule III of the Bengal Tenancy Act: *Abhoy Churn Mookerjee* v. *Shaik Titu* (5), *Dinobundhu Saha* v. *Lolit Mohun Moitra* (6). No doubt the case of *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (1) is clearly against me. The case of *Nandkumar Dobey* v. *Ajodhya Sahu* (4) was one where the landlord dispossessed the tenant by private act of trespass. But the case of *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (1) has been dissented from in *Rudra Narain Maity* v. *Natabar Jana* (7) and *Kamal Dhari Thakur* v *Rameshwar Singh* (8). The present case is, therefore, the landlord not having dispossessed as such, not governed by the special rule of limitation in Article 3 of Schedule III of the Bengal Tenancy Act.

Babu *Ram Chandra Mozumdar* was not called on to reply.

JUDGMENT.

FLETCHER, J.—The only question raised in this appeal is whether, on the facts found, the case comes within the special rule of limitation contained in Article 3 of Schedule III of the Bengal Tenancy Act. The present appellant, the defendant No. 1, claims a settlement from the defendant No. 3, who is admittedly the landlord, after dispossession of the plaintiffs. The question is whether that dispossession falls within the terms of Article 3 of Schedule III of the Bengal Tenancy Act. The defendant No. 3 in addition to being the landlord received from the defendant No. 2 a mortgage, which is said to be for the arrears of rent. Default was made in payment of the mortgage-money and in a suit brought to enforce the mortgage security, the holding of the plaintiffs was brought to sale and purchased by the landlord. The landlord then obtained possession of the property through the Court and subsequently settled the appellant on the land. That, it is said, is not a case falling within Article 3 of Schedule III of the Bengal Tenancy Act. The decisions in this Court on the point are not uniform. It is no use saying that they are. In some of the decisions it is said that the dispossession referred to in Article 3 of Schedule III must be a dispossession by the landlord as such. In the case of *Rudra Narain Maity* v. *Natabar Jana* (7), in which, I may remark, the head-note* is far in excess of what was actually decided by the Court, the learned Chief Justice, Sir Lawrence Jenkins, observed: "We recently had occasion to enter a protest against extending the terms of this Article by use of figures of speech and metaphors. What we have to see in each case is whether, in fact, there has been such dispossession as the Article requires. That dispossession, it is conceded, must be by the landlord." That view I adopt *in toto*. The only question is whether the person who holds the dual capacity of the landlord and also of the purchaser of the holding, when he dispossesses the tenant, comes within the meaning of the Article. He remains the landlord, that is obvious. There are no words in the Article that say "landlord as such". It seems to me difficult, on the face of the Article, to say how we can read such words into the words in the Article. There is a conflict of judicial authorities clearly. In the case of *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (1) the view was taken that the Article applied even when the landlord purchased the holding in execution. That decision was followed by myself and Mr. Justice Richardson in the case of *Pitambar Mahapatra* v. *Bhagabat Lal* (2). The decision in *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (1) has, however, been recently dissented from in the case of *Kamal Dhari Thakur* v. *Rameshwar Singh* (8). In that conflict of judicial authorities, we have got to make up our minds which of these decisions we should follow. I think the decision in *Aminuddin Munshi* v. *Ulfutun-*

(5) 2 C. W. N. 175.
(6) 2 C. W. N. 595.
(7) 21 Ind. Cas. 431; 41 C. 52 at p. 56; 18 C. W. N. 353; 18 C. L. J. 89.
(8) 19 Ind. Cas. 545; 17 C. W. N. 817.

*The reference, apparently, is to the head-note in I. L. R., 41 C. 52 which runs as follows: "By the word 'dispossession' in Art. 3 of Sch. III of the Bengal Tenancy Act is meant dispossession by the landlord *as landlord*."—*Ed.*

nissa Bibi (1) is correct. It is in accordance with the terms of the section and the decision of Jenkins, C. J., in *Rudra Narain Maity* v. *Natabar Jana* (7). That being so we ought to reverse the decision of the learned Judge of the lower Appellate Court and decree the present appeal. The result, therefore, is that the plaintiffs' suit is dismissed with costs in all Courts.

TRUNON, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 382 OF 1915.

June 26, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

KANGALI DHUBI—DEFENDANT—APPELLANT

versus

ICHHAMOYI DEBI AND OTHERS—PLAINTIFFS AND *pro forma* DEFENDANTS—RESPONDENTS.

Contract, tripartite—Specific performance—Rights and liabilities of contracting parties.

The plaintiffs, defendant and his landlords entered into a tripartite agreement that the plaintiffs would give to the landlords a plot of land in exchange for the land the defendant held under them as his homestead and the defendant would vacate the land he held, in favour of the plaintiffs, on receipt of a consideration in money from them and on receiving from his landlords, out of the lands they would get in exchange, an equal piece of land with similar rights for the purpose of his residence. The defendant, on getting Rs. 60 from the plaintiffs, did not vacate the land by removing his huts, whereupon the plaintiffs brought a suit for recovery of its *khas* possession, the landlords having been added as co-defendants:

Held, that the landlords must grant a lease of a convenient plot of land, out of the lands they got in exchange, in favour of the defendant with similar rights and of equal quantity with the land the defendant held under them and that on the execution of such a lease, the plaintiffs would get *khas* possession of the land in suit. [p. 842, col. 2.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 23rd November 1914, reversing that of the Munsif, Iswargunj, dated the 2 rd June 1913.

FACTS.—Plaintiffs brought this suit for recovery of possession of certain lands on declaration of their *taluki* right, and based their claim on an *istifanama* or deed of surrender alleged to have been executed by the defendant. It was alleged that Romesh Chandra Goswami and Sarat Chandra Goswami were the landlords of the defendant who had *nankar* right in the disputed lands under them; that plaintiffs had, by exchange, acquired the superior right in them as well as other lands, so that the defendant became a tenant under the plaintiffs and as such tenant he executed the said *istifa* and agreed to remove his huts and give up possession of the lands in consideration of Rs. 60; that the plaintiffs had already excavated a tank which comprised a portion of the defendant's land.

The defence set up was that Romesh and Sarat were necessary parties (they were subsequently added by the Court's order); that there was no relationship of landlord and tenant between the plaintiffs and the defendant; that the defendant had occupancy *jote* right in the lands for over 30 years; that the stories of the defendant executing the *istifa* and giving up his *jote* lands, the value of which would not be less than Rs. 500, for a nominal sum of Rs. 60, were false; and the defendant also asserted that even if the plaintiff got up any *istifa* in collusion with others the same was a fictitious, fraudulent and collusive deed utterly devoid of consideration.

The Munsif found upon the evidence that the *istifanama* was written out but was not actually executed by the defendant; that there were actually three parties to the transaction, *viz.*, the plaintiffs, their vendors, the added defendants, and the principal defendant; that it was agreed that the defendant would get out of the lands, which Romesh and Sarat got by exchange from the plaintiffs, an equal quantity of *jote* land, that the plaintiffs agreed to pay Rs. 60 as compensation for removing the huts and loss of trees etc.; that though the defendant executed the deed of *istifa* he did not get it registered as an equal quantity of land was not given him as promised and that Rs. 60 was not paid to him. He came to the conclusion that the deed of *istifa* (which was registered by the order of the Special Sub-Registrar on appeal without proper service of notice upon the defendant) was not binding on the defendant for failure of consideration. The result was that the *taluki* right of the

plaintiffs was declared but the prayer for *khas* possession was rejected.

On appeal, the Subordinate Judge of Mymensingh held that the defendant having denied execution in his written statement could not be allowed to make out a new case during the trial, *viz.*, that it was executed but had a two fold consideration: (1) an equal quantity of land in *jote* right, (2) Rs. 60 as compensation for removing huts etc., which did not pass. And if Sarat agreed to give the defendant land it was a separate agreement altogether and the defendant might seek his remedy against the co-defendants in a suit for specific performance. He also found that Rs. 60 was paid as compensation for removing huts and vacating the land. It was further held by the Appellate Court that there was acquiescence on the part of the defendant by his not raising any objection when the plaintiffs dug a tank in a portion of the land and on these findings the Subordinate Judge decreed the plaintiffs' suit in full.

Against this decision the present appeal was preferred by the defendant to the High Court.

Babu *Upendra Kumar Roy*, for the Appellant.—The *istifa* was not valid as there was no relinquishment of the possession of the whole land: *Ramchurn Singh* v. *Raniganj Coal Association, Limited* (1).

Mere proof of notice of relinquishment without proof of actual relinquishment does not absolve a tenant from liability to pay rent. On the principle of mutuality, he will not be deprived of his right to continue in possession.

The principle of cases holding that, if a tenant professes to relinquish the entire holding but really retains a portion of it, there will be no relinquishment, will apply.

A conditional surrender cannot take effect unless the condition is fulfilled.—Foa on Landlord and Tenant, page 616. In the present case the appellant was promised an equivalent piece of land as a condition for his relinquishment, which land he has not been given.

A mere agreement to surrender is not surrendering; though the word "conditional" is not used, yet from the circumstances of the case it was a conditional surrender: *Coupland* v. *Maynard* (2).

In a conditional surrender non-performance of the condition entitles the promisor to fall back on the condition in which he was before the agreement to surrender was made. *Loyd* v. *Langford* (3).

The landlord and the contesting defendants were joint promisors, hence the principle of *Jaharaddi Mandal* v. *Debnath Nath Chaudhury* (4) will apply.

Babu *Dwarikanath Chakravarty* (with him Babu *Kalikinkar Chakravarty*), for the Respondents —The case of *Jaharaddi Mandal* v. *Debnath Nath Chaudhury* (4) does not apply. Here we have paid consideration for the promise made to us; there was a separate and independent contract between the appellant and his landlord; we have no objection to his enforcing that contract against his landlord, the co-defendant, but the defendant cannot resist the claim of the plaintiffs for the specific performance of the contract he made with them, after having received the full consideration of Rs. 60 from them and after having acquiesced in the plaintiffs' digging a tank at a considerable cost on the land in question. The case of *Ramchurn Singh* v. *Raniganj Coal Association, Limited* (1) does not apply to the facts of the case. The plaintiffs have nothing to do with the promise of Romesh and Sarat and they cannot be asked to perform the promise which they (Romesh and Sarat) made. Again, the defendant is trying to make out a new case, a case which was nowhere suggested in the pleadings.

[At this stage their Lordships wanted to know whether the co-defendants Sarat and the legal representatives of Romesh (who had died in the meantime) had entered appearance and on being informed that they had not appeared, though served with notice, proceeded to deliver judgment dealing with the case under Order XLI, rule 33, Civil Procedure Code.]

JUDGMENT.—The facts out of which this appeal arises are shortly these.

(1) 26 C. 29 at p. 36 (P. C.); 25 I. A. 210; 2 C. W. N. 697; 7 Sar. P. C. J. 399.

(2) 12 East 134; 104 E. R. 53.
(3) 2 Mod 174; 86 E. R. 1008.
(4) 33 Ind. Cas. 762; 20 C. W. N. 657 (P. C.).

The plaintiffs are rich men. The defendant has his residence on a small piece of land near their residence. The plaintiffs coveted this land, but they could not induce the defendant to give up the land in his possession. They at last entered into an agreement with the defendant and his landlords that they would give to the landlords another piece of land in similar right and take this land in *taluki* right, and that the defendant-appellant was to vacate the land on receipt of Rs. 60 as compensation for removing his huts and receive out of the land so given in exchange an equal piece of land with rights similar to those he previously had for the purpose of his residence. The landlords of the defendant, namely, Sarat and his brother were not originally made parties but subsequently, on the objection of the defendant, were added as parties.

The learned Munsif found that there was a tripartite agreement by which there was to be an exchange of land between the landlords of the defendant, Sarat and his brother on the one hand, and the plaintiff on the other, and the defendant-appellant was to vacate his huts on receipt of Rs. 60 as compensation for the same and upon receiving from Sarat and his brother an equivalent quantity of land to the land given up by him and in similar right in exchange for this land. Although the learned Munsif found this tripartite agreement, he did not make any order against Sarat and his brother because there was no prayer in the plaint against them.

There was an appeal to the Subordinate Judge by the plaintiffs and the Subordinate Judge thought that the defendant was precluded by his pleading in the case from arguing that the agreement was a tripartite one and that he had not received a part of the consideration. The learned Judge, however, finds from the testimony of Sarat that "it appears that he agreed to give some lands to Kangali for his *bari* out of the land which the plaintiffs gave him," and this seems to us to be a very natural inference.

The defendant has, upon the facts, been living on this land for more than 30 years, and it cannot be expected that he would give up his home and hearth without getting an equivalent piece of land. We, therefore, take it that there was a tripartite agreement, although the learned Judge says that this must be taken as a separate agreement. But upon the facts of the case, as they appear on the evidence, we think that this was a tripartite agreement; and that in order to give full effect to it, Sarat and his co-sharer, that is, the landlord defendants must be compelled to give to the defendant an equal piece of land to that taken over by the plaintiffs from his possession.

The next question is in what right? It appears that the *istifanama* which was executed evidently with the knowledge of Sarat and his co-sharer contains the description of the defendant's holding as a *jote*. The document is not before us and as it is not before us, we take the statement of the title from the judgment of the learned Munsif.

We, therefore, direct that the heirs of Sarat and his brother, that is to say, Romesh Chandra Goswami and Shashi Kumar Goswami do execute in favour of the defendant a lease in *jote* right of land, equal in quantity to that which is covered by the *istifanama*, in a convenient part of the lands received by them in exchange from the plaintiffs, and deliver him possession of the same within one month from the arrival of the record in the Munsif's Court, of which notice will be given to the parties. Upon the execution of such lease in *jote* right and upon delivery of possession to the defendant of that land, the plaintiffs will recover from him the land in suit; but after the delivery of possession to him of the land covered by the lease directed by us to be given by Romesh and Shashi, the defendant will have three months' time in the cold season for the purpose of removing and re-building his huts.

The learned Vakil for the respondent very properly gives up all claim for mesne profits. Under the circumstances, we make no order as to costs in this Court. The costs of the appellant in the lower Courts will be paid by Romesh and Shashi. The other parties will bear their own costs.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 35 OF 1914.

July 8, 1915.

Present:—Mr. Lindsay, J. C.

SHEO NATH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SAMPAT AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Eschcat—Iqrar-malikan—Mafrur, *application of.*

Where, under the terms of an *iqrar-malikan*, a house occupied by a tenant escheats to the *zemindar* if the former becomes *mafrur*, the expression *mafrur* does not apply to the case of a person who is entitled as heir to occupy the house of a deceased tenant but has never actually been in its occupation.

Appeal from the decree of the District Judge, Fyzabad, dated the 1st November 1913, reversing the order of the Probationary Munsif, Fyzabad, dated the 14th May 1913.

Chaudhri *Ram Bharose Lal*, for the Appellants.

Mr. *Mohammad Wasim*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by Sampat and another for recovery of possession of a house situate in plot No. 59 in *Mauza* Rahimpur Dogawan. The plaintiffs are *zamindars* of the village. Their case, as set out in the plaint, was that a house had belonged to *Musammat* Sukhdei, who died on the 18th of March 1911 leaving no heirs. It was alleged that the two defendants, Sheo Nath and Ganpat were in possession without any title. Sheo Nath, I may remark, is brother of Sukhdei, while Ganpat is the son of another brother of *Musammat* Sukhdei. The defendants pleaded that they were heirs of the deceased woman, and during the trial one of the defendants' witnesses stated that Sukhdei's husband had left some collateral relations who lived in another village. The Munsif dismissed the claim on the ground that the plaintiffs had failed to prove that Sukhdei died without any heirs.

The lower Appellate Court reversed this decree, holding that although it had been stated that Sukhdei's husband had left certain collateral relations, those relations were, in the words of the

iqrar-malikan, 'mafrur'. He held, therefore, that the plaintiffs were entitled to succeed. In my opinion this decision of the lower Court is erroneous. It was for the plaintiffs to prove that Sukhdei died without leaving any heirs. Until this fact was established no right of escheat arose under the terms of the *iqrar-malikan*. There can be no doubt that the defendants in this case are heirs of *Musammat* Sukhdei in the absence of any other collateral relations of her husband. While it is true that one of the defendants' witnesses said that Sukhdei's husband had left certain collateral relations, there is absolutely no evidence on the record to show that these relations were alive at the time the suit was brought. If they are alive the plaintiffs cannot succeed, and if they are dead, the plaintiffs are still debarred from recovering the property because the defendants in that case are heirs. I think the Judge was wrong in holding that any male relations left by Sukhdei's husband were disqualified because they were *mafrur*. That expression as used in the *iqrar-malikan* would not, in my opinion, be applied to the case of persons who had never actually been in possession of the house.

I accept this appeal, set aside the decree of the Court below and restore the order of the first Court. The appellants will get their costs both here and in the lower Appellate Court.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 257 OF 1916.

June 30, 1916.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Newbould.

RAM CHANDRA DAS AND OTHERS—*Proforma* DEFENDANTS NOS 4 TO 6—PETITIONERS

versus

HACHUNIA FAKIR *alias* SACHUNIA FAKIR AND OTHERS—PLAINTIFF AND OTHERS DEFENDANTS - OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115,

RAM CHANDRA DAS v. HACHUNIA FAKIR.

O. XXIII, r. 1—Withdrawal of suit, order for, in absence of formal defect—Jurisdiction—High Court—Revision.

There is no general jurisdiction given by the Civil Procedure Code for allowing a party to withdraw a suit with liberty to bring a fresh suit on the same cause of action, except under the provisions of rule 1, Order XXIII, Civil Procedure Code.

An order allowing the plaintiff to withdraw a suit with permission to bring a fresh suit when there is no formal defect in the case, is not in accordance with law and the High Court will set it aside in revision.

Rule against the order of the Munsif, Sherpur, District Mymensingh, in Suit No. 1467 of 1914.

FACTS.—The suit was instituted by the plaintiff-opposite party against defendants Nos. 1 to 6. Subsequently there was a compromise between the plaintiff and the defendants Nos. 1 to 3. The plaintiff then applied to withdraw the suit as against the defendants Nos. 4 to 6 with liberty to institute a fresh suit on the same cause of action and obtained an order to that effect in spite of the objections of the defendants Nos. 4 to 6.

Dr. *Dwarka Nath Mitter* (with him Babu *Brojendra Kumar Rai*), for the Petitioners.—The Rule was directed against an order allowing the plaintiff to withdraw his suit as against defendants Nos. 4 to 6. I submit that the order is bad in law and is against the provisions of Order XXIII, rule 1, inasmuch as there was no formal defect in the plaint nor was there any other sufficient ground justifying the withdrawal of the suit. This is not a case in which the Court had authority to permit withdrawal of the suit. The Court should not allow the plaintiff to cure some inherent defect in the suit in this way, because in such a case the defendant will be materially prejudiced. The authorities have distinctly laid it down that the Courts have no general power of allowing a plaintiff to withdraw from a suit and that they should not allow a suit to be withdrawn after the parties are ready for trial, if such withdrawal may operate to the prejudice of the defendant- *vide* Order XXIII, rule 1, sub-rule (2), *Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (1), *Kharda Company, Limited* v. *Durga Charan Chandra* (2), *Hira Lal Mitra* v. *Uday Chandra Dey* (3) and *Mahipat Shamla* v. *Nathu Vithoba* (4).

Babu *Birendra Kumar De*, for the Opposite Parties.—The order was made under the provisions of Order XXIII, rule 1, clause (6). There was sufficient reason for allowing the plaintiff to withdraw the suit. The circumstances were such that if the plaintiff were to proceed only against the defendants Nos. 4 to 6 the whole plaint had to be changed. Hence the learned Munsif has rightly exercised his jurisdiction. Again, this is not a fit case in which the High Court should exercise its revisional jurisdiction. Defendants Nos. 1 to 3 were the principal defendants. Defendants Nos. 4 to 6 were only *pro forma* defendants. Moreover, at first the latter did not object to the withdrawal of the suit, but when the Court expressed its unwillingness to allow costs to them the Pleader for the defendant No. 5 said that he had objections to the withdrawal of the suit. The order had been passed before the petition of objections was filed. Hence the Rule should be discharged.

JUDGMENT.—The order made in this case does not seem to be one which is authorised by the provisions of Order XXIII, rule 1. There was no formal defect in the case and the learned Munsif ought to have respected the rule of this Court quoted by the petitioners in *Hira Lal Mitra* v. *Uday Chandra Dey* (3). There is no general jurisdiction given by the Civil Procedure Code for allowing a party to withdraw except under the provisions of the said Rule; nor do we find any reason why the learned Munsif did not grant any costs to the defendants.

The order of the learned Munsif, therefore, allowing the plaintiff to withdraw is wrong. We set it aside and direct that the case, as against defendants Nos. 4 to 6, be tried in accordance with law.

The Rule is made absolute with costs, one gold *mohur*.

Rule made absolute.

(1) 13 M. I. A. 160; 12 W. R. (P. C.) 43; 3 B. L. R. (P. C.) 48; 2 Suth P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 158.

(2) 5 Ind. Cas. 187; 11 C. L. J. 45.

(3) 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103.

(4) 4 Ind. Cas 252; 33 B. 722 at p. 726; 11 Bom. L. R. 1109.

ARJUN PRASAD *v.* LAIQ SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 358 OF 1914.

December 23, 1915.

Present:—Mr. Kanhaiya Lal, A. J. C.

ARJUN PRASAD AND OTHERS—PLAINTIFFS —APPELLANTS

versus

LAIQ SINGH—DEFENDANT—RESPONDENT.

Pre-emption—Mortgage—Prior mortgagee getting pre-emption decree against subsequent mortgagee on ground of subsequent mortgage being a sale—Suit by former against mortgagor personally for recovery of mortgage-money—Transfer of Property Act (IV of 1882), s. 68—Maintainability of suit—Merger.

Where a prior mortgagee got a pre-emption decree against the subsequent mortgagee on the ground that the subsequent mortgage was really a sale, and then, after giving credit for the sum mentioned in the subsequent mortgage as having been left with the subsequent mortgagee for payment to the prior mortgagee, sued the mortgagor personally for the balance of the money due on his mortgages:

Held, that the suit was not maintainable, as the effect of the pre-emption decree was to merge the two rights of the mortgagor and the mortgagee in one and the same person, the prior mortgagee. [p. 846, col. 1.]

Baldeo Singh v. *Puttu Lal*, 21 Ind. Cas. 69, referred to.

Appeal from the decree of the District Judge, Hardoi, dated the 29th April 1914, reversing the order of the Munsif, Sandila, dated the 13th February 1914.

Pandit Gokaran Nath Misra, for the Appellants.

Babu Basdeo Lal, for the Respondent.

JUDGMENT.—Ganeshi Lal was the mortgagee of certain property under certain mortgage-deeds executed in his favour by the predecessors-in-title of Laiq Singh. Some of these mortgages were usufructuary and the rest were simple mortgages. The account due on those mortgages was Rs. 1,582-6-6. On the 20th April 1910 Laiq Singh executed what was ostensibly a deed of subsequent mortgage, covering the entire property comprised in the prior mortgages and some other property of his own, in favour of Baldeo Singh on an agreement to repay the said money on the expiry of 41 years. The consideration specified in that deed was Rs. 5,594, out of which Rs. 724 were left with Baldeo Singh for payment to Ganeshi Lal or his representatives in-interest. Ganeshi Lal was succeeded on his death by the plaintiffs. One of them, named Puttu Lal, sued Baldeo Singh for pre-emption in respect of the subsequent mortgage aforesaid, alleging the transaction in question was really a sale disguised under the cloak of a mortgage. That suit was decreed, and the judgment will be found reported as *Baldeo Singh* v. *Puttu Lal* (1). Puttu Lal is admitted to have obtained that decree in his capacity as one of the members of the joint Hindu family, of which the other plaintiffs were also the members. The result of the above decree was that the plaintiffs became the purchasers of the equity of redemption in respect of the prior mortgages held by them and became liable to pay Rs. 724 to themselves in satisfaction thereof. In the present suit the plaintiffs are giving credit for that sum and seek to obtain the balance of the money due on their mortgages. They have given up their lien over the mortgaged property, and their contention is that the cause of action accrued to them to sue for the unpaid portion of the mortgage-money when the property mortgaged went out of their possession as mortgagees and passed into their possession as the purchasers of the equity of redemption on the 24th December 1911, by virtue of the decree for pre-emption above referred to. The defendant denied his liability. The Court of first instance decreed the claim for Rs. 679-14-0, but the lower Appellate Court dismissed the suit on the ground that the money could not be recovered except at the time of redemption of the subsequent mortgage, which was found to be a sale-deed.

In appeal it is contended on behalf of the plaintiffs that there was a covenant in the subsequent mortgage-deed that if the mortgagee had to pay anything more than Rs. 724 to the prior mortgagee, that sum would be recoverable by the subsequent mortgagee at the time of redemption with interest thereon from the property mortgaged. The plaintiffs did not, however, base their claim on that covenant, which is not even referred to in the plaint. The covenant moreover did not impose any personal liability. It merely charged the mortgaged property with the responsibility for payment of the excess at the time of redemption. The ground on which the plaintiffs based their claim is also

(1) 21 Ind. Cas. 69.

untenable, because it is admitted that the property mortgaged, which was the subject of the prior mortgages, has not passed out of their possession. In one sense it may be technically deemed to have changed hands, for it has passed out of the possession of the mortgagees as such and gone into their possession in the capacity of the purchasers of the equity of redemption. The effect of the pre-emption decree, however, is to merge the two rights, and no case, under section 68 of the Transfer of Property Act, for a personal decree against the original owners of the equity of redemption or their heirs has been made out.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 191 OF 1915.

June 28, 1916.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

GIRIJA PROSUNNO ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BECHARAM PATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, O 1, r. 8—Public trust, suit relating to, maintainability of, without consent of Advocate-General—Right to worship idol—Sufficient interest—Special interest.

A suit relating to a public trust should not be brought except with the consent of the Advocate-General, unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust. [p. 847, col. 1.]

When the interest which the plaintiffs have in a public trust as members of the public is not sufficient to enable them to maintain a suit under section 92, Civil Procedure Code, without the consent of the Advocate-General, they cannot by saying that they represent the whole of the Hindu population get a sufficient interest to sue apart from section 92. [p. 847, col. 1.]

The fact that plaintiffs claim to worship the idol to which the property in suit has been dedicated in common with other persons who have the same interest, does not give them a right of suit under Order I, rule 8, Civil Procedure Code. [p. 847, col. 1.]

Appeal against the decree of the Sub-Judge, Hooghly, dated the 5th November 1914, affirming that of the Munsif, Howrah, dated the 12th July 1913.

FACTS of the case appear from the judgment.

Babu *Harakumar* (with Babu *Rupendro Coomar Mitter*), for the Appellants.—The suit is maintainable without the consent of the Advocate-General, though it referred to, a public trust. Apart from section 92 of the Civil Procedure Code, the appellants have a right to sue, *vide Radhabai* v. *Chinnaji* (1) As worshippers, the appellants can maintain the suit without the consent of the Advocate-General. In accordance with the provisions of Order I, rule 8, Civil Procedure Code, persons having an interest in the subject-matter of the suit may institute the suit. The appellants are members of the Hindu community and as such they have an interest and so they can sue.

[FLETCHER, J.—The Hindu community is not a defined class. You have no interest except as members of the public.]

The interest of the appellants is as Hindu worshippers and so they have an interest apart from the interest as members of the public, *vide Ayatannessa Bibi* v. *Kulpir Khalifa* (2).

[FLETCHER, J—In *Ayatannessa Bibi* v. *Kulper Khalifa* (2), the plaintiff said he had a special interest.]

Here the appellants have a special interest, because they occasionally perform the worships of the idol of the *debutter* property of which the land forms a portion. The plaintiffs are "numerous persons having the same interest in the suit."

[FLETCHER, J.—No, they have not any special interest. In that way the whole Hindu population of India can sue, and that is not certainly the meaning of Order I, rule 8, Civil Procedure Code. You can only maintain the suit as members of the public and then with the consent in writing of the Advocate-General under section 92, Civil Procedure Code.]

Babu *Puresh Chunder Mitter* (with him Babu *Nobin Chandra Pal*), for the Respondents, were not called upon.

(1) 3 B. 27.
(2) 22 Ind. Cas. 677; 41 C. 749; 19 C. W. N. 284.

KURE *v.* JHINGURIA.

JUDGMENT.

FLETCHER, J.— This is an appeal from a judgment of the learned Subordinate Judge of Hooghly, affirming the decision of the Munsif of Howrah. The learned Vakil for the appellants in conducting the appeal has taken up a considerable portion of our time and, if I may say so without disrespect, not very usefully. The cases which he has cited before us, with a view to leading us to disagree with the decision of the learned Judge of the lower Appellate Court, really have nothing to do with the matter. The decisions of this Court are clear that a suit of this nature requires the consent of the Advocate-General. There are good reasons why that should be so. Experience shows in all countries that a very large portion of public trust funds has been wasted in litigation and, therefore, it has been considered that a suit relating to a public trust should not be brought except with the consent of the Advocate General, unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust. It seems to me that the learned Judge of the lower Appellate Court rightly applied the law in this respect.

The second point is one which is equally unwarranted by the terms of the law; and that is that these plaintiffs, who occasionally perform the worship of the idol of the *debutter* property of which this land forms a portion, are entitled to sue under the provisions of Order I, rule 8, Code of Civil Procedure, their case being that there are numerous persons having the same interest in the suit. These numerous persons, the learned Vakil for the appellants says, are the whole population of India excluding the Mohamadans, the Christians and the persons belonging to the non-Hindu denominations. That is not what is meant by the rule at all, because the next words state that they should have the same interest in one suit. The interest that the plaintiffs have, as members of the public, being not sufficient to enable them to maintain the suit under section 92, Code of Civil Procedure, without the consent of the Advocate-General, they cannot, by saying that they represent the whole of the Hindu population not only of British India but also of all parts of India lying outside the limits of the Indian Empire, get a sufficient interest to sue apart from section 92.

There is nothing in this appeal. It is accordingly dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1939 OF 1914.

May 3, 1916.

Present:—Mr. Justice Lindsay.

KURE—DEFENDANT—APPELLANT

versus

JHINGURIA—PLAINTIFF—RESPONDENT.

Decree, suit to set aside—Fraud, nature of—False allegations in former plaint proved by perjured evidence, proof of, if necessary—Fraud in proceedings, proof of, necessity of.

Where a suit is brought to set aside a decree on the ground of fraud and the fraud alleged in the plaint is that certain false allegations were made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence, the suit is not maintainable. [p. 849, col. 1.]

In such a suit it must be demonstrated that some fraud has been practised upon the Court in the course of the judicial proceedings which terminated in the decree complained of. [p. 849, col. 1.]

Second appeal from the decision of the District Judge, Agra, dated the 3rd November 1914.

Mr. *Howard*, for the Appellant.

The Hon'ble Mr. *Narain Prasad*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff-respondent for the purpose of having a decree obtained against him in the Small Cause Court at Agra set aside, on the ground that it had been procured by fraud. The plaintiff also prayed that certain property of his which had been attached in execution of the decree should be released.

The facts are as follows:—

In the year 1913 the present defendant sued the present plaintiff on a promissory note alleged to have been executed in November 1912 to secure a loan of Rs. 500. The suit was not defended. The officer deputed to serve the summons on the defendant reported that he had tendered the summons to him, the defendant declined to receive it and the summons was then affixed to the door of the

defendant's house. The Judge of the Small Cause Court being satisfied with the service passed an *ex parte* decree on the 24th April 1913. Execution was taken out in August of that year and the judgment-debtor then applied under Order IX, rule 13, to have the *ex parte* decree set aside. It is stated in the plaint that this application was refused on the ground that the security required by section 17 of the Provincial Small Cause Courts Act was not furnished, but it appears that the merits of the application were considered, for in his order of the 17th September 1913 refusing the application the Judge of the Small Cause Court observed that the applicant had failed to discharge the burden of proving that there was any sufficient cause for his non-attendance in Court when the *ex parte* decree was given against him.

Having failed to get the case re-heard, the defendant Jhinguria has now brought this suit to have the decree set aside. His case as set out in the plaint was that the promissory note upon which the decree was obtained was a forgery. It was alleged in the second paragraph of the plaint that the suit had been instituted fraudulently and that he (plaintiff) had been prevented by the present defendant's fraud from receiving the summons so as to enable him to file his defence. He claimed, therefore, that as the promissory note was a false document and as all the proceedings in the suit were fraudulent, he was entitled to have a declaration that the decree was of no effect and to have his property released from attachment.

The defendant joined issue. He stated that the promissory note was a genuine instrument, he also stated that the plaintiff had dishonestly avoided service of the summons and he finally pleaded that the plaintiff had no cause of action and that he was bound by the *ex parte* decree.

The Munsif framed three issues:—

The first of these was whether the defendant had got service effected by fraud upon the plaintiff. After hearing the evidence he recorded his opinion that there was not a a shred of proof that any fraud had been practised in the matter of the service. He referred to the report of the process-server, to the evidence given by the plaintiff and to that given by the defendant. He accepted the latter evidence as true, the evidence being to the effect that the summons had actually been handed to the plaintiff in the presence of a witness and that he absolutely refused to receive it. On this finding the Munsif dismissed the suit. He held on the other issues that the decree was not liable to be set aside and that the plaintiff was entitled to no relief. The plaintiff then appealed to the District Judge, who on the 23rd June 1914 passed an order of remand. In this he observed that the Court of first instance had only considered the question of the service of the summons and went on to remark that he was not in a position to agree with the Munsif's finding, in the absence of material which would enable him to form an opinion on the merits of the case as a whole. He went on to remark that *prima facie* the suit filed by Kure on the promissory note was a false case, and he returned the record to the Munsif with orders to come to a finding regarding the genuineness or otherwise of the promissory note on which the decree had been obtained. The Munsif received further evidence given by both sides, which led him to the conclusion that the note was a fraudulent and fictitious document.

With this finding before him the learned Judge allowed the appeal and decreed the suit. He was satisfied for various reasons that the promissory note had been fabricated and considered that on this ground the plaintiff was entitled to a decree. He gave no finding whatever upon the issue relating to the fraud alleged in connection with the service of the summons. In short, what he did was to try *de novo* the suit which had been already disposed of in the Small Cause Court and to find in effect that the judgment upon which the decree was based was erroneous.

In second appeal it is argued that the lower Appellate Court was wrong in re-trying the case on the merits, and setting aside the decree without coming to a finding that it had been obtained by fraud.

In my opinion this argument must prevail and the decree of the lower Appellate Court must be discharged. There has been a good deal of case-law upon the question of the nature of the fraud which must be alleged and proved by a plaintiff who asks a Court to set aside a decree on the ground

that it has been fraudulently obtained against him. It is not necessary for me to refer to all the cases cited, as it appears to me that the question is concluded by authority in this Court. In the case reported as *Janki Kuar* v. *Lachmi Narain* (1) it was held by a Bench of this Court that where a suit was brought to set aside a decree on the ground of fraud and the fraud alleged in the plaint was that certain false allegations were made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence, the suit was not maintainable. The learned Judges referred with approval to the statement of the law contained in the judgment of Jenkins, C. J., in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (2).

As remarked by the learned Chief Justice at page 998* of the report, the fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated. He went on to refer to the observations of Sir John Rolt, L. J., in *Patch* v. *Ward* (3) which may be usefully reproduced here:—

"The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance".

In other words, it must be demonstrated that some fraud has been practised upon the Court in the course of the judicial proceedings which terminated in the decree complained of.

Dealing with the case before him Jenkins, C. J., remarked that the judgment of the lower Appellate Court was no more than a re-trial on the merits of the original suit and a determination that the Judge who decided that suit was mistaken. He went on to say:—

"But the Court in this suit has no jurisdiction to decide on the merits of the former judgment; its function is to decide whether that judgment was vitiated by fraud."

(1) 20 Ind. Cas 789; 13 A. L. J. 753; 37 A. 535.

(2) 23 Ind. Cas. 337; 41 C. 939; 18 C. W. N. 681; 19 C. L. J. 457.

(3) (1867) 3 Ch. App. 203; 18 L. T. 134; 16 W. R. 441.

*Page of 41 C.—*Ed.*

The learned District Judge in the present case has fallen into the error imputed to the lower Appellate Court by the learned Chief Justice, and it follows from what has been said that his order in appeal cannot be allowed to stand. It has been suggested that this Calcutta case and the case of this Court which I have cited above are distinguishable from the present case: there the decrees were obtained after contest, here it was obtained *ex parte* in the absence of the defendant. But if there is this distinction in the facts there is no distinction in the principles to be applied. An *ex parte* decree properly obtained is just as much binding as a decree got after contest. It is no doubt a more difficult task for a plaintiff to establish fraud in the case where the decree has been won upon contest but whether it be such a decree or an *ex parte* one, the fraud must be clearly established; if it is not, the suit must fail.

We have it on the finding of the first Court that the plaintiff failed to make out the fraud which he alleged to have been committed in the obtaining of the decree. He was unable to show, as he stated in the plaint, that the defendant had by fraud prevented due service of the summons; on the contrary the Munsif found that the summons had been actually tendered to and refused by the present plaintiff. If this finding is correct there is an end to the case of fraud. I have already mentioned that the learned Judge omitted to deal with the issue relating to fraud in the service of the summons. I do not think it necessary to refer the case back for a finding on this point, as I have all the evidence before me, both that taken before and after remand. The bulk of the evidence led by the plaintiff was directed to show that the promissory note was a false document. One witness, Purna, deposed that he had never seen any Civil Court peon come with Kure to serve any summons on Jhinguria, and this coupled with the plaintiff's own statement that he was not offered the summons, constituted the whole of the plaintiff's evidence on this issue. As opposed to this we have the evidence of Kure supported by the testimony of a witness, Muhammad Husain, in which it is definitely stated that the summons was offered to Jhinguria and was refused by him, with the result

that the serving peon had to post the summons upon his house. It may be noted here that Muhammad Husain attested the return of service made by the peon.

I agree, therefore, with the Munsif that the plaintiff failed to prove that there had been any fraudulent service of summons.

The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and the decree of the first Court restored. The respondent will get his costs in the Court below and in this Court.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 327 OF 1916.

July 21, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

JOHN CARAPIET GALSTAUN—PETITIONER

versus

WOOMESH CHANDRA BANNERJEE—DECREE-HOLDER, AND ANOTHER—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 65—Execution sale in pursuance of consent decree—Sale held by an auctioneer, the nominee of parties—Agent of Court—Receipt of purchase-money by auctioneer, whether 'receipt of assets' by Court—Rateable distribution—Consent decree, characteristics of.

Although an order (or decree) made by a Court on the consent of the parties is a mere creature of agreement and carries out the agreement between the parties, nevertheless it is an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of Justice, namely, it is an order capable of execution by the Court. [p. 852, col. 2.]

Huddersfield Banking Co. v. *Lister*, (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567 and *Wentworth* v. *Bullen*, 9 B. & C. 840; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313, referred to.

The employment of agents for the conduct of a sale in execution of a decree is clearly contemplated by Order XXI, rule 65, Civil Procedure Code, and the fact that the Court appoints a nominee of the parties to a consent decree to conduct the sale and dispenses with the usual preliminaries, such as attachment and the issue of notices, does not render it the less a sale by Court. [p. 852, col. 2; p. 853, col. 1.]

Golam Hossein Cassim Arif v. *Fatima Begum*, 6 Ind. Cas. 300; 16 C. W. N. 394, distinguished.

The receipt of purchase-money by an agent appointed under Order XXI, rule 65, Civil Procedure Code, to conduct a sale is equivalent to receipt of assets by the Court within the meaning of section 73, Civil Procedure Code. [p. 854, col. 1.]

The policy underlying section 73, Civil Procedure Code, is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained, that point of time is the moment when the entire purchase-money has been paid by the purchaser. It is immaterial whether the purchase-money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale. [p. 853, col. 2.]

Maharaja of Burdwan v. *Apurba Krishna Roy*, 10 Ind. Cas 527; 15 C. W. N. 872; 14 C. L. J. 50, distinguished.

A consent-decree provided that the defendant would sell his moveables through an auctioneer and satisfy the plaintiff's claim out of the sale-proceeds, but the defendant-judgment-debtor being afterwards unwilling to proceed with the sale the Court on the application of the plaintiff-decree-holder for execution issued an order upon the auctioneer to sell the property covered by the decree who thereupon sold it and received the purchase-money:

Held, (1) that the sale was in essence a sale held by the Court in execution through a person appointed by Court under Order XXI, rule 65, Civil Procedure Code; [p. 853, col. 1.]

(2) that the receipt of the purchase-money by that person from the purchasers was equivalent to "receipt of assets" by the Court within the meaning of sub-section (1) of section 73, Civil Procedure Code; [p. 853, col. 2.]

(3) that a decree-holder who applied for execution after such receipt of the purchase-money was not entitled to rateable distribution. [p. 854, col. 1.]

Rule against an order of the Sub Judge, 1st Court, 24-Pergannahs, in Money Execution Case No. 169 of 1915.

Mr. *Zorab* and Babu *Bankim Chandra Mukerjee*, for the Petitioner.

Sir *S. P. Sinha* (Advocate-General), Mr. *C. C. Ghose* and Babu *Satis Chandra Mukherji*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order made in a proceeding for rateable distribution under section 73, Civil Procedure Code. The sequence of events which led to the order in question is really not in controversy and may be briefly stated. On the 23rd August 1915, one Banerjee, now opposite party in this Rule, obtained a decree for Rs. 22,441 against Sullivan on the Original Side of this Court. On the 26th August 1915, one Mohammad Abbas obtained a consent decree against Sullivan for Rs. 5,200 in the Court

of the Subordinate Judge of the 24-Pergannahs. On the 31st August 1915, Galstaun, petitioner in this Rule, obtained a decree for Rs. 8,105 against Sullivan on the Original Side of this Court. On the 21st and 22nd September 1915, a considerable sum was realised by a sale of the moveable properties of the judgment-debtor held by Mackenzie Lyall and Co. under the orders of the Subordinate Judge. The question in controversy is whether Galstaun is entitled to rateable distribution of the sale-proceeds. To appreciate the precise position of the rival claimants, we must examine in detail the proceedings taken for execution of the three decrees.

As regards the first decree, we find that a precept was on the 24th August 1915 sent to the Court of the Subordinate Judge under section 46, Civil Procedure Code, and the moveable properties of the judgment-debtor were attached on that basis. On the 6th September 1915, an order was made by this Court for transfer of the decree to the Court of the Subordinate Judge of the 24-Pergannahs for execution. As regards the second decree, we find that Abbas applied for execution on the 8th September 1915. On that very day, an order was made for sale of properties by Mackenzie Lyall and Co., but the proceeding thus initiated was dismissed on the 20th September, as Abbas had in the interval transferred the decree to Banerjee. On that very day, Banerjee made an application to execute the decree as assignee thereof. The sale previously mentioned was held by Mackenzie Lyall and Co. on the 21st and 22nd September 1915. As regards the third decree, we find that Galstaun was not able to obtain an order for transfer from this Court to the Court of the Subordinate Judge, till the 15th December 1915; and his application for execution was not made before the Subordinate Judge till the 14th March 1916. Mackenzie Lyall & Co. sent a cheque to the Subordinate Judge on the 15th March 1916 for Rs. 12,637, the net proceeds in their hands. The question arises, whether, in these circumstances, Galstaun is entitled to obtain rateable distribution under section 73, Civil Procedure Code.

The first sub section of section 73 is in these terms: "Where assets are held by a Court, and more persons than one have, *before the receipt of such assets*, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons." Two of the requisite elements are established in this case; namely, first, assets are held by the Court of the Subordinate Judge; and secondly, each of the decree-holders has obtained a decree for payment of money against the same judgment-debtor and has not obtained satisfaction thereof. The question, consequently, reduces itself to this: who among the rival claimants did, before the receipt of the assets by the Court, make an application to the Court for execution of his decree? In the determination of the question, two points require consideration, namely, *first* what was the true position of Mackenzie Lyall and Co. when they held the sale of the moveable properties on the 21st and 22nd September 1915; did they hold the sale as the agent of the Court or as the agent of the judgment-debtor Sullivan? *Secondly*, was the receipt of money by the auctioneers equivalent to "receipt of assets by the Court" within the meaning of section 73, Code of Civil Procedure?

The determination of the *first* question depends upon the terms of the consent decree made in the suit between Abbas and Sullivan and the true significance of the proceedings taken for the enforcement of that decree. It is indisputable that the sale was held, not in execution of the first or the third decree, but in a proceeding on the basis of the second decree. Was the sale, then, held on the basis of the second decree by Mackenzie Lyall and Co. as in execution of that decree or was it held at the instance of the judgment-debtor and was in essence a private sale for his benefit alone? The answer depends upon the true construction of the consent decree, in which, as happens frequently, sufficient care was not taken to set out precisely the reliefs granted to the successful litigant. That decree, as we read it, provides that "the defendant Sullivan will sell, through Mackenzie Lyall and Co., the whole of the furniture belonging to him, and, according to the terms of the

compromise, will pay out of the net sale-proceeds the sum of Rs. 5,200 to the plaintiff; that if the net sale-proceeds be not sufficient to pay the whole of the said sum, the proceeds shall be paid in part-payment of the said sum of Rs. 5,200 and the plaintiff will recover the balance from the defendant; that for the payment of the said sum of Rs. 5,200, the furniture or the net sale-proceeds thereof shall in the meantime be charged in the first instance with the payment of the said sum to the plaintiff." This decree clearly contemplated a sale in the first instance by the defendant himself through Mackenzie Lyall and Co. and payment by him to the decree-holder of the sum of Rs. 5,200 out of the net sale-proceeds. It was with reference to this aspect of the consent decree that, as soon as it was made, the Court instructed Mackenzie Lyall and Co. to sell the furniture. Difficulties, however, arose from the conduct of the judgment-debtor who was, for some unexplained reason, unwilling to proceed with the sale, and what had been contemplated by the decree was not carried out. The result was that, on the 8th September 1915, the decree-holder was driven to apply to the Court for execution and for an order upon Mackenzie Lyall and Co. to sell the moveables. This application was granted and an order was made as prayed. Whether such an order was or was not contemplated by the decree, it is not for us to determine in the present proceedings. But the fact remains that the Court issued instructions to Mackenzie Lyall and Co. to sell the furniture, and the correspondence between the Court and the auctioneers indisputably shows that the auctioneers proceeded to sell the moveables of the judgment-debtor, not at his request, but under the orders of the Court. Before the sale could actually be held, the decree had, however, been assigned by Abbas to Banerjee. Banerjee, as we have seen, thereupon applied for execution as assignee under rule 16 of Order XXI of the Code, and prayed that fresh instructions might be issued to the auctioneers to hold the sale of the moveables of the judgment-debtor. The Court held that such a step was unnecessary, obviously on the ground that instructions had already been issued to the auctioneers on the application for execution made by Abbas. The sale was then held on the 21st and 22nd September and a large sum of money was realised. It has been contended here that this was a sale held, not in execution at the instance of the Court, but rather at the instance of the judgment-debtor Sullivan pursuant to the agreement between him and his creditor Abbas. In support of this argument, reference has been made to the decision in *Golam Hossein Cassim Arif* v. *Fatima Begum* (1). Stress has also been laid on the circumstance that the steps contemplated by the Code of Civil Procedure as necessary preliminaries to a valid sale held at the instance of the Court were not taken in this case, because the properties were not attached and the requisite notices were not issued. In our opinion, it is fairly clear, on the proceedings taken in their entirety, that the sale was held by the Court through the agency of the auctioneers. The employment of agents for the conduct of a sale of this description is clearly contemplated by rule 65 of Order XXI of the Code, which provides that, save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or "by such other person as the Court may appoint in this behalf" and shall be made by public auction in the manner prescribed. In the present case, the person appointed by the Court, under Order XXI, rule 65, was no doubt the very person nominated by the parties at the time the consent decree was made. It is also true, as observed by Ray, L. J., in the case of *Huddersfield Banking Co.* v. *Lister* (2), that a consent order is a mere creature of agreement and carries out the agreement between the parties, or as Parke, J., puts it in *Wentworth* v. *Bullen* (3), the contract is not the less a contract and subject to the incidents of a contract, because there is superaded the command of a Judge. But it is nevertheless an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of Justice, namely, it is an order capable of execution by the Court. In the case

(1) 6 Ind. Cas. 300; 16 C. W. N. 394.

(2) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

(3) 9 B. & C. 840; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313.

before us, the agreement of the parties that the moveable properties of the judgment-debtor would be sold by Mackenzie Lyall and Co. was accepted by the Court and embodied in the decree. The inference follows that when, upon the application of the judgment-debtor, the Court instructed Mackenzie Lyall and Co. to hold the sale, the Court took a step in execution and the sale was held in execution by a person appointed by the Court in that behalf. The decision of Fletcher, J., in *Golam Hossein Cassim Arif* v. *Fatima Begum* (1) does not militate against this view and is clearly distinguishable; that case only rules that a sale by a Receiver is not a sale by the Court for the purpose of grant of a sale certificate. That principle obviously has no application to the case before us. It may be added that if the sale here be treated as a private sale held at the instance of the judgment-debtor by an agent nominated by him, there would be no room for the application of section 73, Code of Civil Procedure, and the application of Galstaun for rateable distribution could not possibly be entertained. On the *first* question, we must consequently hold that Mackenzie Lyall and Co. held the sale at the instance of the Court and that the sale was in essence a sale by the Court itself.

The determination of the *second* question involves the solution of the problem whether receipt of the purchase-money by the auctioneers from the purchasers was equivalent to receipt of assets by the Court within the meaning of sub-section (1) of section 73, Code of Civil Procedure. We have been invited to answer this question in the negative, on the authority of the decision in *Maharaja of Burdwan* v. *Apurba Krishna Roy* (4). That case is of no assistance in the examination of the question raised before us. The sale there was of immoveable property; under the provisions of the Code, upon such a sale, one-fourth of the purchase money is required to be paid into Court at the time the bid is accepted; the remainder must be brought into Court by the purchaser within a prescribed time. The question in controversy was, whether assets could be deemed to have been received by the Court within the meaning of section 73 before the entire purchase-money had been paid into Court. The answer was in the negative, for the obvious reason that till the entire purchase-money had been brought into Court, there was no completed sale on the basis whereof the sale-proceeds could be distributed amongst the rival claimants. It is also clear that rateable distribution in that case was sought, not in respect of the one-fourth share of purchase-money paid into Court at the time of the acceptance of the bid, but of the entire purchase-money; and with reference to a three-fourths share thereof at least, there could be no controversy that the assets were not received till such portion had been paid into Court. The case before us is of an entirely different description. Here, what was sold was moveable property and the entire purchase-money was paid by the purchasers into the hands of the auctioneers in one instalment. The question thus arises, whether the receipt of the purchase-money by the auctioneers was receipt of the assets by the Court. We are clearly of opinion that the answer must be in the affirmative. The policy which underlies section 73 obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained; that point of time is the moment when the entire purchase-money has been paid by the purchaser. It is immaterial from this point of view, whether the purchase-money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale. This view is consistent with the elementary principle that when an auctioneer receives the purchase-money as agent of the vendor, it is his duty immediately to account for it and pay over the balance due to the latter. This is in conformity with the decisions in *Crosskey* v. *Mills* (5) and *Gray* v. *Haig* (6). We hold accordingly that the assets in the present case were received by the Court for purposes of section 73 on the 22nd September 1915, and not on the 15th March 1916 when the cheque was sent by the auctioneers. It is not necessary for us to enunciate a general principle of

(4) 10 Ind. Cas. 527; 15 C. W. N. 872; 14 C. L. J. 50.

(5) 1 C. M. & R. 298; 3 L. J. Ex. 297.

(6) 20 Beav. 219; 52 E. R. 587; 109 R. R. 396.

universal application that receipt of money by an agent is in all conceivable circumstances equivalent to receipt of money by the principal. It is sufficient to hold that when a sale has been held by a Court in execution under Order XXI, rule 65, receipt of purchase-money by the agent is, for purposes of section 73, equivalent to receipt of assets by the Court. In this view, it is plain that the assets were received by the Court, before Galstaun applied for execution of his decree.

We desire to add that the view we take is clearly consistent with the broad justice of the case. It has been conclusively proved that the delay in the transmission of the purchase-money by the auctioneers to the Court was due entirely to the action of Galstaun himself. He made an application to this Court on the Original Side with a view to restrain the auctioneers from transmitting the sale-proceeds to the Court of the Subordinate Judge. He obtained an *ex parte* order to this effect, on the allegation that the money was held by them within the jurisdiction of this Court as agents of his judgment-debtor, Sullivan. The Court was subsequently apprised that the *ex parte* order had been obtained on a suppression of the fact that the money was in the hands of the auctioneers, not as the agents of Sullivan, but as the agents of the Court of the Subordinate Judge, who had directed the sale. The result was that the order was forthwith recalled and the auctioneers transmitted the cheque to the Subordinate Judge without delay. The parties should clearly be placed in the position they would have occupied if the erroneous order had never been made. It would, in our opinion, have been lamentable if, in such circumstances, we were constrained, upon a narrow construction of section 73, to hold that the petitioner had by recourse to a device succeeded in detaining the money in the hands of the auctioneers for several months and thereby securing an advantage to which he would not otherwise be entitled under the law.

The result is that this Rule is discharged with costs. We assess the hearing-fee at five gold *mohurs*.

Rule discharged.

MADRAS HIGH COURT.

APPEAL No. 110 OF 1915.

July 11, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Krishnan.

RALLABHANDI VENKATA RATNAM AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

RALLABHANDI RAJA RAM MOHANA RAO, MINOR, BY HIS NEXT FRIEND MALLADI VISWANADHA SASTRI, AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4 AND 6—RESPONDENTS.

Will—Probate and Letters of Administration with Will annexed, distinction between—Validity of Will, whether can be questioned after grant of Letters of Administration with Will annexed.

No distinction can be drawn between a grant of Probate and a grant of Letters of Administration with a Will annexed, so far as it affects the proof of the genuineness and validity of the Will. [p. 855, col. 1.]

Probate and Letters of Administration with a Will annexed are conclusive evidence of the factum and validity of the Will. [p. 855, col. 1.]

Whicker v. *Hume*, 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 31 L. T. (O. S.) 319; 115 R. R. 70; 11 E. R. 50, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, at Cocanada, in Original Suit No. 6 of 1914.

Mr. *G. Venkataramiah*, for the Appellants.

Messrs. *P. Somasundaram*, *K. Rajah Iyer* and *B. Narasimha Rao*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition. The *first* question argued before us relates to the genuineness and validity of the Will of one Appa Rao. He died on the 5th July 1908 and a Will was executed by him on the same date. Then an application for Probate was made, but as no executor was designated in the Will, Letters of Administration with the Will annexed were granted on the 15th April 1909. The citations were properly served as required by law and evidence was taken as to the due and proper execution of the Will. An application was afterwards made by some of the parties for revocation of the Letters of Administration. That application was refused and the order was confirmed in appeal. It also appears that a suit was instituted by the second defendant in 1909 (Original Suit 79 of 1909),

seeking a declaration that the adoption of the plaintiff by the 6th defendant, the validity of which depended on the authority granted by the Will, was invalid. That suit was dismissed by the first Court and the decree was confirmed by the lower Appellate Court and in second appeal by this Court. It is now argued on behalf of the appellants that they should have an opportunity of showing that the Will was not genuine and that the testator was not of sound and disposing mind when he signed the Will. It is contended that a distinction ought to be drawn between a grant of Probate and a grant of Letters of Administration with a Will annexed, so far as it affects the proof of the genuineness and validity of a Will. The procedure both with respect to an application for Probate and with reference to Letters of Administration with Will annexed is substantially identical and there is no reason for drawing a distinction between the two. The law is very clearly stated in Halsbury's Laws of England, Volume XIV, page 210, in these words: "Probate and Letters of Administration with a Will annexed are conclusive evidence of the factum and validity of the Will." The case of *Whicker* v. *Hume* (1) lays down the law to the same effect. We think, therefore, that the question cannot be re-opened at this stage.

Then, the *next* question which is argued relates to the insurance money of Rs. 1,000. It is contended that the sum belongs to the joint family and cannot be treated as the separate property of Appa Rao. Appa Rao had an income of his own, and in his Will he says that the money that was due to him from the Insurance Company was his own exclusive property and all the other property was joint family property. We do not think that it has been made out that the finding of the Subordinate Judge is wrong.

The *third* point raised before us relates to the amount of the marriage expenses of the 6th defendant's daughter, that is to say, of the daughter of the brother of the appellants. It was attempted to be argued by the learned Pleader for the appellants that the marriage expenses could not be charged against the joint family property at all, but no such issue was raised before the lower Court and the contention is clearly unsustainable. As regards this amount, Rs. 1,400 and odd have been awarded for the expenses. The appellants did not make any attempt to prove that that amount was not, as a matter of fact, spent. All that was argued before us was that another female member belonging to this family was married about six or seven years ago, and only Rs. 600 or 700 was spent in that marriage. But the expenses vary from time to time and in different cases and we have no reason to hold that the finding of the Subordinate Judge on this point is wrong. But it is rightly pointed out that the decree only makes defendants Nos. 2 to 5 and 9 liable for the expenses of this lady's marriage while, as a matter of fact, the plaintiff also is liable. This is a valid contention conceded by the respondents and the decree will, therefore, be amended by making the plaintiff liable along with defendants Nos. 2 to 5 and 9 for the marriage expenses of this lady in proportion to their respective shares.

On behalf of the 4th defendant, it is contended that there ought to be some provision made for his marriage expenses. We do not think that that is a sound contention.

As regards the memorandum of objections, the only point argued before us is that no provision has been made for mesne profits subsequent to the date of the suit. That is so. The lower Court will make an inquiry into the mesne profits from the date of the institution of the suit and provide for payment of the same to the 1st respondent in his final decree. The amount paid by the appellant into the lower Court will be credited towards the mesne profits which on inquiry are found due to the respondents. The appeal having substantially failed is dismissed with costs of the plaintiff. As regards the memorandum of objections the 1st respondent will bear his own costs.

Appeal dismissed.

V. R. P.

(1) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933; 31 L. T. (O. S.) 319; 115 R. R. 70; 11 E. R. 50.

KALIPADA SIRKAR *v.* HARIMOHAN DALAL.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 575 OF 1915.

June 27, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

KALIPADA SIRKAR—OBJECTOR—APPELLANT

versus

HARIMOHAN DALAL—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXXII, r. 15—Lunatic, decree against—Not properly represented in suit—Execution—Objections to validity of decree, sustainability of—Enforceability or otherwise of decree, whether a question under s. 47, Civil Procedure Code.

A judgment against a person who was *non compos mentis* at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution but should be reversed or annulled in some direct proceeding taken for that purpose, such as by way of review, revision or appeal or a regular suit in a Court of competent jurisdiction; but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made. [p. 859, col. 1.]

A Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. [p. 857, col. 1.]

The question whether a decree obtained against a lunatic, who was made a party to the suit but was not legally represented, is operative or not, does not fall under section 47, Civil Procedure Code, as the lunatic was not a party to the suit in the proper sense of the term. [p. 857, col. 2; p. 858, col. 1.]

Case-law reviewed and discussed.

Appeal against the order of the Sub-Judge, 24-Pergannahs, dated the 20th November 1915.

Babus *Bipin Bihary Ghose* and *Khitish Chandra Chakravarty*, for the Appellant.

Babus *Biraj Mohan Majumdar* and *Satindra Nath Mookerjee*, for the Respondent.

JUDGMENT.—This appeal is directed against an order for execution of a decree for costs. The decree was made on the 24th September 1913 and is in these terms: "it is ordered and decreed that this suit be dismissed, and the costs of the suit Rs. 400-8-9 be paid by the plaintiff to the above-named defendant with interest at 6 per cent. per annum from this day till the date of realisation." In the cause title, set out at the commencement of the decree, the plaintiff is described as follows:—"Lunatic Brojogopal Sarkar, represented by certificated guardian under Act XXXV of 1858, Srimati Mohamaya Dasi, wife of the said Brojogopal Sarkar." The decree consequently entitles the successful defendant to recover the costs allowed in his favour from the lunatic Brojogopal Sarkar. On the 2nd February 1915, the defendant decree-holder applied for execution in accordance with Order XXI, rule 11 (2). Execution was sought against Kalipada Sarkar, the infant son of Brojogopal Sarkar, who had died in the interval. The Court, accordingly, directed notices to issue under Order XXI, rule 22 (1), clauses (*a*) and (*b*). The usual notice was also directed to issue upon Mohamaya Dasi, who had been proposed by the decree-holder for appointment as guardian *ad litem* of the infant. On the 17th March 1915, the Court with the consent of the proposed guardian appointed her guardian *ad litem* of the infant. On the 21st April 1915, the Court issued a fresh notice under Order XXI, rule 22 (1) (*b*), which was served in due course. On the 10th July 1915, the lady filed a petition of objections. She stated that she had lately attained majority and was not a fit and proper person to act as guardian *ad litem* of her infant son. On the writ, she urged that when the decree for costs was made in the original suit, she was herself a minor, not competent to act as next friend of the lunatic, and that the decree was consequently illegal and *ultra vires*, incapable of execution against the estate of her husband in the hands of his minor son. The Court overruled these objections and directed execution to proceed "against the assets of Brojogopal Sarkar, the deceased judgment-debtor, in the hands of his minor son." The propriety of this order is the subject of controversy in the present appeal, preferred on behalf of the infant by his mother.

The *first* objection taken in the Court below is entirely groundless. The lady consented to act as guardian *ad litem*; there is no reason why she should be discharged; there is no conflict of interest between her and her infant son in this matter. Indeed this objection, though mentioned, has not been seriously pressed in this Court.

The *second* objection taken in the Court below raises a question of some nicety. The facts, essential for the full appreciation of the arguments addressed to us, may be briefly

stated. The original suit was instituted on behalf of the lunatic by his wife, who had been appointed manager of his property when he was adjudged a lunatic on the 5th August 1911 under Act XXXV of 1858. The defendant pleaded that the suit was not maintainable, inasmuch as the manager was herself a minor and incompetent under the law to act as next friend of the lunatic. The Subordinate Judge took evidence upon this preliminary question, and came to the conclusion that Mohamaya Dasi was a minor, not only when she got herself appointed manager of the estate of her husband under Act XXXV of 1858, but also at the date of the institution of the suit, and had not attained majority even at the time of the trial. The Court held accordingly that she could not proceed with the suit on behalf of her husband and dismissed it with costs. The decree set out above was drawn up on the basis of this judgment. The question for determination is, whether validity of the decree can be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no operative decree for costs could have been made against him.

It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. This principle was recognized by the Judicial Committee in the cases of *Sri Rajah Papamma Rao Bahadur* v. *Sri Vira Pratapa H.V. Ramchandra Razu*(1) and *Grish Chunder Lahiri* v. *Shoshi Sikhareswar Roy* (2) and has been applied in a long series of decisions [*Hassan Ali* v. *Gauzi Ali Mir* (3), *Rashbihari Singh* v. *Thakur Joyananda Singh* (4), *Shib Lakshan Bhakat* v. *Srimati Tarangini Dasi* (5), *Thakur Madan Mohan Nath Sahi Deo* v. *Bhikhar Shahu* (6), *Ram Nath Singh* v. *Basanta Narain Singh* (*Ugra Narain Singh* v. *Basan Narain Singh*) (7), *Prasanna Kumari Debi* v. *Sris Chandra Mazumdar* (8), *Ramphal Rai* v. *Ram Baran Rai* (9), *Muttia* v. *Virammal* (10), *Venkatachala Reddi* v. *Venkatarama Reddi* (11), *Appa Rao* v. *Krishna Ayyangar* (12), *Sheikh Budan* v. *Ramchandra Bhunjgaya* (13), *Jai Gobind Tiwari* v. *Patesri Partap Narain Singh* (14), *Chhoti Narain Singh* v. *Musammat Rameswar Koer* (15)]; some of which were reviewed by this Court in *Rama Prasad Roy Chowdhury* v. *Anukal Chandra Roy Chowdhury* (16). The doctrine itself is not disputed before us, but its applicability to the circumstances of this case is denied by the appellant. The argument in substance is that the lunatic was not at all represented before the Court at the trial of the suit, and the Court was consequently not competent to pass a decree to his detriment. This position is supported by a reference to three decisions of the Judicial Committee, *Khiarajmal* v. *Daim* (17), *Rashid-un-nisa* v. *Muhammad Ismail Khan* (18) and *Radha Prasad Singh* v. *Lal Sahib Rai* (19), which show that a Court is not competent to make an operative decree against a person, not a party to the suit or properly represented on the record; but still the question remains, whether an objection on this ground can be raised in proceedings in execution of such a decree. We are of opinion that the answer should be in the negative. The point is really concluded by the decision of the Judicial Committee in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (18). There, the plaintiff sued for a declaration that the two decrees and three sales in execution of decrees were invalid so far as

(1) 23 I. A. 32; 19 M. 249; 6 M. L. J. 53.
(2) 27 I. A. 110; 27 C. 951; 4 C. W. N. 631.
(3) 31 C. 179.
(4) 4 C. L. J. 475.
(5) 8 C. L. J. 20.
(6) 15 Ind. Cas. 719; 16 C. L. J. 517.
(7) 19 Ind. Cas. 630; 18 C. L. J. 209; 17 C.W.N. 868
(8) 33 Ind. Cas. 344; 22 C. L. J. 561.
(9) 5 A. 53; A. W. N. (1882) 151.
(10) 10 M. 283 (F. B.).
(11) 24 M. 665.
(12) 25 M. 537.
(13) 11 B. 537.
(14) A. W. N. (1907) 286; 4 A. L. J. 765.
(15) 6 C. W. N. 796.
(16) 27 Ind. Cas. 444; 20 C. L. J. 512.
(17) 32 I. A. 23 (P. C.); 32 C. 296 at pp. 313, 315; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 8 Sar. P. C. J. 784.
(18) 3 Ind. Cas. 861; 36 I. A. 168; 31 A. 572; 13 C. W. N. 1182 (P. C.); 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279.
(19) 17 I. A. 150; 13 A. 53; 5 Sar. P. C. J. 600.

concerned her share in her paternal estate, which purported to be bound thereby. The two decrees were alleged to be not binding upon her, because, amongst other reasons, her sister, a married woman, had, in suits in which these decrees were made, been improperly appointed her guardian *ad litem*. The defendants asserted the validity of the decrees and sales in execution and pleaded, *inter alia*, that the suit was barred by the provisions of section 244 of the Code of Civil Procedure of 1882. The Subordinate Judge held that the suit was not barred and decreed it on the merits. The High Court (Stanley, C. J., and Burkit, J.) held on appeal that the suit was barred under section 244. They observed that the decrees, whereon the execution proceedings were founded, were not and could not be impeached in the suit; the impeached transactions were proceedings of those decrees in execution and the proper course for the plaintiff was to raise these objections under section 244 and not by a separate suit, as the question "arose between the parties to the suit in which the decree was passed or their representatives and related to the execution of the decree." The Judicial Committee, on appeal, reversed the decision of the High Court and restored that of the Primary Court. Sir Andrew Scoble, who delivered the judgment of their Lordships, observed: "Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister was a married woman, and, therefore, was disqualified under section 457 of the Code from being appointed guardian for the suit." That a question of this character cannot be determined in execution, follows from two other decisions of the Judicial Committee, *Radha Prasad Singh* v. *Lal Sahib Rai* (19) and *Khiarajmal* v. *Daim* (17), where relief was granted in regular suits on the ground that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. Lord Watson observed in the first case that an operative decree, obtained after the death of a defendant, by which the extent and quality of his liability are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced. Lord Davey observed in the second case that as against persons who were not parties to the proceedings or properly represented on the record, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. These two cases were argued by Counsel, who had an intimate knowledge of Indian Codes, before eminent Judges, who possessed an extensive acquaintance with our system of procedure (Sir Barnes Peacock, Sir Richard Couch and Sir Arthur Wilson). If the contention of the appellant is well founded, it is singular that it did not strike anybody that the suits were barred under section 244 as the question in controversy could and should have been raised in execution proceedings. It is worthy of note that in *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (20), when an objection of this character was raised in execution proceedings, the application was converted into a plaint under the provisions of section 47 (2) of the Civil Procedure Code and this course was approved by the High Court. Our attention, however, has been drawn to the decision in *Subramania Aiyar M.* v. *Vaithinatha Aiyar* (21), where objection was allowed to be taken in execution proceedings that the decree under execution was passed after the death of the defendant and before his legal representatives were impleaded. Reliance was placed upon the decisions in *Janardhan Krishna Padhye* v. *Ramchandra Vithal Ranade* (22), *Radha Prasad Singh* v. *Lal Sahib Rai* (19) and *Imdad Ali* v. *Jagan Lal* (23). In the first case objection was taken, not in execution of the decree, but by way of application to the Court

(20) 29 Ind Cas. 314; 28 M. L. J. 525; 38 M. 1076.
(21) 31 Ind. Cas. 198; 38 M. 682.
(22) 26 B. 317; 4 Bom. L. R. 23.
(23) 17 A. 478; A. W. N. (1895) 109.

which had passed it. In the second case, the objection was taken, not in execution, but by way of a regular suit. In the third case, the objection was sustained, though taken in execution, but this view is clearly opposed to the decision of the Judicial Committee in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (18). On the other hand, we find that in *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (24), under somewhat similar circumstances, the judgment-debtor was not allowed to object to the validity of the decree in the course of its execution. The position is obviously different where, as in *Arjun Das* v. *Gunendra Nath Basu Mallik* (25), objection is taken to the execution proceedings on the ground of the death of the judgment-debtor, not before but after decree. We also find that in *Amichand Talakchand* v. *Collector of Sholapur* (26), the question was raised by way of an application to the High Court to set aside a decree, so improperly made, in the exercise of its ordinary jurisdiction. The substance of the matter is that a proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. On this principle, it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior Tribunal or by way of a regular suit in a Court of competent jurisdiction, but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made. The case before us is covered completely by the decision of the Judicial Committee in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (18). There the lunatic was never a party to the suit in the proper sense of the term; his wife, though appointed the manager of his estate under Act XXXV of 1858, was herself a minor, and was thus disqualified to act as his next friend in the suit. The lunatic was, in the words of Sir Andrew Scoble, never a party to the suit in the proper sense of the term and, consequently, the question now raised is not a question which arises between the parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. The appellant has contended that this view is likely to lead to lamentable results, that if the decree is allowed to be executed, the purchaser will acquire no title, and that much mischievous litigation will, as a consequence, follow. We appreciate the force of this contention. At the same time, there is no answer to the argument of the respondent that if the decree is directly challenged, as it should be in an appropriate proceeding, the Court will, no doubt, remodel the decree in accordance with Order XXXII, rule 2, read with rule 15 [*Geereeballa Dabee* v. *Chunder Kant Mookerjee* (27), *Devkabai* v. *Jefferson, Bhaishankar and Dinsha* (28)] and thus safeguard his just rights, while if the objection to execution prevails, he will be left without a remedy. We are of opinion that the safest course to follow is to adhere rigidly to the established principle that every order and judgment, however erroneous, is in the words of Lord Cottenham in *Chuck* v. *Cremer* (29) good, until discharged or declared inoperative, and that the execution Court cannot enquire into the validity or propriety of the decree. This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is capable of execution.

The result is that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(24) 27 M. 118.

(25) 27 Ind. Cas. 294; 20 C. L. J. 341; 18 C. W. N. 1266.

(26) 13 B. 234.

(27) 11 C. 213.

(28) 10 B. 248.

(29) 2 Phil. 113 at p. 115; 16 L. J. Ch. 92; 1 Coop. C. C. 338 at p. 342; 41 E. R. 884; 78 R. R. 45.

BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 566 AND 569 OF 1914.

August 2, 1916.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, and Mr. Justice Shah.

BASLINGAPPA VIRBHADRAPPA HUDDAR AND OTHERS—DEFENDANTS —APPELLANTS

versus

CHANDRAPPA BASAWANT RAO DESAI AND OTHERS—PLAINTIFFS - RESPONDENTS.

Grant—Grant for services to be rendered—Resumption right of, where services not required or discontinued—Burden of proof—Evidence—Presumption

Where a grant of land is made for services rendered and to be rendered, the grantor is not entitled to resume either on the discontinuance of the services or of his no longer requiring them to be performed. Where, however, the grant is made as remuneration for or in lieu of wages or service, the land would be resumable on the discontinuance of the service. [p. 860, col. 2.]

The burden of proving that the land is resumable lies on the party seeking to resume. [p. 860, col. 2.]

Lakhamgavda Basaprabhu v. *Keshav Annaji Kulkarni*, 28 B. 305; 6 Bom. L. R. 364, *Alexander John Forbes* v. *Meer Mahomed Taquee*, 13 M. I. A. 438; 14 W. R. (P. C.) 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J 588; 20 E R. 614 and *Yellava Sakreppa Barki* v. *Bhimappa Gireppa Desai*, 28 Ind. Cas. 12; 39 B. 68; 17 Bom. L. R. 128, referred to.

Where the deed of grant is not produced and the only evidence as to its nature goes no further than that the grant was made for services, the presumption is that those services were services rendered in the past and to be rendered in the future and that the land is not, therefore, resumable. [p. 860, col. 2.]

Cross-appeals from the decision of the Assistant Judge, Belgaum, in Appeal No. 66 of 1912, confirming the decree passed by the Subordinate Judge of Bail-Hongal, in Civil Suit No. 228 of 1910.

Mr. *Jayakar* (with him Mr. *Jayant G. Rele*), for the Appellants.

Mr. *Strangman* (with him *M. Nilkant Atmaram*), for the Respondents.

JUDGMENT.

BATCHELOR, A. C. J.—The plaintiffs are the Vatandar Desai Inamdars of Tallur in the Belgaum District, and they brought this suit, as the transcript of the plaint sets out, to recover possession of certain lands from the defendants on the footing that those lands had been, by the plaintiffs' ancestors, granted to the defendants' ancestors for the performance of certain services, which services the plaintiffs no longer required of the defendants. It was stated in the plaint that "the services not being required n the present times, and the lands being resumable, the plaintiffs are entitled to recover them." And it was then set forth that a notice to quit was served on the head of the defendants' family and that the defendants had refused to surrender. Therefore this suit was brought.

The present appeal is by the defendants, whose ancestors were grantees of the lands in suit from the plaintiffs' ancestors. The main question involved in the appeal is whether, assuming that the lands were granted in respect of services, they are resumable merely by reason of the fact that the services are no longer rendered because no longer required. The decision of this question appears to turn on the character of the services for which the grant was made, and a distinction has to be drawn between a grant made for services rendered and to be rendered, and a grant made as remuneration for or in lieu of wages or service. In the case of this latter grant, and not in the case of the former grant, the lands would be resumable on the discontinuance of the service. But the burden of proving that the case falls within the category of lands resumable on the discontinuance of service plainly falls upon the plaintiff who seeks to resume them; see the decisions of this Court in *Lakhamgavda Basaprabhu* v. *Keshav Annaji Kulkarni* (1), which followed the Privy Council judgment in *Alexandar John Forbes* v. *Meer Mahomed Tuquee* (2) and *Yellava Sakreppa Barki* v. *Bhimappa Gireppa Desai* (3).

Now the plaintiffs in this case must, in my opinion, fail because they failed to show that the grant made by them or their ancestors was a grant on terms that the lands should be resumable if the services ceased. In truth we know nothing whatever of the terms of the grant upon this vital point. The grant itself is not forthcoming, and the fragmentary evidence as to its nature goes no further than this, that the grant was made for services. The presumption would be that those services were services rendered in the past and to be rendered in the future, and there is nothing in the evidence to repel that presumption or to establish the case which it is necessary for

(1) 28 B. 305; 6 Bom. L. R 364.

(2) 13 M. I A. 438; 14 W. R. (P. C.) 28; 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614.

(3) 28 Ind. Cas. 12; 39 B. 68; 17 Bom. L. R. 128.

the plaintiffs to establish. The learned Assistant Judge says that he is satisfied "that this land was granted by the Desais for future service." It is clear, however, that there is no evidence to support this finding, if it is to be read in the full rigour of the words; for the only documents upon which the plaintiffs relied in this connection were Exhibits 20-A and 56, which go no further than to show that the defendants' ancestors held as *nisbatdars* under the plaintiffs' ancestors. That phrase, however, would only mean that the defendants' ancestors held either in relation to or under the plaintiffs, and that would be perfectly consistent with the case which the defendants now make. Since the plaintiffs are unable to show that the grant was such that the lands became resumable on the discontinuance of the service he appellants-defendants must on this point succeed.

But then it was contended by Mr. Strangman that his clients, the plaintiffs, are entitled to judgment inasmuch as they were the defendants' lessors, and the defendants, prior to the institution of this suit, denied their title. Therefore, it is argued, a forfeiture of the holding has been incurred. Assuming for the purposes of the argument that the plaintiffs may be correctly described as the defendants' lessors, I am yet of opinion that the plaintiffs cannot save their position upon this ground. For, first, it is in my judgment clear that the whole suit up to this Court of Second Appeal has been fought out between the parties without reference to any such claim as this. As I understand the judgment and proceedings in the Court below, the plaintiffs' claim to recover the land was grounded only on this, that the grant was for service and the service had been discontinued. I can find nothing to warrant the idea that up till this moment the defendants ever had a fair opportunity of meeting the case that they must surrender the land because they have denied the plaintiffs' title. That being so, it is unnecessary to consider whether, if they had to meet such a case, they would be able to meet it successfully. But we have allowed Mr. Jayakar to discuss before us the documents upon which the case for the plaintiffs upon this point was mainly rested, and I am satisfied that in these documents there is no such repudiation of the plaintiffs' title as would work a forfeiture of the holding.

These being the only points mentioned in the argument, I am of opinion that the appeal must be allowed and the plaintiffs' suit must be dismissed. It should be mentioned that although in the pleadings the defendants have, as is usual in the *moffusil*, overstated their case, and claimed that they were entitled to hold the land without rendering service, they now undertake through their Counsel, Mr. Jayakar, to perform the accustomed services, should they ever be asked to do so.

In view of the fact that both sides have steadily overstated their real positions, we think that the proper order will be that each party should bear his own costs throughout.

SHAH, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 470 OF 1913.

July 17, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

LALIT KISHORE MITRA—PLAINTIFF—APPELLANT

versus

Thakur GIRDHARI SINGH AND OTHERS DEFENDANTS—RESPONDENTS.

Partition—Partition of limited interest—Lessee for years of underground mines and minerals, whether can claim partition—Partition Act (IV of 1893), s. 2.

As under English law so in India a person holding a limited interest as a lessee for years may maintain a claim for partition. The right is not restricted alone to persons having a permanent title. [p. 863, cols. 1 & 2.]

A lessee, therefore, for 999 years of the underground mines and minerals can claim a partition against his lessor's co-sharers, especially when persons entitled to the reversion do not object to it. [p. 863, col. 2.]

A partition should not be refused on the ground of its impossibility. If difficulties are actually met with in execution, the Court may order a sale under section 2 of the Partition Act. [p. 863, col. 2.]

Mukunda Lal Pal Chowdhry v *Lehuraux*, 20 C. 379, distinguished.

Hemadri Nath Khan v. *Ramani Kanta Roy*, 24 C. 575 (F. B.); 1 C. W. N. 406; *Heaton* v. *Dearden*, 16 Beav. 147; 96 R. R. 69; 51 E. R. 733; *Baring* v. *Nash*, 1 V. & B. 551; 35 E. R. 214; *Lala Bhagwat Sahai* v. *Bipin Behary Mitter*, 7 Ind. Cas. 549; 37 C. 918; 12 C. L. J. 272 (P. C.); 14 C. W. N. 1034; 8 M. L. T. 276; 7 A. L. J. 1137; 12 Bom. L. R. 997; 20 M. L. J. 907; (1910) M. W. N. 691; 37 I. A. 198, referred to.

LALIT KISHORE MITRA v. GIRDHARI SINGH.

Appeal from a decision of the Subordinate Judge, Manbhum, dated the 14th July 1915.

Mssrs. *Pugh* and *Jayaswal*,and Babus *Naresh Chandra Sinha* and *Sishir Kumar Mitra*, for the Appellant.

Messrs. *P. R. Das* and *Sailendra Nath Palit*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—This was a suit for partition of underground mines and minerals in a village of which an eight-annas share belongs to the first defendant and the remaining eight-annas share is the property of defendants Nos. 4 and 5. The only dealings with the property which need be noticed are (*a*) a *mukarari* of an eight-annas share granted on September 26th, 1878, by the predecessor-in-title of the first defendant to one Raghunath; (*b*) a lease of 4 *muris* of land and other rights granted by the predecessor-in-title of the fourth and fifth defendants on September 23rd, 1879, to Keshu, the son of Raghunath; and (*c*) a lease for 999 years of the underground mines and minerals in half the village granted on January 21st, 1908, to the plaintiffs by the fourth and fifth defendants. The rights of Raghunath and Keshu under leases (*a*) and (*b*) have, by reason of various assignments, vested in the second defendant, the Bengal Coal Co., Ltd.

In view of certain well-known decisions of their Lordships of the Privy Council, it is probable that lease (*a*) did not affect the lessor's right to the underground mines and minerals in his share of the village, but the question need not be decided in this case. It is clear, and indeed it is conceded by Counsel for the Bengal Coal Company, that lease (*b*) did not confer on the lessee any right to under-ground mines and minerals. The plaintiff is, therefore, entitled to the rights which lease (*c*) purports to confer upon him. The question for decision is, whether that lease entitles him to maintain a suit for partition. The fourth and fifth defendants support his claim to partition. The first defendant also is willing to have the underground mines and minerals partitioned. His case is that the second and third defendants have no rights whatever to the minerals in his share of the village.

The Subordinate Judge dismissed the suit, on the ground that the plaintiff as a lessee for a term only was not joint owner of the minerals with any other person, but was only entitled on certain conditions to carry on mining operations in half the village, that his rights under the lease of January 1908 did not entitle him to claim partition of the minerals, and that a partition was impossible.

Counsel for the Bengal Coal Co. relied upon the decision in *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (1), but the authority of that case is much shaken by the decision of the Full Bench in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (2), in which Banerjee, J., delivering the judgment of the Court said at page 581: "In support of the first ground it is urged that the plaintiffs' predecessor-in-title having granted a *putni* of an undivided share of 6 annas in the entire *zemindari*, to allow the plaintiff to enforce partition and limit the *putni* to a specific portion of the *zemindari* proportionate to the 6-annas share would be to allow him to alter the terms of the *putni* lease against the will of the lessees. A contention somewhat similar to this was raised in *Heaton* v. *Dearden* (3) on behalf of the defendant, whose predecessor-in-title had agreed to grant a lease of an undivided moiety of certain mines, in a suit for specific performance of the agreement to lease and for partition, and the contention was disallowed. And there is no reason why a different principle should be followed in this case." and (at page 583): "I am unable to assent to the view that as a general proposition of law there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. I think the Court must in each case determine whether having regard to the nature of the interests owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. This view is in accordance not only with the English cases cited in the argument, namely, *Baring* v. *Nash* (4) and *Heaton* v. *Dearden* (3) which may be referred to so far

(1) 20 C. 379.
(2) 24 C. 575 (F. B.); 1 C. W. N. 406.
(3) 16 Beav. 147; 96 R. R. 69; 51 E. R. 733.
(4) 1 V. & B. 551; 35 E. R. 214.

as they deal with general principles, but also with the rules of justice, equity and good conscience, which our Courts are directed to follow in cases not provided for by any definite rule of law (See Act XII of 1887, section 37)." Counsel for the Bengal Coal Co. relied also upon the decision of the Privy Council in *Lala Bhagwat Sahai* v. *Bipin Behary Mitter* (5). In the course of their judgment their Lordships said: "In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition. Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject."

This case clearly cannot be relied upon as an authority for the proposition that only a person having a permanent title can claim partition.

In *Baring* v. *Nash* (4), the Vice-Chancellor overruled a demurrer to a bill for partition by a lessee for a term of 500 years of which 73 had expired, and held that it was clear law that a person having a limited interest of that kind might claim partition. In *Heaton* v. *Dearden* (3) one of two tenants-in-common of an estate had agreed to grant a lease for 21 years of the mines under it. The Master of the Rolls held that the lessee was entitled to a decree for specific performance and for partition of the estate. In view of the suggestion made by Counsel that an owner of land having given a lease of the surface cannot grant a lease of the minerals, I quote the following passage from the judgment of the Master of the Rolls: "It was argued that the minerals being unbroken, and there being no agreement to demise the surface of the ground, you could neither have the specific performance nor a partition of the property. But so far as the partition is concerned, the point is decided by the case of *Baring* v. *Nash* (4), because a limited interest in a portion of the estate would not differ in effect from a limited interest with respect to the whole of the estate. With respect to specific performance, I am also of opinion that it is decided by the ordinary principles that a man may, if he pleases, sell his interest in the surface of an estate reserving the minerals, or he may sell his interest in the minerals reserving the surface, that he may demise and contract to demise the minerals alone, in the same manner as he may enter into a contract to sell them without the surface, and that having demised the minerals he has also given the right to get at them."

According to the English authorities it is clear that a lessee for years may maintain a claim for partition.

I see no reason for holding that a different rule prevails in India. Moreover, the objections that have been taken at times to allowing a suit for partition by a person holding a limited interest do not apply to the present case. The plaintiff holds a lease for no less than 999 years and the fourth and fifth defendants, who are entitled to the reversion, desire that the claim for partition should be allowed.

There remains the question whether a partition of the underground mines and minerals is impossible. In his plaint the plaintiff claimed a sale as an alternative to partition and the Bengal Coal Co. at once denied that the underground rights could not be conveniently partitioned or that a division could not reasonably or conveniently be made (written statement, paragraph 7). Their Counsel in this Court seemed inclined to dissent from this. At present I see no reason to anticipate any special difficulty in effecting a partition but in case any such difficulty is found hereafter, we may reserve to the Court below the right to order sale under section 2 of the Partition Act, 1893.

I would allow this appeal and pass a preliminary decree for partition of the underground mines and minerals of the village, provided that, if hereafter it is found impracticable to partition the same, a sale may be

(5) 7 Ind. Cas. 549; 37 I. A. 198; 37 C. 918; 12 C. L. J. 240 (P. C.); 14 C. W. N. 962; 8 M. L. T. 228; 7 A. L. J. 1137; 12 Bom. L. R. 997; (1910) M. W. N. 691; 20 M. L. J. 907.

ordered. The Bengal Coal Company must pay the appellant's costs in this Court. All other parties will pay their own costs in this Court. Costs in the Court below will be costs in the cause.

SHARFUDDIN, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL No. 15 OF 1915.

August 7, 1916.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, and Mr. Justice Seshagiri Aiyar.

P. M. A. MUTHIAH CHETTY—PLAINTIFF—APPELLANT

versus

P. V. KOTHANDARAMASWAMI NAIDU—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 59—Mortgage, equitable—Deposit of title-deeds, when creates mortgage—Letter accompanying deposit, when requires to be stamped and registered—Stamp Act (II of 1899), s. 26, Sch. I, Arts. 5, 6—Registration Act (XVI of 1908), s. 17—Mortgage, creation of—Oral evidence, admissibility of—Evidence Act (I of 1872), s. 92.

The 2nd defendant deposited the title-deeds of his house with the 1st defendant, and simultaneously delivered to him a letter in which he stated: "I hereby give you full authority to make use of this property in any manner you think best and pay yourself up to these amounts and, if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my other properties to recoup all the short balances." The letter was neither stamped nor registered and made no reference to the deposit. The 1st defendant effected a sub-mortgage to the plaintiff. In a suit by the plaintiff to recover the amount due on the basis of an alleged equitable mortgage:

Held, (1) that the letter created a simple mortgage of the properties covered by the title-deeds and was invalid for want of registration; [p. 865, col. 1; p. 866, col. 1.]

(2) that it was incumbent on the plaintiff to prove that the deposit of title-deeds created an equitable mortgage and for this purpose evidence independently of the letter was admissible. [p. 865, col. 1; p. 866, col. 1.]

Per *Abdur Rahim, Offg. C J.*—The letter, though it did not require registration, should be stamped on the basis of an agreement under Article 5 of the Stamp Act. [p. 865, col 1.]

It is the deposit of the title-deeds that creates an equitable mortgage and a letter or writing which contains evidence of the transaction cannot be said to create or declare any right to or interest in immoveable property within the meaning of section 17, clause (*b*) of the Registration Act. [p 865, col. 1.]

Kedarnath Dutt v. *Sham Lall Khettry*, 11 B. L R. 405 at p. 410; 20 W. R. 150; *Oo Nouny* v. *Moung Htoon Oo*, 13 C. 322; *Gokul Dass* v. *Eastern Mortgage and Agency Co.*, 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102, approved.

Per *Seshagiri Aiyar, J.*—The letter is not covered by Article 6 or 40 of the Stamp Act and as such is not required to be registered under section 17 of the Registration Act. [p 866, col. 1.]

Article 26 of the Stamp Act does not refer to the admissibility of a document. It rather deals with the quantum of interest allowable in a suit when the document is sued on and accepted as evidence. [p. 865, col. 2.]

A mortgage by deposit of title-deeds is not created by the writing which accompanies, precedes or is contemporaneous with the deposit. The essence of the transaction is the deposit. It is that that creates the mortgage. [p. 866, col. 1.]

The declaration mentioned in section 17 of the Registration Act must, by its own force, have the legal consequences contemplated by the parties and should not simply be a statement of what has been effected. Consequently, the declaration contained in the letter, if the letter itself does not constitute the mortgage, would not attract the provisions of section 17. [p 866, col. 1.]

Jeevarathnammal v. *N. Varada Pillai*, 32 Ind. Cas. 111; 3 L. W. 1; 19 M. L. T. 52; (1916) 1 M. W. N. 17 (F. B.), referred to.

Section 92 of the Evidence Act will be no bar to the reception of oral evidence to prove an equitable mortgage, as the letter indicates altogether a separate transaction, *viz*, a simple mortgage. [p. 866, col. 2]

If the letter makes a bare reference to the factum of deposit and to the creation thereby of the equitable mortgage, no question of stamp or registration will arise. [p. 866, col. 2.]

Kedarnath Dutt v. *Sham Lall Khettry*, 11 B. L. R. 405; 20 W. R. 150; *Oo Nouug* v. *Moung Htoon Oo*, 13 C. 322; *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee*, 35 Ind. Cas. 190, (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 18 Bom. L. R. 664; 20 M. L. T. 242; 20 C.W.N. 925 (P. C.), referred to.

Behram Rashid Irani v. *Sorabji Rustamji Elavia*, 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 35 and *Swami Chetty C. B.* v. *S. T. Ethirajulu Naidu*, 34 Ind. Cas. 853; 3 L. W. 585; (1916) 2 M. W. N. 84, distinguished.

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 22nd January 1915, in the Ordinary Original Civil Jurisdiction, in Civil Suit No. 271 of 1913.

Messrs *C. P. Ramaswami Aiyar* and *A. Krishnaswami Aiyar*, for the Appellant.

The Hon'ble Mr. *T. Rangachariar* and Mr. *K. C. Desikachari*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—In this case the whole question is, whether Mr. Justice Kumaraswami Sastri is right in refusing to admit in evidence a letter, dated 17th February 1911, written by the 2nd defendant to the 1st defendant when the former deposited the title-deeds of his house with the latter in order to cover certain liabilities which he might incur in the course

of business. The document is neither stamped nor registered and the learned Judge refused to take it in evidence on both these grounds. If the letter merely stated the terms on which the equitable mortgage was effected, I should be inclined to hold that it did not require any registration and should only be stamped on the basis of an agreement under Article 5 of the Stamp Act. It is the deposit of the title-deeds that creates an equitable mortgage and a letter or a writing which contains evidence of the transaction cannot be said to create or declare any right or interest in immoveable property within the meaning of section 17, clause (*b*) of the Registration Act. In this connection, therefore, I agree with the ruling to this effect in *Kedarnath Dutt* v. *Sham Lall Khettry* (1), *Oo Noung* v. *Moung Htoon Oo* (2) and *Gokul Dass* v. *Eastern Mortgage and Agency Co.* (3). But the real difficulty in the way of the appellant is that the letter goes much farther, purporting in fact to create a simple mortgage. It says: "I hereby give you full authority to make use of this property in any manner you will think best and pay yourself up of these amounts and if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my other properties to recoup all the short balances". This satisfies all the requirements of a simple mortgage, and could not be construed to be a recital of a mere equitable mortgage, for an equitable mortgage would not entitle the mortgagee to any personal remedy. On this ground alone, it must be held that the letter in question requires registration under section 17 of the Act and being unregistered is inadmissible in evidence. If the letter be put aside, there is no other evidence that the title-deeds were handed over for the purpose of creating an equitable mortgage. The appeal will be dismissed with costs.

SESHAGIRI AIYAR, J.—The 2nd defendant in this case is said to have mortgaged the properties in suit by depositing their title-deeds with the 1st defendant. The 1st defendant sub-mortgaged them with the plaintiff. There is no dispute now about the latter transaction. The question decided by the learned Judge and argued before us relates to the validity of the transaction between the 1st and 2nd defendants.

The plaint in paragraph No. 7 refers to a deposit of title-deeds, without more, on the 17th February 1911. To prove this deposit, a letter admittedly written by the 2nd defendant to the 1st defendant was sought to be put in evidence. The learned Judge rejected it as inadmissible. Upon this a witness was examined to prove the deposit. This witness only says, "The title-deeds were handed over after the letter was signed by Kothandarama Swami Naidu". No question was put him as to the purpose for which the deposit was made. The deposition as it stands is not enough to establish that an equitable mortgage was created under section 59 of the Transfer of Property Act. Mr. A. Krishnaswami Aiyar admitted as much. It is clear that the learned Judge did not shut out any evidence. Consequently, if the letter is not admissible in evidence, the judgment of the learned Judge must be upheld, as there is no independent evidence to prove the mortgage. The learned Judge held that the letter required both stamp and registration. In his view, the letter is an agreement to which Article 6 of the Stamp Act applies. I am unable to agree. The learned Judge found that as the document does not "secure any amount" section 26 of the Stamp Act is a bar to its admissibility. If the document does not secure any amount, Article 6 cannot apply and it must come under the residuary Article 5. Even otherwise, I do not think that section 26 refers to admissibility. It rather deals with the quantum of interest allowable in a suit when the document is sued on and accepted as evidence. I do not think that Article 6 has any application.

Mr. T. Rangachariar argues that the letter is a mortgage to which Article 40 applies. In the first place, if this docu-

(1) 11 B. L. R. 405 at p. 410; 20 W. R. 150.
(2) 13 C. 322.
(3) 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102.

ment is held to contain an agreement relating to the deposit of title-deeds, Article 40 cannot apply, because a reading of Articles 6 and 40 makes it clear that agreements of this kind are not to be regarded as mortgages. There is good reason for this position. As Mr. Krishnaswami Aiyar pointed out, a mortgage by the deposit of title-deeds is not created by the writing which accompanies, precedes or is contemporaneous with the deposit. The essence of the transaction is the deposit. (Section 59 of the Transfer of Property Act.) It is that that creates the mortgage. It may be that the letter or agreement executed with reference to it contains the terms of the contract. But such a document would not *per se* have the effect of creating the mortgage. I am, therefore, inclined to think that the letter in question does not constitute an equitable mortgage. The learned Vakil for the respondent suggested that the letter, even if by itself it did not create a right, must be deemed to have declared the subsisting right, and that consequently by the operation of section 17 of the Registration Act, registration is compulsory. The answer to this is, that the declaration mentioned in section 17 must, by its own force, have the legal consequences contemplated by the parties, and should not simply be a statement of what has been effected. *Jeevarathnammal* v. *N. Varada Pillai* (4). Consequently, the declarations contained in the letter, if the letter itself does not constitute the mortgage, would not attract the provisions of section 17.

While I am thus far clear that the letter is not covered by Article 6 or 40 of the Stamp Act and as such is not required to be registered under section 17 of the Registration Act, I am compelled to hold that it is a simple mortgage. All the elements constituting a simple mortgage are in it. It refers to a loan to be secured; the properties are definite; the charge on the properties is mentioned; and a present and subsequent personal liability is contemplated. Consequently as the property on which this mortgage is charged is more than Rs. 100 in value, the document is inadmissible for want of both stamp and registration. In the view that I have taken, if there had been independent evidence of the equitable mortgage, the plaintiff would have succeeded. Section 92 of the Evidence Act will be no bar to the reception of oral evidence, because the transaction alleged and sought to be proved is an equitable mortgage, whereas the letter in question does not evidence any such mortgage or its terms. In my opinion, this letter indicates altogether a separate transaction.

I have not referred to any of the cases, for the simple reason that the question whether a letter of this kind can by itself create an equitable mortgage was not considered in the cases cited before us. There is clear authority, which I am prepared to follow, that if the letter made a bare reference to the factum of deposit and to the creation thereby of the equitable mortgage, no question of stamp or registration would arise. *Kedarnath Dutt* v. *Sham Lall Khettry* (1) and *Oo Noung* v. *Moung Htoon Oo* (2). In *Behram Rashid Irani* v. *Sorabji Rustamji Elavia*(5) and *Swami Chetty C. B.* v. *S. T. Ethirajulu Naidu* (6) the point whether the document was capable of creating an equitable mortgage *per se* was not considered. We have the authority of the Judicial Committee in *Pranjivandas Jagjivandas Mehta* v. *Chan Mah Phee* (7) that it is the deposit without more that creates the mortgage, although the extent of the property covered by the deposit may depend upon the writing which defines the quantum of the property deposited. Section 59 of the Transfer of Property Act is clear on the point.

I, therefore, feel constrained to hold that the plaintiff has failed to prove the mortgage set up. The decision of the learned Judge is right. This appeal must be dismissed with costs.

Appeal dismissed.

V. R. P.

(4) 32 Ind. Cas. 11; 3 L. W. 1; 19 M. L. T. 52; (1916) 1 M. W. N. 17 (F. B.).

(5) 23 Ind. Cas. 140; 38 B. 372; 16 Bom. L. R. 35.

(6) 34 Ind. Cas. 853; 3 L. W. 585; (1916) 2 M. W. N. 84.

(7) 35 Ind. Cas. 190; (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 18 Bom. L. R. 634; 20 M. L. T. 242; 20 C. W. N. 925 (P. C.).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2488 OF 1915.

April 20, 1916.

Present:—Mr. Justice LeRossignol.

HARNAM SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

BHAGWAN SIGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution—Decree giving certain areas in specified plots of shamilat*—Executing Court, duty of.*

Plaintiff applied for execution of a decree which gave him certain areas in certain specified plots of *shamilat*. It appeared that the defendants had failed to get the decree set aside. They also sued for a partition of the whole *shamilat* but failed as it was found that they had more than their share:

Held, (1) that the failures of the defendants-respondents could not affect the plaintiff's right to execute the decree and the Court was bound to order execution;

(2) that the admission by the plaintiff that the Naib-Tahsildar's measurements were correct could not be twisted into a surrender by him of their decree.

Miscellaneous second appeal from the order of the District Judge, Jullundur, dated the 26th May 1915, affirming that of the Munsif, 1st class, Phillour, Jullundur District, dated the 8th March 1915.

Mr. *Nand Lal*, for the Appellants.

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—The learned District Judge's order cannot stand. The appellants' decree of 11th October 1912 gave them certain areas in certain specified plots of *shamilat* and nothing has happened since then to affect the rigour of that decree.

The present complications have arisen from the fact that the appellants in 1911-1912 were allowed to sue for their share in only a portion of the *shamilat*.

In their suit for partition of the whole of the *shamilat*, the respondents failed and in that suit they referred to the decree which appellants now wish to execute and alleged that they will get it set aside. They did attempt to secure that end but failed.

Consequently, respondents failed both to have plaintiffs' decree set aside and they also failed to secure a partition of the whole *shamilat*, for it was found in that case that they had more than their share.

How can two failures of the respondents affect the appellants' right to execute their decree of 1912?

I agree with the learned District Judge that the result is unsatisfactory, for if the finding that defendants had an excess of only 1 *kanal* 3 *marlas* is correct, it is not right that they should have to surrender 3 *kanals* 13 *marlas* 7½ *sarsahis*, but for that they have only themselves to blame, for they should have asked for partition of the whole *shamilat* after making allowance for 3 *kanals* 13 *marlas* 6½ *sarsahis*, to which plaintiffs were entitled under their decree.

The admission by appellants that the Naib-Tahsildar's measurements were correct cannot be twisted into a surrender by them of their decree of 11th October 1912.

I accept the appeal and direct that the decree of the appellants be executed, but in the circumstances I leave parties to bear their own costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 748 OF 1915.

June 22, 1916.

Present:—Mr. Justice Rafique.

MOHAMMAD YUSUF AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAJA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908*), O. XLVII, r.* 1*—Review—Application filed after filing appeal, maintainability of.*

An application for review of a decree after an appeal has been preferred against it is not maintainable. [p. 868, col. 1.]

Second appeal from the decision of the District Judge, Saharanpur, dated the 15th February 1915.

Mr. *Shafi uz-zaman*, for the Appellants.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants in the Court of the Assistant Collector of Saharanpur for the recovery of arrears of rent. The claim was partially decreed on the 14th February 1914. The plaintiffs preferred an appeal to the Court of the District Judge on the 17th March 1914. During the pendency of the appeal in the District Judge's Court the plaintiffs filed an application for review of judgment on the 3rd April 1914 to the first Court. The application was entertained and the case was re-tried and a decree was passed in favour of the plaintiffs on the 29th

June 1914. On the 7th July 1914 the plaintiffs withdrew their appeal. The defendants preferred an appeal from the decree of the 29th June 1914, on the ground among others that the first Court had no right to entertain the application for review. The learned Judge accepted the appeal and set aside the decree of the 29th June 1914. The plaintiffs in their second appeal to this Court contend that the defendants having failed to appeal from the order of the first Court granting the application for review, they cannot challenge the decree which was passed subsequently on the 29th June 1914. The contention has no force in view of the provisions of Order XLVII, rule 7. Under rule 7, Order XLVII, an aggrieved party may appeal either from the order granting the application for review or from the final decree passed subsequently. In the present case the defendants chose to wait and appeal from the decree that was passed after the application for review had been allowed. The *next* contention for the plaintiffs-appellants is that the first Court could entertain their application for review as the appeal by the plaintiffs, though pending at the time, was subsequently withdrawn. I do not think that the contention is correct. According to Order XLVII, rule 1, "any person considering himself aggrieved by a decretal order from which an appeal is allowed but from which no appeal has been preferred may apply for review." In the present case the application for review was filed by the plaintiffs after they had preferred an appeal from the decree to the Court of the District Judge. The application for review was clearly not entertainable by the first Court. The *last* contention for the appellants is that the ground upon which the lower Appellate Court has disposed of the appeal was not taken by the defendants in their memorandum of appeal. The learned Judge has decided the appeal on the ground that the application for review was not maintainable, in view of the fact that an appeal by the plaintiffs had been preferred and was pending. This ground was taken by the defendants in their memorandum of appeal in paragraph 5. I dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 549 OF 1916.

July 28, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin and Mr. Justice Kingsford.

RAM ASRAY SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEONANDAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Exclusion of time—Practice—Time requisite for obtaining copies—Folios not deposited owing to dilatoriness of applicant, effect of—Time to run from signing of decree—Guardian ad litem, *not formally appointed but allowed to represent minor, effect of—Civil Procedure Code (Act V of 1908), O. I, rr. 1, 9; O. XXXII, r. 3—Non-joinder of necessary parties, effect of.*

In appeals the period of limitation should be calculated from the date on which the decree was actually signed. [p. 869, col. 1.]

Bani Madhub Mitter v. *Matungini Dassi*, 13 C. 104 (F. B.), followed.

An applicant for a copy should deposit the required number of folios not later than the first day on which the office of the Court is open after that on which the number of folios was notified to him, and in calculating the time required for obtaining a copy the applicant is not entitled to deduct the days during which the preparation of the copy was delayed by his own neglect to furnish the folios. In other words, the length of time requisite for obtaining a copy within the meaning of section 12 of the Limitation Act ought not to vary with the dilatoriness of the applicant in supplying the required number of folios. [p. 869, cols. 2.]

Where in a suit an application for appointment of a guardian *ad litem* is made and the guardian nominated in the application is allowed to represent the minor at the trial, the mere omission of a formal order appointing the guardian is not fatal to the suit. [p. 870, col. 1.]

Where in a suit for profits for *zerait* land held by defendants in excess of their shares all the co-sharers are not made parties, the suit ought to be dismissed for non-joinder of the necessary parties in whose absence the excess could not be determined. [p. 870, col. 1.]

Second appeal from a decision of the Additional Judge, Shahabad, dated the 4th January 1914.

Messrs. *S. Sinha* and *Parmeshwar Dayal*, for the Appellants.

Mr. *Shahabuddin Khan*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—The first question for decision is whether this appeal was filed within time. The judgment of the lower Appellate Court was pronounced on January

4th, 1916. The decree was signed on January 8th. An application for copies of the judgment and decree was presented on February 17th and on the same day notice was given to the applicant of the number of folios required for the copies. The folios were filed on February 22nd and a note was then made on the back of the counterfoil of the application that the copies would be ready on February 24th. The applicant received the copies on the last mentioned date and filed his appeal in this Court on April 14th. The appeal was filed within time if limitation is calculated from January 8th, the day on which the decree was signed, and the appellant is allowed to deduct all the time that elapsed between the date of the filing of the application for the copies and the delivery of the same. It was held by a Bench of five Judges of the Calcutta High Court, as long ago as May 1886, that in cases of this kind the period of limitation should be calculated from the date on which the decree was actually signed [see *Bani Madhub Mitter* v. *Matungini Dassi* (1)]. That decision has not been followed by all the other High Courts, but the practice is so well established in the territories over which this Court has jurisdiction that we think we ought to follow it. Limitation must, therefore, be calculated in the present case from January 8th.

The question whether an appellant is entitled under section 12 of the Limitation Act to deduct all the time that elapsed between the date of his application for a copy and the date on which it was delivered to him, even if delivery of the copy was delayed, as in this case, by reason of his own neglect to file the folios as soon as the required number was notified to him, has not, so far as we are aware, been the subject of any reported decision of the Calcutta High Court. But we are informed that for some time past it has been the practice on the appellate side of that Court to allow the appellant to deduct all the time that elapsed between the presentation of his application for a copy and the delivery of the copy, although the preparation of the copy was delayed by his own neglect to file the folios. We are not prepared to follow this practice, which seems to us to be contrary to law. It appears that in some cases litigants have taken advantage of it to give themselves a longer period of limitation than the law intended to give them. We understand that it has been held generally in the Subordinate Courts that an applicant for a copy should deposit the required number of folios not later than the first day on which the office of the Court is open after that on which the number of folios was notified to him and that in calculating the time required for obtaining a copy the applicant is not entitled to deduct the days during which the preparation of the copy was delayed by his own neglect to furnish the folios. This appears to us to be a reasonable rule and we propose to enforce it for the future in all cases to which section 12 of the Limitation Act applies, both with reference to appeals and applications filed in this Court and with reference to appeals and applications filed in Subordinate Courts. It appears to us that the length of time requisite for obtaining a copy within the meaning of section 12 of the Limitation Act ought not to vary with the dilatoriness of the applicant in supplying the required number of folios. The present appeal was in our view of the law filed beyond time, but there can be little doubt that the appellants relied upon the practice which prevailed in the Calcutta High Court and under the circumstances we hold that they have, within the meaning of the explanation to section 5 of the Limitation Act, established sufficient cause for not filing their appeal within time.

The appeal arises out of a suit brought by the appellants for a declaration that respondents Nos. 1 to 4 were in possession of a certain quantity of *zerait* land in excess of their proper shares. The appellants claimed to be entitled to a share in the profits of the excess lands. The Subordinate Judge dismissed the suit, because the appellants did not procure the formal appointment of a guardian *ad litem* for two of the respondents and also because the appellants failed to implead as defendants two persons who held shares in the village. On appeal the Additional District Judge agreed with the Subordinate Judge that the suit must fail because a guardian *ad litem* had not been appointed for two of the minor respondents, and express

(1) 13 C, 104 (F. B.).

ed the opinion that persons in the position of the present appellants were not entitled to make a claim of this kind against co-sharers who were found to be in possession of *zerait* lands in excess of their shares. We should have found it difficult to sustain the dismissal of this suit on the ground that a guardian *ad litem* was not appointed for the two minor respondents, for it appears that the appellants put in a formal application for the appointment of a guardian *ad litem* of these respondents. They also mentioned the proposed guardian in the plaint and the proposed guardian, who was the elder brother of the two minors, was allowed to represent the respondents at the trial. In these circumstances it would be difficult to hold that the suit should be dismissed merely because there was no formal order appointing a guardian *ad litem*. It seems to us that the learned Additional Judge has overlooked the 18th paragraph of the written statement, which appears to admit the existence of a practice among co-sharers in this village whereby any co-sharer, who cultivates land in excess of his share, takes one half of the produce as if he were the *raiyat* of the land and distributes the remaining half to co-sharers in the village. But it seems to us that the appellants' suit was rightly dismissed in consequence of their failure to implead two of the co-sharers in the village. The principal question of fact in dispute between the parties is the extent of the *zerait* land held by the respondents or some of them in excess of their shares. This cannot be finally determined in the absence of some of the co-sharers in the village, nor can the profits or any portion of the profits of the excess land be distributed amongst the parties behind the backs of some of the co-sharers in the village. For these reasons we are of opinion that the suit was rightly dismissed and we dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

[SECOND CIVIL APPEAL No. 1033 OF 1914.

April 27, 1916.

Present:—Mr. Justice Scott-Smith.

INDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KARM SINGH AND OTHERS—DEFENDANTS, AND ANOTHER—PLAINTIFF—RESPONDENTS.

Pleader and client—Admission by Pleader on client's behalf, how far binding.

Where the plaintiffs at first contested the validity as well as the factum of a certain Will but at a subsequent stage of the suit their Pleader admitted the factum of the Will on their behalf:

Held, that the plaintiffs were bound by the statement made by their duly appointed Pleader.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division at Gurdaspur, dated the 24th February 1914, reversing that of the Munsif ,2nd class, Batala, District Gurdaspur, dated the 28th November 1913, decreeing the claim.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This appeal was admitted on the ground that there were serious defects in the procedure of the 1st Court, as it had ignored the fact that two of the plaintiffs were minors.

The plaintiffs at first contested the factum as well as the validity of the Will of Bhag Singh, but on the 24th May their Pleader on his clients' behalf admitted the factum of the Will, as it was probably felt that it was futile to contest it in the presence of a registered deed. The minor plaintiffs were represented by Indar Singh their brother as next friend, and are certainly bound by a statement of this sort made by their duly appointed Pleader

Ground 2 is quite wrong, as Mit Singh was a plaintiff from the beginning. No doubt the other plaintiffs would not be bound by his statement, but the lower Appellate Court did not decide the appeal on this alone, but based its decision on the question of custom whether under the circumstances the Will was valid.

The question of custom cannot be -uoo tested in second appeal without a certificate, which has not been obtained.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 872 OF 1914.

June 27, 1916.

Present:—Justice Sir Stanley Batchelor, KT., and Mr. Justice Shah.

GOKALDAS MOTIRAM SURTI—PLAINTIFF—APPELLANT

versus

PARTAB KABHAI BAROT—DEFENDANT—RESPONDENT.

Pre-emption—Muhammadan Law—Applicability to Hindus of Godhra—Suit to pre-empt fraction of property, maintainability of.

The Hindus of Godhra are governed by the Muhammadan Law of pre-emption.

The right of pre-emption cannot be exercised in fractions and a suit to pre-empt a portion of the property sold cannot be maintained.

Abdullah v. *Amanatullah*, 21 A. 292; A. W. N. (1899) 82 and *Amir Hasan* v. *Rahim Bakhsh*, 19 A. 466; A. W. N. (1897) 118, not followed.

Lalla Nowbut Lall v. *Lalla Jewan Lall*, 4 C. 831; 2 C. L. R. 319 (F. B.), followed.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 215 of 1912, confirming the decree passed by the Subordinate Judge, Godhra, in Civil Suit No. 136 of 1911.

Mr. *Ratanlal Ranchhoddas*, for the Appellant.

Mr. *G. K. Parekh*, for the Respondent.

JUDGMENT.—The house in suit belonged to one Damodar, whose neighbour on the north was the 1st defendant and on the south the plaintiff. Damodar sold the house to the 1st defendant, who subsequently sold it to the 2nd defendant. The parties are Hindus of Godhra. The plaintiff brought this suit on the footing that he was entitled to pre-empt one-half of the house, and, therefore, he prayed for possession of one half of it on payment of a sum of Rs. 462-8-0.

It has been held by the lower Courts that Hindus in Godhra are governed by the doctrine of pre-emption and that finding must now be accepted. The plaintiff's suit has been dismissed by the District Judge, as the learned Judge was of opinion that it was not lawful for one person to pre-empt a fraction of the property in controversy.

Mr. Ratanlal, who appears for the plaintiff in this appeal, has urged that the learned District Judge is wrong in this view of the Muhammadan Law of pre-emption, and in support of this contention has relied upon *Abdullah* v. *Amanatullah* (1), which followed *Amir Husan* v. *Rahim Bakksh* (2). It cannot, we think, be denied that these judgments are in the plaintiff's favour nor can it, as we think, be denied that they are incapable of reconcilement with the Full Bench decision of the Calcutta High Court in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3). We have, therefore, to choose between these two authorities, and in this predicament it seems to us safer to follow the ruling which commended itself to the Calcutta Full Bench. The parties here are, as we have said, Hindus to whom the Mahomedan doctrine of pre-emption applies rather derivatively than originally. Moreover, the authorities show that in this Presidency it has not been the custom to enforce the doctrine of pre-emption to the extent allowed in Allahabad, and, as we venture to think, the enforcement of it to the extent of allowing the right of pre-emption to be exercised in fractions would be productive not only of serious practical inconvenience but in many instances of injustice, seeing that the owner would frequently be compelled to sell his property at an under-value.

On these grounds it appears to us that the best course now open to us is to follow the principle adopted in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3) and to confirm the decree of the District Judge dismissing this appeal.

Costs of it will be borne by the plaintiff.

Appeal dismissed.

(1) 21 A. 292; A. W. N. (1899) 82.
(2) 19 A. 466; A. W. N. (1897) 118.
(3) 4 C. 831; 2 C. L. R. 319 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 442 AND 443 OF 1915.

July 27, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

NARASINGA ROW GADAY ROW SAHIB AND OTHERS—DEFENDANTS—APPELLANTS

versus

RANGASAMI THEVAN—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 22 (1)—Contract for sale of immoveable property—Possession, absence of

NARASINGA ROW *v.* RANGASAMI THEVAN.

provision for—Suit to enforce contract—Tenants, whether necessary parties—Decree directing delivery, illegality of—Undue advantage to vendee—Inadequacy of price—Title defective—Discretion of Court—Adverse possession, failure to pay rent, whether constitutes.

Failure to pay rent for a certain period is not such an assertion of right as will make a tenant's possession adverse to his landlord's. [p. 872, col. 2.]

In a suit to enforce the specific performance of a contract for the sale of immoveable property, the tenants in possession are not proper parties in the absence of any provision for delivery of possession in the contract. [p. 873, col. 1.]

Bugata Appala Naidu v. *Chengalvala Jogiraju*, 32 Ind. Cas. 237; (1916) 1 M. W. N. 77, referred to.

Mere inadequacy of price will not entitle a Court to withhold specific performance of a contract for sale of land. If the vendor's title to the land is open to suspicion and the exertion and expense necessary to enforce it was in the minds of the parties in fixing a low price, the contract should be specifically enforced. [p. 872, col. 2]

In order to justify the application of section 22 (1) of the Specific Relief Act, there should be evidence of facts, unknown to or fraudulently concealed from one side, of which the other was aware or of the use of undue influence. [p. 872, col. 2.]

Second appeals against the decrees of the Subordinate Judge of Negapatam, in Appeal Suits Nos. 133 of 1914 and 810 of 1913, respectively, preferred against those of the District Munsif, Mannargudi, in Original Suit No. 258 of 1912.

FACTS.—This was a suit to enforce specific performance of a contract to sell land. Defendants Nos. 1 and 2 were the owners in whose names the *pattas* stood. The 3rd defendant was a tenant in 1884, but he did not pay rent from that date and in 1909 he applied for a *patta* of the lands in his own name, which was refused; defendants Nos. 4 to 13 were the tenants under the 3rd defendant. Defendants Nos. 1 and 2 entered into an agreement with the plaintiff to sell the land worth Rs. 2,600 to him for Rs. 500, of which Rs. 25 was paid as earnest money and the balance was to be paid on the execution of the sale-deed (and for 200 *kulies* if plaintiff succeeded in the suit). The contract to sell did not provide for delivery of possession. Plaintiff brought the present suit to enforce the specific performance of the contract to sell. Defendants Nos. 1 and 2 set up that the agreement was brought about by fraud and undue influence and was not binding upon them, and the 3rd defendant claimed that by non-payment of rent he had acquired an absolute title to the land. Both the lower Courts found the agreement to sell, binding on the 1st and 2nd defendants and finding that 3rd defendant was a tenant from year to year and decreed the suit for specific performance of the agreement to sell and directed also delivery of possession. Defendants Nos. 1 to 4 filed the present second appeal to the High Court.

Messrs. *T. Rangachariar* and *S. Muthiah Mudaliar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—These second appeals are argued, *first*, on the ground that the 3rd defendant has prescribed for a full title to the properties, items Nos. 1 and 5. The evidence shows that he was admitting his position as a tenant in 1884, though since then he has not paid rent. Failure to pay rent is not such an assertion of rights as will make a tenant's possession adverse. We accept the lower Appellate Court's decision on this point.

Next, it is argued that the plaintiff's contract is, with reference to section 22 (1) of the Specific Relief Act, not one of which specific performance should be decreed. The contract, no doubt, entitled the plaintiff to buy land worth intrinsically Rs. 2,600 for Rs. 500 and a promise to return 200 *kulies* of the whole 10 acres on possession being given; and these terms are at first sight unfavourable to the 1st and 2nd defendants. But, on the other hand, the vendors' title to the land was open to considerable suspicion; and the exertion and expense necessary to enforce it were presumably in the minds of the parties. There is no evidence either of any facts, unknown to or fraudulently concealed from one side, of which the other was aware, or of the use of undue influence; and such evidence is necessary in order to justify the application of this provision. This ground of appeal, therefore, must fail.

The *remaining* argument is that the 3rd and 4th defendants should not have been made parties, because the contract, to which they were strangers, between the plaintiff and the 1st and 2nd defendants was for the sale of the land and did not

include the giving of possession of it by the last mentioned. The plaintiff, no doubt, in the plaint alleged an agreement as to giving of possession. But the plea does not appear to have been persisted in, and we, therefore, do not consider it. In the absence of an agreement to give possession, there is nothing against our applying the principle enunciated in *Bugata Appala Naidu* v. *Chengalvala Jogiraju* (1) and holding that the 3rd and 4th defendants are not proper parties to the suit.

The second appeals are, therefore, allowed to this extent that so much of the lower Appellate Court's decrees as relates to possession will be expunged. In other respects they are dismissed. There will, in the circumstance, be no order as to costs in this Court.

Appeal partly allowed;
Decrees modified.

V.B.P.

(1) 32 Ind. Cas. 237; (1916) 1 M. W. N. 77.

PATNA HIGH COURT.
FULL BENCH.
FIRST CIVIL APPEAL NO. 380 OF 1913.
June 26, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, Mr. Justice Sharfuddin, Mr. Justice Atkinson and Mr. Justice Kingsford.

Musammat Bibi WAHIDUNNISSA—DEFENDANT—APPELLANT
versus
Babu DIP NARAIN PERSHAD—PLAINTIFF—RESPONDENT.

Appeal—Partition suit—Preliminary decree, appeal against, whether affected by failure to appeal against final decree subsequently passed.

There is a right of appeal against the preliminary decree in a partition suit and the appellant is not barred of his right to secure an adjudication therein by his failure to appeal against the final decree subsequently passed. [p. 873, col. 2; p. 874, col. 1.]

Kanhaiya Lal v. *Tirbeni Sahai*, 24 Ind. Cas. 827; 36 A. 532; 12 A. L. J. 876 (F. B.), approved.

Ram Nath Singh v. *Basanta Narain Singh* (*Ugra Narain Singh* v. *Basan Narain Singh*), 19 Ind. Cas. 630; 18 C. L. J. 209; 17 C. W. N. 868; *Nistarini Dabee* v. *Rai Mohun Biswas*, 20 Ind. Cas. 576; 18 C. L. J. 214; *Abdul Jalil* v. *Amar Chand Paul*, 21 Ind. Cas. 510; 18 C. L. J. 223; *Atul Chandra Singha* v. *Kunja Behari Singha*, 30 Ind. Cas. 321; 22 C. L. J. 90, followed.

Lakshmi v. *Marudevi*, 12 Ind. Cas. 664; 37 M. 29; 10 M. L. T. 437; 21 M. L. J. 1063, referred to.

Khirodamoyi Dasi v. *Adhar Chandra Ghose*, 21 Ind. Cas. 516; 18 C. L. J. 321; *Sadhu Charan Datta* v. *Hara Nath Datta*, 27 Ind. Cas. 135; *Balwantsingh Ramchandra* v. *Sakharam Mancharam*, 33 Ind. Cas. 137; 18 Bom. L. R. 80*n*; and *Dattatraya Ramachandra Savale* v. *Ajmuddin Fakhruddin*, 33 Ind. Cas. 146; 18 Bom. L. R. 76, distinguished.

Per *Sharfuddin, J.*—A preliminary decree in a partition suit has existence independent of the final decree and the final decree is really dependent upon and subordinate to the preliminary decree. A preliminary decree retains its force as such even after the passing of the final decree. The final decree does not extinguish the preliminary decree but instead gives effect to it. [p. 874, col. 1.]

First appeal from a decision of the 2nd Subordinate Judge, Monghyr, dated the 29th May 1913.

Messrs. *Syed Mohammad Tahir* and *Muhammad Hasan Jan*, for the Appellant.

Messrs. *Kulwant Sahai* and *Rai Guru Saran Prasad*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This is an appeal by the defendant in a suit for partition against a preliminary decree passed on May 29th 1913. The appeal was filed on July 3rd, 1913. A final decree was made in the case on September 27th, 1913, despite the objection of the appellant that the final decree should not be made until her appeal had been disposed of. A preliminary objection has been taken to the hearing of this appeal, to the effect that this appeal cannot proceed inasmuch as a final decree has now been passed in the case and no appeal has been filed against that decree. In my opinion, the preliminary objection should be overruled. I adhere to the decision of the Full Bench of the Allahabad High Court in *Kanhaiya Lal* v. *Tirbeni Sahai* (1) in which I took part. Further, I consider that it has been shown that there is a strong current of authority in the Calcutta High Court in favour of the view that an appeal of this kind can be heard, although a final decree has been passed in the case and no appeal has been filed against that decree. I would refer to the decisions in *Ram Nath Singh* v. *Basanta Narain Singh* (*Ugra Narain Singh* v. *Basan Narain Singh*) (2), *Nistarini Debee* v. *Rai Mohun Biswas* (3), *Abdul Jalil*

(1) 24 Ind. Cas. 827; 36 A. 532 (F. B.); 12 A. L. J. 876.
(2) 19 Ind. Cas. 630; 18 C. L. J. 209; 17 C. W. N. 868.
(3) 20 Ind. Cas. 576; 18 C. L. J. 214.

v. *Amar Chand Paul* (4) and *Atul Chandra Singha* v. *Kunja Behari Singha* (5). In all those cases the appeal against the preliminary decree was filed before the final decree had been made. They are, therefore, on all fours with the present case. The view taken in those cases is in accordance with the view taken by the Allahabad High Court in the case cited above and with the view taken by the Madras High Court in *Lakshmi* v. *Marudevi* (6). Our attention has been drawn to the decisions in *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (7) and *Sadhu Charan Datta* v. *Hara Nath Datta* (8). In both those cases the final decree had been passed before the appeal against the preliminary decree was filed. They are, therefore, distinguishable from the present case. For the same reason we may distinguish from the present case the cases of *Balwantsing Ramchandra* v. *Sakharam Mancharam* (9) and *Dattaraya Ramachandra Savale* v. *Ajmuddin Fakruddin* (10) decided by the Bombay High Court. On these grounds, therefore, I am of opinion that this preliminary objection should be overruled.

SHARFUDDIN, J.—Under the Civil Procedure Code a decree may be appealed against. It is, therefore, clear that so long as a decree retains its force as such it can be appealed against. I understand that a preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree. In my opinion, a preliminary decree retains its force as such even after the passing of the final decree. A preliminary decree is not extinct after the passing of the final decree and the final decree instead of extinguishing a preliminary decree gives effect to it. Agreeing with the observations of His Lordship the Chief Justice I am also of opinion that the objection should be overruled.

(4) 21 Ind. Cas. 510; 18 C. L. J. 223.
(5) 30 Ind. Cas. 321; 22 C. L. J. 90.
(6) 12 Ind. Cas. 664; 37 M. 29; 10 M. L. T. 437; 21 M. L. J. 1063.
(7) 21 Ind. Cas. 516; 18 C. L. J. 321.
(8) 27 Ind. Cas. 135.
(9) 33 Ind. Cas. 37; 18 Bom. L. R. 80n.
(10) 33 Ind. Cas. 146; 18 Bom. L. R. 76.

ATKINSON, J.—I entirely agree with the views expressed by the Chief Justice.

KINGSFORD, J.—I entirely agree with the views expressed by the Chief Justice.

Preliminary objection overruled.

[Their Lordships then dealt with the case on the merits and delivered the following]

JUDGMENT.

CHAMIER, C. J.—The respondent claims to be entitled by purchase from two persons named Kamaluddin Ahmad and Rafiqunnissa to a 15¼-annas share out of a *mahal* in *Mauza* Bobil bearing *tauzi* number 3841. The defendant-appellant is the owner of the remaining 9-pies share in the *mahal*. She resisted this suit for partition of the *mahal* on the ground that on June 1st, 1888, when the different members of the family divided up the family property they agreed to allow *Mauza* Bobil to remain unpartitioned until certain suits, which had been brought by third persons in respect of a village allotted to the present appellant, had been disposed of. It appears, however, that notwithstanding the agreement contained in the *ekrarnama* of June 1st, 1888, the present appellant claimed partition of *Mauza* Bobil. Kamaluddin, one of the persons through whom the present respondent claims, objected that the village should not be partitioned and he relied upon the *ekrarnama* of June 1st, 1888. His objection was overruled and partition was effected and two *mahals* were formed in the village. The appellant in her written statement in the present case alleged that the suits referred to in the *ekrarnama* were still pending. Whether this is so or not we think that she cannot resist the suit on that ground. She herself in conjunction with her relative Azizunnissa claimed partition of this very village in 1894 and she cannot now resist the claim of the purchaser from Kamaluddin. In my opinion, the partition to be effected in this case will not affect in any way any right which the appellant may have under the *ekrarnama* of June 1st, 1888. I would dismiss this appeal with costs.

SHARFUDDIN, J.—I agree.

ATKINSON, J.—I agree.

KINGSFORD, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 247 OF 1915.

August 4, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

SIMIL ROWTHER—APPELLANT

versus

KUMARAPPA CHETTY AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 36, 44 (4), —Official Receiver's report, correctness of—Presumption —Court, duty of, to hold judicial enquiry—Official Receiver, joinder of, as party.

Section 44, clause (4), of the Provincial Insolvency Act only provides for a presumption in favour of the correctness of any statement in the Official Receiver's report but does not empower the Court to leave the duty of judicial enquiry, as a preliminary to judicial action under section 36, to the Official Receiver or to act in proceedings under that section on evidence which it has not itself taken.

Jagannath v. *Lachman Das*, 26 Ind. Cas. 32; 36 A. 549; 12 A. L. J. 889, followed.

In such enquiry the Official Receiver should be joined as a party.

Appeal against the order of the District Court, Trichinopoly, in Civil Miscellaneous Petition No. 179 of 1915, in Civil Miscellaneous Petition No. 554 of 1914, in Insolvency Petition No 24 of 19.3.

Mr. *K. S. Ganesa Aiyar*, for the Appellant.

Mr. *S. T. Srinivasa Gopalachari*, for the Respondents.

JUDGMENT.—The lower Court's procedure renders it impossible to accept its decision It originally had before it a report of the Official Receiver, dated 8th September 1914, recommending the setting aside of a transfer by the insolvent. The lower Court instead of holding, as it should have done, a judicial enquiry itself found the Official Receiver's enquiry inadequate and called on him to extend it. He again reported on 1st February 1915, after taking further evidence on this occasion, that the transfer was not open to exception. The lower Court in the order appealed against set aside the transfer, apparently relying on the fact that it was made within two years of the adjudication and presuming against its good faith and the passing of consideration.

The Provincial Insolvency Act, section 44, clause 4, no doubt provides for a presumption in favour of the correctness of any statement in the Official Receiver's report. But that does not empower the Court to leave the duty of judicial enquiry, as a preliminary to judicial action under section 36, to the

Official Receiver or to act in proceedings under that section on evidence which it has not itself taken. *Vide* also the judgment in *Jagannath* v. *Latchman Das* (1), in which we concur. The lower Court's decision is, therefore, set aside. It will re-hear the case, itself taking any evidence, which either side may think it necessary to adduce. We observe that the Official Receiver should have been and should now be made a party to the proceedings. Costs of alienee and Official Receiver to-date will follow the result and be provided for in the order to be passed by the lower Court.

Appeal allowed; Case sent back.

V.R.P.

(1) 26 Ind. Cas. 32; 36 A. 549; 12 A. L. J. 889.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 217 OF 1915.

April 20, 1916.

Present:—Mr Justice LeRossignol.

FATTEH KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAZ KHAN—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom - Alienation made 12 years before suit—Necessity—Standard of proof—Speculative suit.

In a suit by a remote reversioner to challenge a sale made by the last male owner, it appeared that there were several other reversioners who did not attack the alienation and that the vendor's brother had acquiesced in the sale. The vendees contended that the sale had been forced by hard times. It was found that the years before and after the date of the alienation were exceedingly hard years of draught and scarcity:

Held, (1) that the vendor's allegation was *prima facie* correct, and that considering that the suit was filed 12 years after the alienation a very high standard of proof of necessity could not be insisted on; [p. 876, col. 1]

(2) that as the vendor's brother had two sons still unmarried, the suit was speculative and deserved to fail on this ground also. [p. 876, col. 1.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 13th November 1914, affirming that of the Munsif, 1st class, Chakwal, District Jhelum, dated the 18th October 1913.

Mr. *Nand Lal*, for the Appellants.

Mr. *Taj-ud din*, for the Respondents.

JUDGMENT.—This is a suit by a remote reversioner to challenge a sale by Malak in 1900.

There are several reversioners who have equal rights with the plaintiff but they do not attack the alienation, which is said by the vendees to have been forced on Malak by hard times.

The years before and after 1900 were exceedingly hard years of draught and scarcity and the vendee's allegation is *prima facie* correct.

Against the vendor the plaint makes no allegation except that he was a simpleton.

We find also that his brother Bahadur acquiesced in the sale.

Plaintiff waits for twelve years before he comes into Court and the Courts below have exacted in the circumstances a standard of proof of necessity which is far too high.

I find that the proof of necessity given is all that can fairly be expected.

Further Bahadur, brother of defendant, has two sons still unmarried, so that plaintiff's suit is speculative and for that reason also deserves to fail.

For these reasons I accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 39 OF 1915.

July 19, 1916.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

KAMATCHI AMMAL—PLAINTIFF—PETITIONER—APPELLANT

versus

PICHU IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 17, scope of—Execution petition returned for amendment but not re-presented, whether step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Art. 182.

An execution petition returned for amendment but not re-presented may yet give a fresh starting point for limitation.

Rama v. *Varada*, 16 M. 142; *Narayanaswami Naidu Garu* v. *Kovidi Gantayya*, 32 Ind. Cas. 691; (1915) M. W. N. 865; *Gopisetti Narayanaswami Naidu Garu* v. *Muthyala Venkataratnam*, 32 Ind. Cas. 816; 2 L. W. 1207, followed.

Rule 17 of Order XXI, Civil Procedure Code, is an enabling one, which allows certain defective applications subsequently amended to be deemed applications "in accordance with law" with effect from the date of the first presentation.

Appeal against the order of the Court of the Temporary Subordinate Judge of Madura, in Appeal Suit No. 32 of 1914, preferred against that of the District Munsif, Tirumangalam, in Execution Petition No. 332 of 1913, in Original Suit No. 383 of 1901.

Mr. *K. V. Krishnaswami Aiyar*, for the Appellant.

Mr. *V. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—The defects in the application, dated 27th July 1911, are regarded by the Subordinate Judge as serious, but, in our opinion, they were not calculated nor intended to mislead the Court, for if the dates of the applications in 1907 and 1908 had been correctly stated, the application would still be found to be within 3 years of the preceding and succeeding applications, and, therefore, the defects would not be material.

Following the decisions in *Rama* v. *Varada* (1) and in *Narayanaswami Naidu Garu* v. *Kovidi Gantayya* (2) and in *Gopisetti Narayanaswami Naidu Garu* v. *Muthyala Venkataratnam* (3), we think that an execution petition returned for amendment but not re-presented may yet give a fresh starting point for limitation.

We do not consider that Order XXI, rule 17, of the Civil Procedure Code of 1908 was intended to affect the construction, put upon the words "applying in accordance with law" in the Limitation Act, by this Court and by other High Courts in dealing with defects in form occurring in execution applications. The rule is an enabling one, which allows certain defective applications subsequently amended to be deemed "applications in accordance with law" with effect from the date of their first presentation.

We reverse the orders of the lower Courts and remand the petition for disposal according to law. Costs here and in the lower Appellate Court will be borne by respondents. Costs in the executing Court will be provided for in the final order.

Appeal allowed; Case sent back.

V.R.P.

(1) 16 M. 142.
(2) 32 Ind. Cas. 691; (1915) M. W. N. 865.
(3) 32 Ind. Cas 816; 2 L. W. 1207.

MULLA VEETTIL USSAIN *v.* SUBRAMANIA AYYAR.

MADRAS HIGH COURT.

APPEAL SUITS NOS. 171, 170 AND 231 OF 1914.

July 27, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Srinivasa Aiyangar.

IN A. S. No. 171

MULLA VEETTIL USSAIN—DEFENDANT No. 6—APPELLANT

IN A. S. No. 170

UMMAYYA UMMA—DEFENDANT APPELLANT

IN A. S. No. 231

MUTTA VEETTIL USSAIN—DEFENDANT No. 5—APPELLANT

versus

IN A. S. No. 171

SUBRAMANIA AYYAR AND OTHERS—PLAINTIFFS NOS. 1, 2, 4, 5, AND 7 TO 55—RESPONDENTS

IN A. S. No. 231

MULJI DHANJI SAIT THROUH HIS *Muktiar*—RESPONDENT

IN A. S. No. 170

GOPALJI LALJI SAIT AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 5 AND 7 TO 11—RESPONDENTS.

Muhammadan Law—Settlement—Charity, dedication to—Transaction impugned as sham—Fraud on creditors—Burden of proof—Registered document, evidentiary value of—Non-solvency of settlor—Subsequent user of property—Presumption—Dedication to take effect after grantor's death, effect of—Revocation, right of.

In cases where dedication to a charity is impugned as a sham transaction the production of a registered document in writing making a transfer of the property would no doubt be strong *prima facie* evidence of such dedication. But it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. The use of the property subsequent to the alleged dedication is always excellent evidence of the reality or otherwise of the transaction. [p. 879, col. 2.]

Kulsom Bibee v. *Golam Hossein Cassim Ariff*, 10 C. W. N. 449; *Muhammad Aziz-ud-din Ahmad Khan* v. *Legal Remembrancer to Government*, 15 A. 321; *Suppammal* v. *Collector of Tanjore*, 12 M. 387 at p. 392; *Watson & Co.*, v. *Ramchand Dutt*, 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; *Ramchandra Mukerjee* v. *Ranjit Singh*, 27 C. 242 at p. 251; 4 C. W. N. 405, followed.

The non-solvent condition of the settlor at the date of the grant and his subsequent alienation of the property are proof that the dedication was intended to defraud his creditors and the instrument will, therefore, be void as against them. [p. 878, col. 2.]

If the dedication was intended to defeat creditors, it makes no difference whether the grantor intended it to be a real or a sham transaction. [p. 879, col. 2.]

Where the grant is to take effect after the grantor's death it is open to the grantor to revoke the same during his lifetime and deal with the dedicated property as his private property. [p. 880, col. 1.]

Muzhurool Huq v. *Puhraj Ditarey Mohapattur*, 13 W. R. 235 at p. 237; *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*, 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476, followed.

On 27th January 1910, the deceased father of defendants Nos. 1 to 7 executed a document, described as *wakf* deed, by which he purported to make a *wakf* of certain properties specified in it, to take effect after his death for purposes which were *prima facie* charitable. The grantor was then deeply indebted. He effected two mortgages of some of those properties on 16th July 1910 and 19th September 1910 respectively to plaintiff. In a suit on the mortgages it was pleaded in defence that as the properties were dedicated to charity the mortgages were invalid:

Held, that the *wakf* deed was brought about to defraud creditors and was, therefore, void. Moreover as it was intended to take effect after the settlor's death and was revoked by him it was inoperative and the mortgages were valid and binding. [p. 879, col. 2; p. 880, col. 1.]

Appeal No. 171 of 1914 against the decree of the District Court, South Malabar, in Original Suit No. 2 of 1913.

Appeals Nos. 170 and 231 of 1914 against the decree of the District Court, South Malabar, in Original Suit No. 3 of 1913.

IN A. S. No. 171 OF 1914.

Mr. *C. Madhavan Nair*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

IN A. S. No. 170 OF 1914.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *A. S. Venku Aiyar*, for the Respondent.

IN A. S. No. 231 OF 1914.

Meesrs. *C. Madhavan Nair* and *P. Appu Nair*, for the Appellants.

Mr. *A. S. Venku Aiyar*, for the Respondents.

JUDGMENT.

A. S. No. 171 OF 1914.

The question for decision in this appeal is whether the properties mortgaged to the plaintiff by Athan, the deceased father of defendants Nos. 1 to 7, were *wakf* properties dedicated for pious and religious purposes. There are two mortgages in suit, one executed on the 16th July 1910 and the other on the 19th September 1910. On the 23rd January 1910, Athan had executed and got registered a document called *wakf* deed, by which he purported to make a *wakf* of certain properties specified in it for purposes which *prima facie* are charitable. The mortgaged properties are some of those so settled. If the transaction

was a real one, and if the same was not invalid as one intended to defraud the creditors of Athan, it may be that the *wakf* constituted under that document was binding on Athan and his subsequent assignees. But, as we have come to a clear conclusion that that document was executed by Athan for the purpose of defeating his creditors, that in fact it was merely a cloak to screen the properties from them, we do not think it necessary to discuss the various grounds of invalidity raised by the plaintiff in the lower Court and accepted by the learned Judge. We may, however, point out that the learned Judge was not correct in stating that the bulk of the income from the properties was left undisposed of; for it will be seen that after appropriating certain sums of money for the several objects specified in the document, the settlor directed that the residue of the income should be devoted for objects (2) and (3), which were certainly charitable. It is also not correct that there was no appointment of a *mutawalli* or trustee; for the appellant Ussain, Athan's youngest son, was appointed manager after the death of Athan; further, directions were given for the appointment of successors to Ussain. Whether the learned Judge intended to draw a distinction between a *mutawalli* or trustee and a manager, we do not know; but we think it is clear that Ussian was appointed a trustee under Exhibit I.

Exhibit I covers admittedly the whole of the immoveable properties belonging to Athan. It is also clear that at the time of its execution he was indebted to the extent of over Rs. 20,000. On the 24th January, *i.e*, the very date on which Exhibit I was registered, an order *nisi* preventing Athan from alienating his properties was issued at the instance of a creditor, who had sued Athan and others for a comparatively small sum of about Rs. 700. In reply to an affidavit, charging Athan with attempting to put away his properties so as to prevent his creditors from realising their dues, Athan, on the 31st January, distinctly denied that he had alienated any portion of his properties and denied that he had any intention of doing so in future. This statement must be untrue, if Athan had as a matter of fact made a *wakf* of his immoveable properties under Exhibit I, which was only a few days earlier. In the same affidavit Athan stated that he had moveable property of considerable value consisting of timber and elephants, which he said was more than sufficient to pay his debts; and curiously enough, in the *wakf* deed Exhibit I there is a statement that he has reserved his moveable properties for the payment of his debts. It is clear he was unable to pay his debts from out of his moveable properties and was, therefore, obliged to give security for the considerable sums which he owed to the plaintiff in this suit. Ussain and his brothers, defendants Nos. 1 to 5 who are contesting this suit, have not chosen to produce the account books of Athan, which are in their possession, to prove the value of the moveable properties possessed by Athan and the extent of his indebtedness on the date of Exhibit I. What became of the moveables and why he was unable to pay his debts soon after the execution of Exhibit I is not also explained. Athan was a trader doing a pretty large business and had at the time of Exhibit I apparently got into difficulties. He purported to make a charitable trust of the whole of his immoveable properties. The principal defendants, who were in a position to show whether he retained enough to pay his creditors, have not chosen to produce his accounts; in fact we have reason to think that they have deliberately withheld these accounts though summoned to produce them. It is, we think, a reasonable inference to draw that if Exhibit I represented a real transaction, Athan, after the withdrawal of the bulk of his properties from the reach of his creditors, was in an insolvent condition. Exhibit I, therefore, which is a voluntary settlement, was void as against his creditors.

There are other circumstances proved in the case which go materially to strengthen this conclusion; in fact taken with the facts already stated they lead to the conclusion that Exhibit I does not represent a real transaction at all, but was executed by Athan as a cloak to retain the benefit to himself. Though Exhibit I purported to create a *wakf* of these properties, it is clear from the terms of the document that the *wakf* was not intended to take effect till after Athan's death. The learned Counsel for the appellant contended that the *wakf* took effect immediately on the execution of Exhibit I and that Athan himself was by implication constituted the first trustee. We are unable to agree

with this contention. There is nothing in the language of Exhibit I to compel us to hold that there was an immediate dedication of the properties. The settlor appointed his last son as manager expressly after his death. He fixed a salary of Rs. 200 for the manager for the time being after his death. He did not fix any salary for himself, made no provision for the management of the property and none for the utilisation of the income during his life, and nobody could have compelled him to devote one single rupee of the income on the objects specified in Exhibit I. He revoked Exhibit I by Exhibit F on the 14th July 1910, mortgaged some of the alleged trust properties on the 16th July 1910 to the plaintiff (Exhibit A), made a gift of other portions to his daughter Umayya Umma the 7th defendant and his son Ussain the 6th defendant on the 17th and 29th of July respectively (Exhibit H and J), Ussain being the very person who was to be the trustee under Exhibit I after the death of Athan. It is also in evidence that Athan enjoyed the so-called *wakf* properties as if they were his own and treated them as his private property as before. The defendants have attempted to prove that Athan had given effect to Exhibit I; but they have not cared to produce the accounts of Athan which would have settled this matter one way or the other. After the death of Athan, his heirs including Ussain have been dealing with the property as their private property. In fact every one interested has been treating Exhibit I as a nominal or sham transaction and we think that was the truth. The learned Judge in the Court below appears to have come to the same conclusion, though his finding is neither clear nor certain. The learned Counsel for the appellant contended that Exhibit I having been executed and registered, it was not competent for the plaintiff to question the reality of the transaction and that evidence of subsequent conduct should not have been admitted to prove that Exhibit I was a nominal or sham document, and relied on certain observations contained at page 484 in *Kulsom Bibee* v. *Golam Hossein Cassim Ariff* (1). With all respect, we think that those observations are too broadly expressed. In cases where the question is whether there has been a real dedication, the production of a registered instrument in writing making a transfer of the property would, no doubt, be strong *prima facie* evidence of such dedication. But we think that it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. It has been so held in several cases and the user of the property subsequent to the alleged dedication has always been held to furnish excellent evidence of the reality or otherwise of the transaction [see *Muhammad Aziz-ud-din Ahmad Khan* v. *Legal Remembrancer to Government* (2), *Suppammal* v. *Collector of Tanjore* (3), *Watson & Co.* v. *Ramchand Dutt* (4) and *Ramchandra Mukerjee* v. *Ranjit Singh* (5)]. It must be remembered that the transaction is questioned by a creditor of the settlor at whose instance the transaction was liable to be set aside.

In this case, however, we have, as already stated, come to the conclusion that Exhibit I was executed with intent to defeat creditors and in this view it makes no difference whether Athan intended Exhibit I to be a real or nominal transaction. The appellant does not contend that if the intention was to defeat creditors the transaction would still be valid under the Muhammadan Law.

It is just possible to take another view of the transaction, and that is whether Exhibit I could not be construed as a dedication of these properties after the lifetime of Athan, and whether Athan did not intend a real dedication after his death. If that was his intention, whether such a dedication is valid under the Muhammadan Law appears to be a matter of doubt. As already observed, Exhibit I does not create an immediate *wakf* of the properties, giving a life-estate in the income to the grantor himself as a beneficiary under the trust. If that had been the nature of the transaction, it may be possible to hold that such a dedication is valid. See *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (6), approved by the Privy Council in *Mahomed Ahsanulla Chowdhry*

(1) 10 C. W. N. 449 at p. 484.

(2) 15 A. 321.
(3) 12 M. 387 at p. 392.
(4) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535.
(5) 27 C. 242 at p. 251; 4 C. W. N. 405.
(6) 13 W. R. 235 at p. 237.

v. *Amarchand Kundu* (7). However that may be, we are inclined to think that if the transaction was real, the intention of the author of the trust, as it appears from the language used by him in Exhibit I, was to keep the property under his absolute control and disposition so long as he was alive. In fact he intended practically a testamentary disposition of the property for charitable purposes. As already stated, there is a provision for the payment of debts from out of his moveables. The person who is to realise his moveable property and pay his debts is not specified. Whether the debts payable were those existing at the date of the instrument or at the date of his death, is not clear. It looks as if he intended that provision to be carried into effect after his death. This is the view on which he himself acted. The settlor then would be entitled to revoke it, and as he had revoked it before the execution of the mortgage, he was entitled to deal with the properties as his own.

For these reasons we dismiss the appeal with costs. Appeal No. 231 follows and is also dismissed with costs.

APPEAL No. 170 OF 1914.

This is an appeal by a daughter of Athan who was made a defendant in Original Suit No. 3 of 1913 against an order for costs against her. We see no reason to interfere with the discretion exercised by the learned Judge in the Court below. This also will be dismissed with costs.

Appeals dismissed.

V. R. P.

(7) 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 419 OF 1912.

June 7, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

MAKHLACHOR RAHMAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FAIZUR RAHMAN CHAUDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 539—Religious Endowments Act (XX of 1863), s. 18—Wakf—Endowment for religious purposes and charity—Suit for scheme and removal of trustees—Sanction of Court, if necessary—Necessary parties, who are—Religious and charitable trust, when public trust—Limitation—Allotments for charity and maintenance of grantor's family, non-specification of, whether fatal to the trust.

Where a *sanad* provides for the maintenance of a mosque and for *khairat* (charity), feeding of travellers etc., and the public offer of prayers at the mosque, the trust created is a religious, charitable and public trust. [p. 883, col. 2.]

A suit for the removal of persons professing to act as trustees of a *wakf*, for appointment of new trustees and for a scheme of management should be instituted with the sanction of the Advocate-General and no leave of the Court is necessary under section 18 of the Religious Endowments Act. [p. 882, col. 1.]

Jan Ali v. *Ram Nath Mundul*, 8 C. 32; 9 C. L. R. 433, *Lutifunnissa Bibi* v. *Nazirun Bibi*, 11 C. 33, distinguished.

In such a suit the Court is not concerned with the question of possession or limitation, which can only arise when a suit for recovery of possession of trust property improperly alienated is brought by the trustees, who may be appointed and in whom the properties may be vested. The proper parties are the persons who were managing the trust professing to be trustees, irrespective of any person in possession of any part of the trust property. [p. 882, col. 2.]

A person electing to proceed under the Religious Endowments Act can be given only such special relief as that special Statute provides and if he seeks any relief beyond that he should proceed under section 539 of the Civil Procedure Code, 1882. [p. 882, col. 2.]

Gyanananda Asram v. *Kristo Chandra Mukherji*, 8 C. W. N. 404, followed.

A *wakf* which does not specify the proportion in which the income is to be appropriated for the several objects is not invalid. [p. 882, col. 1.]

Mohamed Ahsanullah Chowdhry v. *Amarchand Kundu*, 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; *Mazhurool Huq* v. *Puhoraj Ditarey Mhapattar*, 13 W. R. 235, followed.

Appeal against the decree of the District Judge, Rajshahye, dated the 31st July 1912.

FACTS of the case appear from the judgment.

Babu *Ramdaya Dey*, for the Appellant:—1. The suit is not maintainble, as permission of the Distict Court was not obtained under section 18 of the Religious Endowments Act (XX of 1863). The trust being partly for religious and partly for charitable purposes, leave of the Court was necessary in so far as it was a trust for religious purposes. See *Jan Ali* v. *Ram Nath Mundal* (1), *Lutifunnissa Bibi* v. *Nazirun Bibi* (2).

(1) 8 C. 32; 9 C. L. R. 433.

(2) 11 C. 33.

2. The suit is bad for defect of parties—persons in possession who are descendants of the trustee have not been made parties.

3. The suit is barred by limitation, as it was virtually a suit for possession.

4. There was no valid *wakf*, as the property was to be appropriated partly for religious and charitable purposes and partly for the maintenance of the founder and his family. See Tayabji's Muhammadan Law, page 452, see also page 515.

5. The trust is not a public trust.

6. Assuming the trust to be a public trust, the Court cannot appoint a *mutawalli* as the founder has reserved that power to himself and to his descendants.

Babu *Chandra Sekhar Sen* (with him Babu *Pravath Chandra Dutt*), for the Respondents.—The suit is maintainable. The argument if it means anything, is this, that before the Civil Procedure Code of 1908, no suit could be maintained in respect of a religious trust without the permission of the District Judge under section 18 of Act XX of 1863. If that is so, the religious trusts which do not fall under section 3 or 4 of the said Act cannot be enforced, as no permission can be obtained from the District Court in respect of trusts which are outside the scope of the Act.

Act XX of 1863 is a special Act granting some special relief. A suit for administration of a trust with a prayer for additional reliefs must be brought under section 539, Civil Procedure Code, 1882. See *Gyanananda Asram* v. *Kristo Chandra Mukherji* (3).

The Act of 1863 did not take away rights, which persons had prior to the Act, to bring suits. See *Kalee Churn Giri* v. *Golabi* (4), *Punch Cowrie Mull* v. *Chunnoo Lall* (5). The Act was merely permissive. The plaintiff has the power of election. *Gyanananda Asram* v. *Kristo Chandra Mukherji* (3).

The present case does not fall under section 3 or 4 of Act XX of 1863. So the question does not arise at all.

The cases of *Lutifunnissa Bibi* v. *Nazirun Bibi* (2) and *Jan Ali* v. *Ram Nath Mundul* (1) are distinguishable. The case of *Jan Ali* v. *Ram Nath Mundul* (1) was decided under Act X of 1877 and the words "or religious" do not find a place in section 539 of the said Act. The words were introduced in Act XIV of 1882. The scope of section 539 has been explained in *Rai Budreedas Mukim Bahadur* v. *Chuni Lal Johurry* (6).

It has been proved by evidence that only the defendants are in possession. So the question of adding persons who are mere descendants of the original founder does not arise.

No question of limitation arises in a suit for enforcing a trust against a person who is a trustee *de son tort*. Every breach of trust gives rise to a distinct cause of action.

The *wakf* was a valid *wakf*. There was a substantial dedication for charitable purposes. See *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (7).

The trust is a public one. The *sanad* provides for distributing alms and burning lamps and other religious purposes. The public worship in the mosque. Provision had also been made for an *imam*. See *Mazhur Husain Khan* v. *Abdul Hadi Khan* (8), *Luchmiput Singh* v. *Amir Alum* (9) and Baillie, pages 565, 566.

For what is a public trust, he referred to Lewin on Trusts, page 18. See *Evan* v. *Avon Corporation* (10).

For what are the tests of charity, he referred to *Attorney-General* v. *Pearce* (11), *Savile* v. *Couper* (12).

The Court has the power of appointing a *mutawalli*. The power of the *Qadi* has been delegated to the Judge now. The *Qadi* has ample power to remove a trustee. See the observations of Mookerji, J., in *Atimannessa Bibi* v. *Abdul Sobhan* (13).

Babu *Ramdayal Dey* replied.

JUDGMENT.—This appeal arises out of a suit brought under the provisions of section 539 of Act XIV of 1882 (Code of Civil Procedure) in respect of an endow-

(3) 8 C. W. N. 404.
(4) 2 C. L. R. 128.
(5) 2 C. L. R. 121.
(6) 10 C. W. N. 581; 33 C. 789.
(7) 17 C. 498 at p. 509; 17 I. A. 28; 5 Sar. P. C. J. 476.
(8) 9 Ind. Cas. 753; 33 A. 400; 8 A. L. J. 162.
(9) 9 C. 176; 12 C. L. R. 22.
(10) 29 Beav. 144 at p. 149; 54 E. R. 581; 30 L J. Ch. 165; 6 Jur. (N. S.) 1361; 3 L. T. 347; 9 W. R. 84.
(11) (1740) 26 E R. 454; 2 Atk. 87.
(12) (1887) 36 Ch. D. 520; 56 L. J. Ch. 980; 56 L. T. 907; 35 W. R. 829.
(13) 32 Ind. Cas. 21; 20 C. W. N. 113; 22 C. L. J. 577; 43 C. 467.

ment alleged to be one for public charitable and religious purposes. The plaintiffs, who are the descendants of one Ahmed Shah, alleged that the latter founded a mosque and obtained 4 *droves* of rent-free land under a *sanad* granted by Nawab Hussain Coolie Khan sometime before the year 1767 for the maintenance of the mosque and for other religious and charitable purposes connected with the same, that this *sanad* was confirmed by another *sanad* granted on the 24th January 1767 and that for a long time past the trust was not being properly administered and the descendants of Ahmed Shah were alienating the endowed properties. The plaintiff accordingly brought that suit with the sanction of the Advocate-General of Bengal, praying that proper persons might be appointed as trustees after the removal of those who professed to act as trustees, that a scheme for the management of the trust properties might be settled and for other reliefs. The defendants, who are some of the descendants of Ahmed Shah, raised various defences to the suit. The Court below held against the defendants, appointed certain persons as trustees and framed a scheme for the management of the trust. Some of the defendants have appealed to this Court and several grounds have been urged in support of the appeal.

The *first* ground taken is that the suit cannot be maintained as no leave of the Court has been obtained under section 18 of the Religious Endowments Act (XX of 1863). It is urged that the trust being partly for religious and partly for charitable purposes, leave of the Court under section 18 of that Act ought to have been obtained in so far as it was a trust for religious purposes; and we have been referred to the cases of *Jan Ali* v. *Ram Nath Mandal* (1) and *Latifunnessa Bibi* v. *Naziran Bibi* (2). The first case relied upon was decided under section 539 of Act X of 1877 and the suit in the second case was decided in the Court of first instance while the said Act was in force and it was also decided by this Court apparently with reference to the provisions of section 539 of that Act. Section 539 of Act X of 1877 related only to charitable trusts and the words "or religious" were not in that section. Those were introduced by Act XIV of 1882. As suits in respect of trusts for religious purposes did not come within the purview of section 539 of Act X of 1877, it was necessary to obtain leave of the Court under section 18 of Act XX of 1863. Section 539 of Act XIV of 1882 having been extended to religious trusts also, a suit brought with the sanction of the Advocate-General is quite competent. Besides, as pointed out by Maclean, C. J., and Banerjee, J., in the case of *Gyananda Asram* v. *Kristo Chandra Mokherjee* (3), a person electing to proceed under the Religious Endowments Act can be given only such special relief as that special Statute provides for and if he wishes for any relief beyond that, he should proceed under section 539 of the Civil Procedure Code. Some of the reliefs claimed by the plaintiffs in the present case are outside the limited scope of section 14 of Act XX of 1863. That being so, the suit is maintainable with the sanction of the Advocate-General under section 539 of Act XIV of 1882 and no leave under Act XX of 1863 is necessary. We may mention that no objection to the suit was taken in the Court below on this ground.

The *next* contention is that the suit is defective, as all the defendants of the original founder have not been made parties. It is urged that these persons are in possession of portions of the trust property and that they are, therefore, necessary parties to the suit and further that if they are not trustees, the suit would be barred by limitation. But we are not concerned with the question of possession in the present case, which is one under section 539, Civil Procedure Code. That question will arise when a suit is brought for recovery of possession by the trustees who may be appointed and in whom the trust properties may be vested. Some of these persons claim through the female descendants of Ahmed Shah and although the evidence of the defendants is that they are in possession of portions of the property, there is evidence on the side of the plaintiffs that it is only the plaintiffs and the defendants who are in possession of the trust property and that no portion of it is in the possession of persons who, the defendants say, should be made parties to the suit. However that may be, the suit is directed against the defendants who were managing the trust and who professed to be the trustees, and they are the proper parties to a suit under section

539, Civil Procedure Code. In these circumstances, we do not think that the suit is defective for want of parties.

The *third* contention is that the suit is barred by limitation. The suit, however, is not one for possession of property and, as already stated, the question of possession or limitation will arise when a suit is instituted by the trustees who may be appointed for recovery of possession of property improperly alienated. So far as the reliefs claimed in the present suit are concerned, we do not see how any question of limitation can arise. It is found that there is a mosque and that there are some properties attached to it. A suit for the appointment of trustees or the framing of a scheme for management is not, under the circumstances, barred by limitation.

The *fourth* ground is that there was no valid *wakf*, as the property was to be appropriated partly for religious and charitable purposes and partly for the maintenance of Ahmed Shah and his family and the proportions in which the income was to be appropriated for the several objects was not defined in the *sanad*. Reading the *sanad* as a whole, however, there can be no doubt that the primary object was the appropriation of the property to religious and charitable purposes, the surplus only going to the maintenance of Ahmed Shah and his family. As pointed out in the case of *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (7), there is good ground for holding that provision for the family out of the grantor's property may be consistent with the gift of it as *wakf*, and their Lordships of the Judicial Committee agreed with and adopted the views of this Court, stated by Mr. Justice Kemp in the case of *Mazhurool Huq* v. *Puhraj Ditarey Mohapattar* (14), and observed as follows:—"After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says:—'We are of opinion that the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law.'"

(14) 13 W. R. 235.

It is *next* urged that it is not a public trust. But the *sanad* provides for the maintenance of a mosque and for *khairat* (charity), feeding travellers, etc. The evidence shows that money is spent for the expenses of worship and for charity. The public offer prayers at the mosque and the witnesses who have been examined by the plaintiffs prove that it is a public mosque. It is admitted by the defendants themselves in their written statement that the property is a *wakf* property. Having regard to the terms of the *sanad* and the pleadings and the evidence in the case, there can be no doubt that the trust is a public charitable and religious trust.

The *last* ground taken is that it is not open to the Court to appoint a trustee, because (it is argued) under the *sanad* all the descendants of the founder are trustees. The document itself, however, is not clear upon the question of succession to the office of trustee. The learned Judge has considered the claims of the several persons who were put forward by the parties as candidates for the office and has assigned good reasons for rejecting the claims of those whom he has rejected. He has appointed one of the plaintiffs, namely, Faizur Rahman Chowdhury and another person Tabbullah who is one of the defendants as trustees. It is said that one Azizur Rahaman is a well qualified man and that he also ought to have been appointed a trustee. But the learned Judge points out that he is too young. Now four years have elapsed since the date of his decision and it will be open to the learned Judge to consider whether he also should be appointed as a trustee and if he thinks that he is now properly qualified and that in the interest of the trust he ought to be appointed, he may appoint him also. We would also point out to the learned Judge that an enquiry should be made as to the properties of the trust and the income and the expenditure thereof and also as to how the income is to be appropriated. The Court below will go into these questions and give the necessary directions. Subject to these the decree of the Court below is affirmed and the appeal is

dismissed with costs. We assess the hearing-fee at three gold *mohurs*.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2320 OF 1913.

February 24, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

BANI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SURAT SINGH AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Punjab Courts Act (III of 1914), s. 41 (3)—Grant of certificate on point of custom—No evidence as to custom—Certificate, grant of, effect of.

Where a lower Appellate Court is of opinion that, far from there being any conflicting or uncertain evidence to warrant a substantial doubt as to the existence of an alleged custom, there is no evidence worth the name in support thereof, no certificate under section 41 (3) of the Punjab Courts Act ought to be given and, if given, the Chief Court will decline to act upon such a certificate as under the law it ought not to be granted.

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 24th May 1913.

Mr. *Nand Lal*, for the Appellants.

Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—We are clear that no certificate should have been granted in the present case, and that the appellants are precluded from impugning the finding against them on the extraordinary custom set up by them that they, as proprietors holding land in the same *patti* as the land held by the deceased, were entitled to inherit it to the exclusion of the other collaterals. The certificate in question is in the following terms:—

"I would willingly give a certificate but am doubtful whether I can legally do so, as I have to be satisfied in addition to the custom that the evidence regarding it is so conflicting or uncertain that there is substantial doubt as to the existence of the custom. Here there is no evidence of the custom, but a solitary instance in which it was apparently followed and this occurred so long back that it cannot be explained by any one. If I have the power notwithstanding this to grant the certificate, defendants are welcome to a certificate, but I have my doubts. However, I grant the application."

Now section 41 (3) of the Punjab Courts Act lays down as a condition precedent to the granting of a certificate that the Judge of the lower Appellate Court must certify that the evidence regarding custom is so conflicting or uncertain that there is such substantial doubt regarding its existence as to justify a second appeal. Here it is beyond question that the learned Additional Divisional Judge was of opinion that, far from there being any conflicting or uncertain evidence to warant a substantial doubt as to the existence of the custom, there was no evidence worth the name in support thereof. It appears to us that the learned Judge would have refused the application for certificate, if he had not entertained doubts as to his power to do so. Accordingly we decline to act upon a certificate of this kind, which under the law contained in the aforesaid section of the Punjab Courts Act could not have been granted.

As regards the contention that there was a complete and valid compromise outside the Court, by which the dispute between the parties was adjusted, it is sufficient to remark that on the facts as found by the lower Appellate Court it is abundantly clear that some of the plaintiffs, who are minors and females, were not even present before the *panchayat*, which met at the *chaupal* to bring about a settlement, and the appellants themselves withdrew from the alleged settlement or compromise by not giving 100 *bighas* of land to the plaintiffs and by getting a mutation in their own favour for the entire estate. The Courts below have rightly overruled this plea, which is wholly unsustainable.

Upon these findings the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 3335 OF 1910 AND 119 OF 1911.

June 5, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

RAM KRISTO CHAKRABURTTY—DEFENDANT NO. 1—APPELLANT

versus

NARENDRA KISHORE ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Presumption, backward—Præsumitur retro—*Possession, long, of lands after Permanent Settlement, whether raises presumption that they were possessed at the time of the Permanent Settlement.*

The principle of *præsumitur retro* is not confined to cases where the question is as to the existence of a *taluk* at the time of the Permanent Settlement, but it applies also to cases where the question is, whether certain lands, possessed for a long time after the Permanent Settlement as part of a *taluk* existing from before the Permanent Settlement, appertained to the *taluk* at the time of the Permanent Settlement. [p. 886, col. 2.]

From long possession of certain lands as part of a *taluk* existing from before the Permanent Settlement a presumption may arise that those lands were comprised within the *taluk* at the time of the Permanent Settlement. [p. 886, col. 2.]

But such a presumption is one of fact and it is open to a Court to attach such weight to it as it likes, having regard to the facts and circumstances of a particular case. [p. 886, col. 2.]

Nityanund Roy v. *Banshi Chandra Bhuiyan*, 3 C. W. N. 341; *Nagendra Lal Chowdhury* v. *Nazir Ali*, 10 C. W. N. 503; *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrain*, 14 I. A. 101; 14 C. 740; 5 Sar. P. C. J. 45; 11 Ind. Jur. 350; 7 Ind. Dec. (N. S.) 490, referred to.

Appeals against the decrees of the Subordinate Judge, Noakhali, dated the 4th August 1910, modifying those of the Munsif, Additional Court, Feni, dated 11th March 1910.

Babus *Dhirendra Lal Kastgir* and *Bipin Chandra Sen*, for the Appellant.

Babus *Akshoy Kumar Banerjee*, *Romesh Chandra Sen* and *Birajmohan Majumdar*, for the Respondents.

JUDGMENT.

IN S. A. NO. 3335 OF 1910.

The plaintiffs, as purchasers of a revenue-paying estate at a sale under the Revenue Sale Law, brought the suit out of which this appeal arises, to recover possession of the lands in suit, on a declaration that the lands appertained to the estate purchased by them.

The defendants pleaded that the lands formed part of a *taluk* called *Taluk* Mohamaya which was held from the time of the Permanent Settlement, and was, therefore, protected under the provisions of section 37 of Act XI of 1859.

The Court of first instance found that a portion of the lands appertains to the estate purchased by the plaintiffs and that finding has been affirmed by the Court of Appeal below. The Courts below have also concurred in finding that *Taluk* Mohamaya is a *taluk* existing from before the Permanent Settlement and is, therefore, protected under section 37 of Act XI of 1859.

With respect to the question whether the disputed lands appertain to *Taluk* Mohamaya, the Court of first instance, referring to certain *chittas* of 1229 and 1259 and certain *kabuliyats* beginning with the year 1811 which were found by the Commissioner to include the lands in dispute, held as follows:—"The *thak* map being silent as to the position of any tenure, and as it does not contain any line demarcating any such tenure, the said *chittas* are good evidence, under section 13 of the Evidence Act, to show that at the time of preparation of them, the disputed lands formed part and parcel of the tenure named Mohamaya. Having regard to these facts and circumstances as well as to the presumption arising from the long possession of the disputed land as part of the *Taluk* Mohamaya, I find that the disputed land is comprised within *Taluk* Mohamaya, and that the said *taluk* had been in existence at the time of the Permanent Settlement as well as at the time when the plaintiffs' estate was carved out, and that it, therefore, cannot be annulled, and that the plaintiffs are not entitled to get *khas* possession of the lands in suit." That Court accordingly declared plaintiffs' title to the portion of the lands found to be included in the estate purchased by them, but disallowed the claim for *khas* possession of the said lands and dismissed the claim for the rest of the lands.

The learned Subordinate Judge, however, held that the lands do not appertain to that *taluk*, because the defendants in their written statement (paragraph 7) stated that at the time of the *butwara* in 1208 the *taluk* fell under two other *zemindars*. It appears that the Pargannah, out of which the estate purchased by the plaintiffs was created, con-

sisted of two shares, *viz.*, 4 annas and 12 annas, respectively. The 12-annas share was subsequently partitioned into 4 estates, one of which was a 4-annas share, which is the share purchased by the plaintiffs. The defendants in their written statements pleaded that *Taluk* Mohamaya fell into two of the other shares under the *butwara* and that they had been paying rent to the *zemindars* of the said shares. The learned Subordinate Judge, with reference to this statement, says, "or in other words, no lands of the plaintiffs' *zemindari* appertain to this *taluk*. It follows, therefore, that the plots which appertain to the plaintiffs' *zemindari* cannot appertain to the defendants' *taluk*," and again, "the fact that at the time of the *butwara* no part of this *taluk* fell in the plaintiffs' *zemindari* goes to show that these lands did not form any part of the *taluk*, for in that case, the *taluk* would have been shown as appertaining to the plaintiffs' *zemindari* too." The reasoning of the Subordinate Judge is that as the lands appertain to plaintiffs' estate, and as the *taluk* does not appertain to that estate, the lands cannot appertain to the *taluk*. But that conclusion does not necessarily follow, because the lands, although appertaining to the plaintiffs' estate, might have been treated and held as part of the *taluk* which fell into other estates as found by the Court of first instance. However that may be, the learned Subordinate Judge is in error in holding that the presumption relied upon by the Court of first instance does not apply to the present case. He does not refer to the *kabuliyats*, but refers to the *chittas* and observes that they merely show that the defendants were in possession of these lands alleging that they appertain to their *Taluk* Mohamaya, but that they do not prove that the lands appertained to that *taluk* from before 1208.

Referring to the cases of *Nityanund Roy* v. *Banshi Chandra Bhuiyan* (1) and *Nagendra Lal Chowdhury* v. *Nazir Ali* (2) relied upon on behalf of the defendants, he observes:— "But these decisions do not help us in any way. In neither of the cases cited was there any question as to which lands appertain to a particular *taluk*. In these cases, the existence of the *taluk* at the time of the Permanent Settlement was presumed from long possession." It is true that in those cases the question was as to the existence of the *taluk* at the time of the Permanent Settlement. But the principle of *præsumitur retro* is not confined to such cases only, and there is no reason why the principle should not apply to a case like the present.

In the case of *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* (3) the Judicial Committee held that on a question of parcel or no parcel when possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *præsumitur retro*.

In the present case the defendants proved that the lands in dispute were in their possession and held by them from the time of their ancestors as part of *Taluk* Mohamaya, and the evidence goes back to 1811, *i. e.*, more than a century ago. The Court of first instance, having regard to the facts and circumstances and the presumption arising from long possession of the disputed land as part of the *Taluk* Mohamaya, held that the disputed land was comprised within the *taluk* both at the time of the *butwara* and at the time of the Permanent Settlement.

The presumption is no doubt one of fact; it is open to the Court to attach such weight as it likes, or to hold, having regard to the other facts and circumstances of a case, that it is of no assistance to a party. But the learned Subordinate Judge appears to have held as a matter of law that the principle of presuming backwards is not applicable to a case where the question is, whether certain lands have been held as part of a *taluk*. We think he was wrong in the view he took, and as the question was decided by the Court of first instance to a large extent upon the presumption, we think that the case should be remanded to the lower Appellate Court for a fresh decision of the question, whether the lands in dispute have been held by the defendants as part of their *Taluk* Mohamaya from the time of the Permanent Settlement, after taking the said presump-

(1) 3 C. W. N. 341.
(2) 10 C. W. N. 503.
(3) 14 I. A. 101; 14 C. 740; 5 Sar. P. C. J. 45; 11 Ind. Jur. 350; 7 Ind. Dec. (N. S.) 490.

tion into consideration, and disposal of the case according to law. It is needless to say that it will be for that Court to attach such weight to the presumption as it thinks proper. Costs will abide the result.

IN S. A. No. 119 OF 1911.

The judgment that we have just delivered in Appeal No. 3335 will govern this appeal also.

Appeals allowed; Cases remanded.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 8 OF 1915.

February 10, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

PARMA DAT—DEFENDANT—PETITIONER

versus

BIPJU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 12—Arbitration—Award, modification of—Substantial alterations—Jurisdiction—Revision.

In modifying an award a Court has no power to go beyond the provisions of paragraph 12, Schedule II, of the Code of Civil Procedure and it acts without jurisdiction if it makes substantial modifications because it takes a different view from that held by the arbitrator as to what is just and fair in this or that set of circumstances. [p. 888, col. 1.]

Material irregularity on the part of a Court in dealing with objections to an award is a ground for revision, though it is no ground for revision that the arbitrator himself has been guilty of some misconduct and that the Court has wrongly adjudicated upon the objection raised regarding that misconduct. [p. 888, col. 1.]

A Court's refusal to call the arbitrator to answer questions which the petitioner wished to put to him regarding his conduct of the proceedings is a ground for revision. [p. 888, col. 1.]

Civil revision from the decree of the District Judge, Kangra, at Dharmsala, dated the 31st July 1914.

The Hon'ble Rai Bahadar Bakhshi *Sohan Lal*, for the Petitioner.

Mr. *Ghulam Muhammad*, for the Respondent.

ORDER.—This case has been dragging on in the Courts since the 24th of August 1899, and it is matter for regret that so far little real progress has been made towards the decision of it. As the judgment of the lower Court shews, it has been bandied about between the Courts for some sixteen years, having been remanded for the last time by the Chief Court on the 13th of June 1910 (see Civil Appeal No. 1158 of 1908). The learned Judges who disposed of the case remarked: "We must, therefore, again set aside the proceedings of the lower Court and remand the case for a fresh trial, and we hope that on this occasion the learned District Judge will proceed according to law." Even this warning has not been sufficient to ensure that the lower Court should proceed according to law. The case has been handled by a great many different officers, and it is a surprising thing how many of them seem to be imperfectly acquainted with the Civil Procedure Code.

As the record shews, on the 17th November 1911 the parties agreed to refer certain questions to an arbitrator, Mr. Daulat Ram. The arbitrator was to decide —

(1) Who is to pay the costs of the case?

(2) What is the joint property belonging to the parties and in whose possession is each portion of it?

(3) How should the property found joint be divided between the parties *balihaz qabza*?

(4) Apart from culturable land, what is the value of each part of the other property?

Now the order of remand aforesaid set aside the whole of the proceedings up to date, and thereafter the Court framed only two issues, on the 17th December 1910 and the 20th December 1910, respectively, namely—

(1) Can plaintiff sue for part only of the joint property?

(2) What is the family's property now in existence?

The first issue was found against the plaintiff, when it was held that plaintiff could not sue for a portion only of the joint property. It seems to me a matter of some doubt whether these two issues were in any case sufficient for final decision of the case and it is also doubtful whether an award strictly confined to the terms of reference aforesaid would suffice for the final decision of the case.

When the award was put in, voluminous objections were filed by both the parties, which objections were more or less summarily dealt with, and in the end the

lower Court, having modified the award in important particulars, passed a decree upon the basis of the award so modified. It is also to be noted that the award originally presented was remitted for re-consideration and was amended by the arbitrator himself. It was this amended award which was further modified as aforesaid.

The defendant comes up here with a revision petition. The limits within which such revision is possible are well known. In my opinion material irregularity on the part of the Court in dealing with objections is a ground for revision, though it is no ground for revision that the arbitrator himself had been guilty of some misconduct and that the Court had wrongly adjudicated upon the objection raised regarding that misconduct. Only two points have been argued on behalf of the petitioner. The *first* is that the Court materially erred when on the 31st October 1913 it refused to call the arbitrator to answer questions which the petitioner wished to put to him regarding his conduct of the proceedings. The *second* is that the arbitrator himself on the 26th of May 1912 refused to summon a certain witness because that witness had already been examined in Court. In my opinion, the second of these points has no value and is not a proper subject for revision, but the Court certainly should have called the arbitrator as a witness when the petitioner applied that he should be summoned. I must, therefore, though I do it with great reluctance, again remand the case in order that the Court may summon the arbitrator and allow the petitioner to examine him regarding his proceedings. A return to this should be made within two months.

I take this opportunity of pointing out that the lower Court appears to me to have overlooked Article 12, Schedule II, Civil Procedure Code, which lays down the circumstances under which a Court may modify or correct an award. The two or three modifications which the lower Court has introduced into the award do not fall under that Article. They are substantial modifications made by the Court because it took a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances.

Now, under the Article the Court may only modify or correct an award, *first*, by striking out of it something not referred to arbitration; *secondly*, by amending imperfections *in form* or correcting *any obvious error* which can be amended without affecting the decision of the case; and *thirdly*, where the award contains a *clerical mistake* or an error arising from an *accidental slip or omission*. The Court, therefore, as it seems to me, acted entirely without jurisdiction in making the modifications to the award which it has made.

The result, therefore, is that, if in the end this Court decides that the award should not be set aside on the ground of misconduct on the part of the arbitrator, it will probably be necessary to give plaintiff a decree exactly in accordance with the award as made by the arbitrator himself. See order of remand above.

Petition allowed; Case remanded.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 48 OF 1916.

July 17, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

DEBI CHARAN LAL AND OTHERS—APPELLANTS

versus

Sheikh MEHDI HUSSAIN AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—"Sufficient cause," finding as to, when not to be interfered with—Time requisite for obtaining copies, how to be determined—Patna High Court Letters Patent, cl. 10—Appeal—New point—Practice.

Where a lower Appellate Court, after considering all the circumstances of a case, has come to the conclusion that "sufficient cause" has or has not been established for not filing an appeal within time, a High Court in second appeal will not interfere. [p. 889, col. 2.]

There is no hard and fast rule which determines exactly for all classes of cases the amount of time requisite for obtaining copies within the meaning of section 12 of the Limitation Act. The question in each case is, what on the facts of that case was the time requisite for obtaining copies. [p. 890, col. 1.]

The words of section 12 of the Limitation Act do not lay down that the time requisite for obtaining a copy must be continuous. [p. 890, col. 2.]

DEBI CHARAN LAL v. MEHDI HUSSAIN.

A decree in a Court of a Munsif was passed, prepared and signed on September. 27th. From September 28th to October 31st (both days included) the Court was closed for annual vacation and it re-opened on 1st November. An application for a copy of the judgment was made on November 3rd and for a copy of the decree on November 13th. Both copies were ready and delivered on November 21st and an appeal was filed on November 28th:

Held, that as 27th September, the day on which the judgment was pronounced and the decree signed, was excluded and as from 28th September to 31st October, the Court was closed and an application for copies could not be made, the whole of the time from 27th September to 31st October was part of the time requisite for obtaining copies, whether they were applied for on the day on which the Court re-opened or on some later date. [p. 890, col. 2.]

Saminatha Ayyar v. *Venkatasubba Ayyar*, 27 M. 21; 13 M. L. J. 300: *Bani Madhub Mitter* v. *Matungini Dassi*, 13 C. 104 (F. B.); *Bechi* v. *Ahsanullah Khan*, 12 A. 461; A. W. N. (1890) 149; *Khub Chand* v. *Harmukh Rai*, 12 Ind. Cas. 183; 34 A. 41; 3 A. L. J. 1095, referred to.

Tanjore Palace Estate v. *Andi Ramiah Chetty*, 11 Ind. Cas. 339; (1911) 2 M. W. N. 364, followed.

Ordinarily a new point which was not taken before a Single Judge of the High Court, will not be allowed to be taken for the first time in an appeal under clause 10 of the Letters Patent. [p. 891, col. 1.]

Appeal from a decision of Mr. Justice Mullick, in Second Appeal No. 2667 of 1914, dated the 4th May 1916.

Messrs. *S. Sinha*, *Parmeshwar Dayal* and Babu *Abani Bhusan Mukherji*, for the Appellants.

Messrs. *Mahomed Mustafa Khan* and *Ray Guru Saran Prasad*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—The question for decision in this appeal is, whether the appellants' appeal to the lower Appellate Court was within limitation. On September 27th, 1913, the respondents obtained a decree in the Court of a Munsif. Strangely enough, the decree of the Court was prepared and signed on the same day. The annual vacation began on the following morning and the Court re-opened on November 1st. The appellants applied for a copy of the judgment on November 3rd and for a copy of the decree on November 13th. Both copies were ready and were delivered on November 21st. An appeal was filed by the appellants on November 28th. The Subordinate Judge, to whom the appeal was transferred for disposal, dismissed it on the ground that it had been filed beyond time, and that the appellants had failed to show sufficient cause within the meaning of section 5 of the Limitation Act for not preferring the appeal within time. The appellants filed a second appeal in this Court. A learned Judge of this Court dismissed the appeal, holding that as the Subordinate Judge had considered all the circumstances of the case and had in the exercise of his discretion come to the conclusion that the appellants had not established sufficient cause within the meaning of section 5 of the Limitation Act, this Court could not interfere. It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time, the High Court in second appeal will not interfere. In my opinion, the learned Judge was right in following those authorities.

But it is contended before us that the time during which the Court was closed should be treated as part of "the time requisite for obtaining a copy of the decree" within the meaning of section 12 of the Limitation Act. This point was not taken either before the Subordinate Judge or before the learned Judge of this Court, but I think that we ought to consider it. The appellants rely upon the decision of the Madras High Court in *Saminatha Ayyar* v. *Venkatasubba Ayyar* (1). In that case facts were practically the same as in the present case, except that the appellant applied for a copy of the decree on the day on which the Court re-opened after the vacation. It was held that the time during which the Court was closed was part of the time requisite for obtaining a copy of the judgment. The respondents rely upon the case of *Tanjore Palace Estate* v. *Andi Ramiah Chetty* (2), in which two other Judges of the same Court declined to hold that vacation was part of the time requisite for obtaining a copy of the judgment delivered five days after the Court closed for the vacation, as the appellant had not applied for a

(1) 27 M. 21; 13 M. L. J. 300.
(2) 11 Ind. Cas. 339; (1911) 2 M. W. N. 364.

copy till 17 days after the re-opening of the Court. They referred to the case of *Saminatha Ayyar* v. *Venkatasubba Ayyar* (1) with approval as I read the judgment, but distinguished it from the case before them on the ground that the appellant had not applied for the copy till 17 days after the re-opening of the Court. They concluded their judgment with the observation that they could see no reason for excluding the period during which the Court was closed, except upon grounds which would entitle an appellant to demand the exclusion of every holiday which occurred during the period allowed for the presentation of his appeal.

Different High Courts have laid down different general rules for determining the amount of time requisite for obtaining copies. For example, a Full Bench of the Calcutta High Court held in *Bani Madhab Mitter* v. *Matungini Dassi* (3) that the time which elapses between the delivery of the judgment and the signing of the decree is part of the time requisite for obtaining a copy of the decree, whether or not the appellant applies for the copy before the decree is signed while a Full Bench of the Allahabad High Court held in *Bechi* v. *Ahsanullah Khan* (4) that the time requisite for obtaining a copy does not begin till an application for the copy is made.

These and a few other decisions of general application have settled the practice on important points for the Provinces subject to those Courts and they suffice for the great majority of cases. But so far as I am aware, no High Court has attempted to lay down any hard and fast rule which shall determine exactly for all classes of cases the amount of time requisite for obtaining a copy.

Subject to any general rules which may have been laid down, it appears to me that the question in each case is, what was in fact the time requisite for obtaining the copy? The decision in *Saminathu Ayyar* v. *Venkatasubba Ayyar* (1) rests avowedly on the special circumstances of the case. So also does that in *Khub Chand* v. *Harmukh Rai* (5).

(3) 13 C. 104 (F. B.).
(4) 12 A. 461 (F. B.); A. W. N. (1890) 149.
(5) 12 Ind. Cas. 183; 34 A. 41; 8 A. L. J. 1095.

I, therefore, ask myself the question, what was the time requisite for obtaining the copy of the decree in this case? The day on which the judgment was pronounced and the decree signed in this case must admittedly be excluded. So far as I know, it is the universal practice to exclude the day on which the case was decided for all purposes connected with the calculation of limitation for an appeal. It is common ground that from September 28th to October 31st (both days included) the appellants could not have applied for a copy either of the judgment or of the decree. That being so, it appears to me to follow that the whole of the time which elapsed from the delivery of the judgment to the re-opening of the Court on November 1st, 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the appellant applied for copies on the day on which the Court re-opened or on some later date. In fact it appears to me that the date on which the application for copies was made, has in this case no bearing on the question whether or not the period of the vacation should be deducted. In this respect I am unable to accept the decision in *Tanjore Palace Estate* v. *Andi Ramiah Chetty* (2). It was suggested that the time requisite for obtaining a copy must be continuous. But the words of the section do not appear to lay down any such rule. In the United Provinces it is the practice to disallow the days which the applicant has wrongly allowed to elapse between the notification of the number of stamped sheets required and the deposit of those sheets. The effect of this is to allow two different periods as time requisite for obtaining the copy.

On the facts of this case I am of opinion that the period of the vacation was part of the time requisite for obtaining the necessary copies. I would, therefore, allow this appeal and setting aside the judgment of the learned Judge of this Court and that of the Subordinate Judge I would remand this case to the Court of the Subordinate Judge to be disposed of according to law.

I agree with the learned Judge of this Court in thinking that the decision of the Subordinate Judge with reference to section 5 of the Limitation Act was clearly wrong.

As observed above, the point on which

this appeal has been allowed was not taken before the Single Judge of this Court. In this connection I take this opportunity of pointing out that the conduct of a case before a Single Judge of this Court must not be regarded as a preliminary canter in which the parties and their legal advisers are not called upon to exert themselves. Ordinarily I would not allow a point to be taken in appeal under clause 10 of the Letters Patent which had not been taken before the Single Judge. In the present case I felt bound to allow a new point to be taken in order to remedy what appeared to me to be a serious failure of justice.

I would make the costs of the hearing before the Single Judge costs in the cause, but would leave the parties to pay their own costs of this appeal.

SHARFUDDIN, J.—I agree.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 137 OF 1916.

August 9, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

A. BHAGIRATHI NETHIARAMMA AND ANOTHER—DEFENDANTS NOS. 1 AND 3—PETITIONERS

versus

N. M. MEENAKSHI NETHIARAMMA AND ANOTHER—PLAINTIFF AND DEFENDANT, NO. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 152, 153—Amendment of a decree affirmed in appeal, application for—Jurisdiction of Trial Court.

Where a decree is confirmed by the Appellate Court, the decree liable to be amended is only that of the Appellate Court and not that of the Court of first instance. The Trial Court has, therefore, no jurisdiction to entertain an application for amendment of the decree of the Appellate Court. [p. 891, col. 2; p. 892, col. 1.]

Visvanathan Chetti v. *Ramanathan Chetti*, 24 M. 646, distinguished.

Barhamdeo Singh v. *Harmanoge Narain Singh*, 23 Ind. Cas 419; 18 C. W. N. 772; 20 C. L. J. 18; *Krishna Upadya* v. *Ganapaye Upadye*, 28 Ind. Cas. 586; *Raja Ram Rao, T. V.* v. *Arumugam Karuputti*, 28 Ind. Cas. 377; 17 M. L. T. 224, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Palghat, in Mis. I. A. No. 3316 of 1915, in Original Suit No. 286 of 1911 (Appeal Suit No. 377 of 1912).

Mr. *P. Appu Nair*, for the Petitioners.

Mr. *K. Kuttikrishna Menon*, for the Respondents.

JUDGMENT.—In this case, the District Munsif passed a decree in an original suit. Against that decree an appeal was preferred and the Appellate Court confirmed the decision of the District Munsif. After the confirmation of the decree, an application was made to the District Munsif to amend the decree. It is settled law in this Presidency that where a decree is confirmed by the Appellate Court, the decree liable to be amended is only that of the Appellate Court and not that of the Court of the first instance. The District Munsif had, therefore, no jurisdiction to entertain the application for amendment of the decree of the Appellate Court.

Mr. Kuttikrishna Menon drew my attention to a decision in *Visvanathan Chetti* v. *Ramanathan Chetti* (1), which says that after amendment the decree can be appealed against, and contended that the proper course which should have been adopted by the present petitioners was to have preferred an appeal against the amended decree and that they should not be allowed to agitate the matter in a revision petition. What was held in *Visvanathan Chetti* v. *Ramanathan Chetti* (1) was that the District Munsif was wrong in thinking that the decree was not in conformity with the judgment, that consequently he was in error and that an appeal lay to the District Judge against his order directing the amendment. In the present case, as the District Munsif had no jurisdiction to entertain the application, his amendment cannot add to or vary the decree. Therefore, there is no decree to appeal from. In the decisions in *Barhamdeo Singh* v. *Harmanoge Narain Singh* (2), *Krishna Upadya* v. *Ganapaye Upadye* (3) and *Raja Ram Rao, T. V.* v. *Arumugam Karuputti* (4) it was

(1) 24 M. 646.
(2) 23 Ind. Cas. 419; 18 C. W. N. 772; 20 C. L. J. 18.
(3) 28 Ind. Cas. 586.
(4) 28 Ind. Cas. 377; 17 M. L. T. 224.

held that where there is an appeal pending, whether it be to the Privy Council or to the High Court, the jurisdiction of the lower Court to amend the decree during the pendency of that appeal is not taken away: but once the decision is passed by the Appellate Court, the only Court competent to amend the decree is the Appellate Court which passed it, and not the Court against whose decree the appeal was preferred.

I hold that the District Munsif had no jurisdiction to amend the decree. I must set aside his order and allow the petition. I make no order as to costs.

Petition allowed.

V. R. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3133 OF 1915.

February 23, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

JOWALA SINGH—DEFENDANT—APPELLANT

versus

LAKHA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Courts Act (III of 1914), s. 41—Appeal, second—Misreading of evidence—Money paid validly to prior mortgagee in excess of sum mentioned in sale-deed—Legal necessity.

Misreading of evidence is a sufficient ground for the Chief Court's interference on second appeal.

A sum of money paid by the vendee to a prior mortgagee, due on the footing of the mortgage but in excess of the sum mentioned in the sale-deed, is a payment for valid necessity and should be allowed against the collaterals of the vendor.

Second appeal from the decree of the District Judge, Lahore, dated the 7th May 1915.

Mr. *Mehr Chand*, for the Appellant.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—Badhawa Singh, childless proprietor, who died three and-a-half years before suit had more than a year earlier sold ancestral land for Rs. 2,000. His reversioners sue for possession on the usual grounds. The first Court held that, out of the consideration recorded in the sale-deed, namely, Rs. 1,200 to be paid by vendee to previous mortgagees, Rs. 600 cash paid to vendor in village and Rs. 200 paid before Sub-Registrar, only Rs. 1,200, admitted by plaintiffs, could be said to be for "necessity." The passing of the Rs. 600 item was entirely disbelieved, and "necessity" for the Rs. 200 item was denied because vendor was a bad character. At the same time the first Court seems to admit that vendee really paid Rs. 1,566 and not Rs. 1,200 to the previous mortgagees. It, however, refused to allow more than Rs. 1,200, and so gave a decree for possession of the land on payment of one-third of Rs. 1,200, one-third being declared plaintiffs' share.

Vendee appealed. The lower Appellate Court doubted whether the extra Rs. 366 ever passed to previous mortgagees, the doubt being the result of two misreadings of the evidence on the record; the Court took it that on the footing of the mortgage only Rs. 1,200 and not Rs. 1,566 was due, *secondly*, that Jowala Singh, vendee, had practically admitted in his statement on solemn affirmation that he had paid only Rs. 1,200 accounting for the rest of the Rs. 2,000 without bringing in the extra Rs. 366 aforesaid. Now in the mortgage-deed the condition was that on Rs. 400 no interest should be charged, but on the remaining Rs. 100 interest at 24 per cent. per annum should be paid. At this rate the interest due at time of sale would be some Rs. 360, so that the lower Appellate Court was wrong in supposing that there was no occasion to pay more than Rs. 1,200. Again, Jowala Singh in his statement aforesaid was not stating all that he had paid, he was merely stating how the Rs. 2,000 was made up. His case is that he paid the extra Rs. 366 *in addition* out of his own pocket to pacify the previous mortgagees.

In my opinion this sort of misreading of evidence affords sufficient reason for this Court to interfere on second appeal. I, therefore, accept this appeal and modify the decree by adding Rs. 122 (one-third of Rs. 366) to the amount plaintiffs must pay to defendant-vendee before they can recover possession.

Parties to bear their own costs here and in lower Appellate Court.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL No. 167 OF 1901.

February 14, 1916.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

SREEMAN MAHA MANDALESWARA KATARI SALAWA MAHARAJA OOMADA RAJAH MAHARAJA RAJ BOMMARAJU BAHADUR DEVA MAHARAJULINGARU RAJAH OF KARVETNAGAR AND OTHERS—PLAINTIFFS AND LEGAL REPRESENTATIVES—APPELLANTS

versus

ECHAMPADI SARAVANA PILLAI AND OTHERS—DEFENDENTS NOS. 1 TO 6 AND LEGAL REPRESENTATIVES OF THE DECEASED DEFENDENTS NOS. 1, 4, 3 AND 5—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 41—Benamidar—*Real owner permitting another to hold himself out as owner of estate—Mortgage by latter—Doctrine of* bona fide *purchaser for value, applicability of—Notice, direct or constructive—Burden of proof.*

It is a principle of natural equity that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it. [p. 898, col. 1.]

Mahomed Mozuffer Hossein v. *Kishori Mohun Roy*, 22 C. 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; *Bhugwan Doss* v. *Upooch Singh*, 10 W. R. 185, followed.

Varden Seth Sam v. *Luckpathy Royjee Lallah*, 9 M. I. A. 303; Marsh 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756, *Akshoy Kumar Banerjee* v. *Corporation of Calcutta*, 27 Ind. Cas. 261; 42 C. 625; 19 C. W. N. 37; 21 C. L. J. 177; *Mulji Jetha & Co.* v. *Macleod*, 5 Bom. L. R. 991; *Tiruvenkatachariar* v. *Venkatachariar*, 23 Ind. Cas. 621; 26 M. L. J. 218; *Himatlal Motilal* v. *Vasudeo Ganesh Mhashar*, 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634; *Lalubhai Surchand* v. *Bai Amrit*, 2 B. 299; *Attorney-General* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R 621; *Wilkes* v. *Spooner*, (1911) 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 55 S. J. 479; 27 T. L. R. 426; *Ramcoomar Koondoo* v. *McQueen*, 11 B. L. R. 46 (P. C.); 18 W. R. 166; I. A. Sup. Vol. 40; 3 Sar. P. C. J. 160, referred to.

Where, therefore, *A* conveys property to *B*, coupled with an agreement that the latter should re-convey the same to the former on the happening of a certain event, but *B* is permitted to remain in possession of the property and on the faith of that possession third persons obtain mortgages from *B* and set up title as *bona fide* mortgagees for value: the onus is upon *A* to show that the mortgagees from *B* had notice of *A*'s title when they obtained their mortgages from *B*. [p. 897, col. 2; p. 898, col. 1.]

The proposition that the defence of *bona fide* purchaser for value is a single defence and cannot be split up, has in its general aspect reference to the form of pleadings and cannot be treated as decisive of the question of onus in all cases in which such a defence is pleaded. [p. 898, col. 2; p. 899, col. 1.]

Akshoy Kumar Banerjee v. *Corporation of Calcutta*, 27 Ind. Cas. 261; 42 C. 625; 19 C. W. N. 37; 21 C. L. J. 177; *Attorney-General* v. *Biphosphated Guano Co.*, 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621; *Wilkes* v. *Spooner*, (1911) 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 55 S. J. 479; 27 T. L. R. 426; *Lalubhai Surchand* v. *Bai Amrit*, 2 B. 299, referred to.

Appeal against the decree of the Court of the Subordinate Judge, North Arcot, in Original Suit No. 25 of 1900.

Mr. *L. A. Venkataraghava Aiyar* for Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Messrs. *E. V. Ananthakrishna Aiyar* and *S. Ramaswami Aiyar*, for the Respondents.

This appeal coming on for hearing on the 3rd and 4th December 1903 and having stood over for consideration till the 15th December 1903, the Court (Sir Subramania Aiyar, Officiating, C. J., Benson and Bhashyam Ayyangar, JJ.) delivered the following

JUDGMENT.—This is a suit on behalf of the present Rajah of Karvetnagar who, on his own application made under Madras Act IV of 1899, was constituted a ward of the Court of Wards and the suit is in effect to recover possession from the defendants of the four villages described in the plaint, on payment, if necessary, of such sum, if any, as may be found due and for the execution of a conveyance in his favour by the 1st defendant. Various defences were raised to the suit and the Subordinate Judge, after framing 19 issues, confined the trial to the 8th, 9th, and 17th issues, and with reference to his findings thereon dismissed the suit with costs. This appeal has been preferred on the ground that his findings on those issues are contrary to law and have been based on a misconstruction of Exhibit B. We agree with the Subordinate Judge that the legal relation between the plaintiff and the 1st defendant in regard to the plaint villages is settled and determined by Exhibit B, dated the 25th August 1888, and that it is unnecessary to go further back and consider the dealings between the parties, prior to that date, in respect of these villages—which were brought to sale in March and April 1903 in execution of the decree in Original Suit No. 5 of

1879, which was passed against the plaintiff and his deceased father, the then Rajah of Karvetnagar, and were purchased by or in the name of the 1st defendant herein. It is clear from paragraphs Nos. 11, 12, 13, 19 and 20 of the plaint that the plaintiff does not—and rightly so—repudiate the agreement of Exhibit B as not binding upon him; and the 2nd defendant in this suit, who alone originally impeached its validity on the score of absence of consideration, subsequently withdrew this contention at the trial of the suit. In our opinion, both the plaintiff and the 1st defendant are bound by that agreement. The Subordinate Judge held that, according to the terms of Exhibit B, it was settled that the 1st defendant was the owner of the villages—meaning apparently both beneficial and legal owner—and that he was to sell the same to the plaintiff for a consideration of Rs. 99,568-15-6 after getting a reconveyance thereof from T. S. Krishnama Chari, the defendant in Original Suit No. 71 of 1887 on the file of the High Court, to whom the villages had been either mortgaged by way of conditional sale or sold with a condition for re-purchase. We are of opinion that this view of the Subordinate Judge proceeds on a misconstruction of the document. The agreement clearly proceeds on the footing that the plaintiff was the beneficial owner of the villages, the 1st defendant being only the legal owner, and that, in the matter of pecuniary obligations incurred by the 1st defendant in connection with the purchase of the villages and in the matter of other money dealings between him and the plaintiff, there was found due from the plaintiff to the defendant a sum of Rs. 99,568-15-6 on settlement of accounts. This agreement was executed during the pendency of the aforesaid Original Suit No. 71 of 1887, after a written statement had been filed by the 2nd defendant therein, one Narayana Ayyangar, who jointly with the present 1st defendant—the plaintiff therein—had executed the mortgage by way of conditional sale in favour of T. S. Krishnamachari, the 1st defendant therein, the principal contention raised in that written statement being that the purchase of the village by the present 1st defendant was out of funds belonging to the Rajah of Karvetnagar and that the reconveyance by Krishnamachari ought to be in favour of the Rajah and not to the 1st defendant. The agreement provides that the Rajah should cause Narayana Ayyangar to withdraw his objections, that immediately after a decree for reconveyance is passed in favour of the 1st defendant he should sell to the Rajah the plaint villages for the sum of Rs. 99,568-15-6 and give possession thereof, that when the Rajah finds it convenient to pay the said amount in one lump, he should do so with interest at 1 per cent. per mensem on Rs. 40,000 out of the said amount and half a rupee per cent. per mensem on the remainder of Rs. 99,568-15-6 and that till such payment the Rajah should give as security for the said principal and interest a mortgage with possession of the plaint villages or of the other villages which the 2nd defendant may accept—both the sale-deed by the 1st defendant and the deed of mortgage by the Rajah in favour of the 1st defendant to be executed and registered on the same day. The learned Pleader for the respondents lays particular stress upon the expression that the 1st defendant is to *sell* to the Rajah the plaint villages for the sum of Rs. 99,568-15-6 and urges that this shows that the 1st defendant was both the legal and beneficial owner of the villages and that the sum of Rs. 99,568-15-6 was the price which as vendor he was to get for selling the villages to the plaintiff. This argument would no doubt carry weight if the said amount was really the price. Admittedly, a considerable portion of it was debt due by the Rajah to the defendant on money dealings between them unconnected with the villages and this, therefore, cannot certainly form a portion of the price, inasmuch as the Rajah only undertakes to pay what he already owed to the defendant. Even the remainder (of the Rs. 99,568-15-6) cannot be really viewed as price for the sale of the villages, for that amount too was found *due* by the Rajah to the 1st defendant in respect of the pecuniary obligations which he had incurred for the benefit of the Rajah in connection with the purchase of the villages. That the amount of Rs. 99,568-15-6 is made up of these two items

appears not only from the recitals in Exhibit B but also from Exhibit D, the settlement of accounts giving the particulars of the said amount. Taking Exhibit D along with the evidence of the plaintiff's 1st witness—the only witness examined in the case—it is clear that the receipts derived from the villages for the 4 years commencing from 1883—when the villages were purchased in Court auction-sale—were credited in the accounts to the Rajah and deducted as payments made towards the amount due by him to the 1st defendant. This conclusively shows that the agreement (Exhibit B) proceeded on the footing that the Rajah was the beneficial owner of the villages and the 1st defendant held the same for his benefit.

The respondents' Pleader also relies upon the recitals made in Exhibit B that the villages were purchased in Court auction-sale by the 1st defendant, that he, in conjunction with Narayana Ayyangar, executed a deed of conditional sale in favour of Krishnamachari, and that, according to the terms of the said conditional sale, he repaid the amount of the conditional sale to Krishnamachari; but such recitals are not inconsistent with the purchase having been made for the benefit of the Rajah or with the other transaction also having been entered into on his behalf, in connection with such purchase. The reason why it was not expressly stated in Exhibit B that the purchase was made for the benefit of the Rajah and the deed of conditional sale also executed on his behalf, may be that such recital might prejudice the suit, Original Suit No. 71 of 1887 (in the High Court), instituted by the 1st defendant in his own name, for the purpose of obtaining a reconveyance from Krishnamachari. The object of agreement B was that the objection raised (in Original Suit No. 71 of 1887) by Narayana Ayyangar should be withdrawn and that, instead of the suit being dismissed, a decree might be obtained by the 1st defendant for a reconveyance to him by Krishnamachari, so that the former might be in a position to transfer the villages to the Rajah and execute the necessary conveyance. Though the 1st defendant in his written statement pleads that he purchased the villages on his own account and with his own money and borrowed Rs. 52,750 on his own account (from Krishnamachari) for purchasing the villages yet he admits that the deed of conditional sale which he in conjunction with Narayana Ayyangar executed in favour of Krishnamachari, included not only the said Rs. 52,750, but also a further sum of Rs. 21,495 which was due by the Rajah to Krishnamachari and that Krishnamachari was to re-convey the villages on payment not only of the above two sums, but also of a further sum of Rs. 5,000 due by the Rajah to him. He further admits that a deed of indemnity was also executed in favour of Krishnamachari by himself, Narayana Ayyangar, the plaintiff and his father the late Rajah. As regards the re-payment (by the 1st defendant) of the amount due to Krishnamachari under the deed of conditional sale, the defendant in order to enable him to do so borrowed a lakh of rupees, on the 18th April 1884, from the Mahant of Tirupati on a mortgage of the plaint villages and other properties belonging to him. The defendant, however, admits in paragraph 10 of his written statement that in December 1884, the said debt of one lakh of rupees due by him to the Mahant was discharged, so far as he was concerned, by the Rajah, including the same in a mortgage-bond for 14 lakhs of rupees executed by him in favour of the Mahant. These and other dealings between the Rajah and the 1st defendant were adjusted and the agreement (Exhibit B) was entered into on the 25th August 1888. This document also provides that the 1st defendant should not be under liability to satisfy the decree in Suit No. 320 of 1880 (on the file of the High Court) obtained by Krishnamachari, not only against the Rajah but also against him and that the Rajah should arrange to satisfy that decree himself. From the nature of these transactions and the context in Exhibit B it is clear that the word 'sale' therein is used simply in the sense of a conveyance from the legal owner to the beneficiary or to any other person nominated by him.

The respondents' Pleader further urges that as the agreement is silent as to the income of the villages prior to the contemplated conveyance (by the 1st defendant) to the Rajah, the agreement should be construed merely as an agreement for sale. This is quite inconsistent with the income of the villages prior to the agreement having been

dealt with as belonging to the Rajah and credited to him in the account Exhibit D. It was evidently expected that there would be no delay in obtaining a decree for re-conveyance from Krishnamachari (in the High Court suit) and in the villages being conveyed and transferred by the 1st defendant to the Rājah and no express provision was, therefore, made as to the future income of the villages; but the death of Narayana Ayyangar subsequent to the agreement and the necessity of bringing his legal representative on the record caused a delay of about a year in obtaining the decree. The sum of Rs. 99,568-15-6 was on a settlement of accounts found due to the 1st defendant on the 25th August 1898, and the interest provided in the document evidently runs from that date; there is nothing in the document to support the contention of the respondents' Pleader that interest should be reckoned only from the date of the conveyance (to be executed by the 1st defendant in favour of the Rajah), on which date the Rajah was also to execute a mortgage-deed for the said amount in favour of the 1st defendant. If, as held by the Subordinate Judge, Exhibit B were a contract for sale, the suit would essentially be one for the specific performance of a contract and in that case it would be clearly barred under Article 113 of the Limitation Act. But in the view which we take of Exhibit B the suit is really one for the possession of immoveable property by a beneficial owner thereof against the legal owner, on payment, if necessary, of such sum, if any, as may be found due; and the execution of a conveyance by the 1st defendant to the plaintiff is not essential and is unnecessary if he gets a decree for recovery of the villages as beneficial owner. The plaintiff should be charged with interest at the rate provided in that document or such other rate as may have been agreed upon between the parties on the same day as Exhibit B was executed (as alleged before us by the Advocate-General), provided such agreement is valid and subsisting from the date thereof, in addition to the principal sum of Rs. 99,568-15-6, and the defendant should be charged with the income derived from the villages from the same date. Having regard, however, to the provisions of the Transfer of Property Act, effect cannot be given to Exhibit B itself as creating a mortgage of the villages in favour of the defendants from the date when a re-conveyance was executed by the High Court (*i. e.*, the 7th February 1890) and defendants Nos. 2 to 6 cannot, therefore, be regarded technically as sub-mortgagees. If they became mortgagees under the 1st defendant without notice, express or constructive, of Exhibit B and in the *bona fide* belief that the 1st defendant was the owner, they would be entitled to be paid the full amount due to them under their respective mortgages before the villages could be recovered by the plaintiff from them. If, however, it is not proved that they are such *bona fide* mortgagees for value they should, for the purposes of this suit, be treated merely as sub-mortgagees under the 1st defendant on the footing that the 1st defendant was a usufructuary mortgagee for the sum of Rs. 99,568-15-6, with interest as provided in Exhibit B. In taking an account of the income of the villages on either footing the mortgagees-defendants should be respectively charged with the income derived from them during the time they have respectively been in possession. As regards the covenant (in Exhibit B) that the plaintiff himself should arrange for the satisfaction of the decree in Civil Suit No. 320 of 1880 (on the file of the High Court), it is admitted that it is still outstanding against both the plaintiff and the 1st defendant. Under the provisions of (Mad.) Act IV of 1899, its execution, so far as the plaintiff is concerned, must have been transferred to the Collector, the decree-holder, however, being apparently at liberty to execute the decree against the 1st defendant only by process of Civil Court. If the decree-holder does thus execute it and the defendant obtains a decree for damages against the plaintiff for breach of the covenant, such decree will, under the provisions of the Act (IV of 1899), have to be transferred to the Collector for execution; and under the rules framed under the Act the execution of that decree may be postponed for an indefinite time. Under such circumstances the plaintiff should, before recovering possession of the villages, satisfy the decree in Civil Suit No. 320 of 1880, or arrange with the decree-holder therein to enter up satisfaction of the decree, so far at any rate as

the 1st defendant is concerned, within a time to be fixed by the appellate decree herein.

Before disposing of this appeal finally we must call upon the District Judge to try the following issues with reference to the foregoing observations and submit his findings thereon within three months from this date. Both parties will be at liberty to adduce evidence on these issues; ten days will be allowed for filing objections to the findings.

(*i*) What are the amounts, if any, still due to the defendants Nos. 2 to 6 on their respective simple or usufructuary mortgages?

(*ii*) Whether all or any of the defendants Nos. 2 to 6 are *bona fide* mortgagees for value without notice (*vide* definition in section 3 of the Transfer of Property Act) of the plaintiff's title?

(*iii*) What sums, if any, are payable by the plaintiff to defendants Nos. 1 to 6 respectively before recovering possession of the plaint villages?

[In compliance with the order for findings contained in the above judgment, the District Judge of North Arcot specified on the first revised issue the amounts due to each of the defendants on the report of a Commissioner, who was appointed for the purpose. On issue 2, defendants Nos. 2 and 3 were found not to be *bona fide* mortgagees without notice and defendants Nos. 4 to 6 found to be *bona fide* mortgees without notice. On the third issue the Judge found that plaintiff was liable to pay the 1st defendant alone Rs. 104,975-6-11.]

This appeal coming on for final hearing after the return of the finding of the lower Court on the issues referred to it for trial on the 7th February 1916 the Court delivered the following

JUDGMENT.—In this suit (No. 25 of 1900), which was instituted by the Rajah of Karvetnagar for the recovery of 4 villages, Kolathur, Melapudi, Kelapudi and Pemmanallur, Sir Subramania Aiyar, Benson and Bashyam Ayyangar, JJ., for the purpose of disposing of the appeal preferred to the High Court from the decree of the Subordinate Judge of North Arcot, directed the lower Court on the 15th December 1903 to determine the following issues:—

1. What are the amounts, if any, still due to the defendants Nos. 2 to 6 on their respective simple or usufructuary mortgages?

2. Whether all or any of the defendants Nos. 2 to 6 are *bona fide* mortgagees for value without notice (*vide* definition in section 3 of the Transfer of Property Act) of the plaintiff's title? and

3. What sums, if any, are payable by the plaintiff to defendants Nos. 1 to 6 respectively before recovering possession of the plaint villages?

The results of the enquiry were submitted in due course, but as the findings calculated the sums due by the plaintiff to the defendants and by the 1st defendant to defendants Nos. 2 to 6 only up to the 6th July 1903, the High Court before dealing with the objections to the finding directed the lower Court on 21st November 1911 to ascertain what would be due till the 8th July 1912 and also ordered that a Receiver may be appointed for the property from that date. We have now before us the revised findings and shall proceed to deal with the objections to them.

There are six defendants in this suit; the 6th defendant did not appear before us. He has a mortgage subsequent to that of the 4th defendant. The 1st defendant was an officer of the Karvetnagar Raj and all the four villages stand in his name, but it has been held by this Court that he is only the legal owner of the property, the plaintiff being the beneficial owner. It has also been held that before the plaintiff could recover the villages he was bound to pay the 1st defendant the principal sum of Rs. 99,563-15-6 with such interest thereon as might be found due to him, while on the other hand the 1st defendant was liable for the income derived from the villages from the date of Exhibit B, that is, 25th August 1883. Defendants Nos. 2 to 6 hold mortgages on these villages executed in their favour by the 1st defendant and it has been ruled that if they became mortgagees under the 1st defendant without notice of Exhibit B, express or constructive, and in the *bona fide* belief that the 1st defendant was the owner, they would be entitled to be paid the full amount due to them under their respective mortgages before the plaintiff could recover the villages. If they were not such *bona fide* mortgagees for value,

they should be treated merely as sub-mortgagees under the 1st defendant on the footing that he was a usufructuary mortgagee for the amount due to him.

The first contention raised before us on behalf of the appellant is that the onus lay on the defendants Nos. 2 to 6 to show that when they obtained their respective mortgages they had no notice of Exhibit B and that they were *bona fide* mortgagees for value. The District Judge failed to determine for himself this question as he should have done. He has submitted his finding in an alternative form; if the burden of proof lay on the defendants, they had failed to discharge that burden; if the onus was on the plaintiff, he found it proved by the evidence that the defendants Nos. 2 and 3 were not *bona fide* mortgagees without notice but that the defendants Nos. 4, 5 and 6 were *bona fide* mortgagees without notice.

A number of decisions have been cited to us, but we think that the proper principle governing the present case is that which has been applied to purchasers from *benamidars*. That principle has been most clearly laid down in *Ramcoomar Koondoo* v. *McQueen* (1) by their Lordships of the Privy Council. They say: "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." The rule was re-affirmed in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (2). See also *Bhugwan Doss* v. *Upooch Singh* (3).

(1) 11 B. L. R. 46 (P. C.); 18 W. R. 166; 1 A. Sup. Vol. 40; 3 Sar. P. C. J. 160.
(2) 22 C. 909; 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583.
(3) 10 W. R. 185.

In the present case the 1st defendant no doubt was more than a mere *benamidar*, he had a lien on the property for large payments made by him. But all the same the plaintiff or his predecessors-in-title allowed him to appear before the world in the character of owner, and that is the essential fact which brings into play the principles of natural equity expounded by the Judicial Committee. The fact that he has an interest of his own in the property is no intimation to a purchaser of the right of the real owner. The other decisions brought to our notice referred to cases of a different nature. In *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (4) what was set up against the purchaser was a prior equitable charge by deposit of title-deeds; in *Akshoy Kumar Banerjee* v. *Corporation of Calcutta* (5) it was a statutory charge and in *Mulji Jetha & Co.*, v. *Macleod* (6) the contest was between the *cestui que* trust of certain joint stock shares and the purchasers and pledgees deriving their title from the holder in whose hand the shares were impressed with the trust. In another class of cases to which reference has been made, *viz.*, *Thiruvenkatachariar* v. *Venkatachariar* (7), *Himatlal Motilal* v. *Vasudeo Ganesh Mhashar* (8) and *Lalubhai Surchand* v. *Bai Amrit* (9), the competition lay between a person to whom the owner had agreed to sell certain properties and a person to whom he actually sold the properties subsequently. It is not necessary for us to discuss these cases in detail. But we must point out that the proposition enunciated in *Attorney-General* v. *Biphosphated Guano Co.*, (10) and *Wilkes* v. *Spooner* (11) and relied on in *Akshoy Kumar Banerjee* v. *Corporation of Calcutta* (5) that the defence of a *bona fide* purchaser for value

(4) 9 M. I. A. 303; Marsh 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.
(5) 27 Ind. Cas. 261; 42 C. 625; 19 C. W. N. 37; 21 C. L. J. 177.
(6) 5 Bom. L. R 991.
(7) 23 Ind. Cas. 621; 26 M. L. J. 218.
(8) 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 634.
(9) 2 B. 299.
(10) 11 Ch. D. 327; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621.
(11) (1911) 2 K. B. 473; 80 L. J. K. B. 1107; 104 L. T. 911; 55 S. J. 479; 27 T. L. R. 726.

without notice is a single defence and cannot be split up has, in its general aspect, *reference* more to the form of pleadings, as clearly stated by West, J., in *Lalubhai Surchand* v. *Bai Amrit* (9), and cannot be treated as decisive of the question of *onus* in all cases in which such a defence is pleaded. If the latter were the case as we are asked to infer from the judgment in *Akshoy Kumar Banerjee* v. *Corporation of Calcutta* (5), then the ruling in the *benami* cases, *Ramcoomar Koondoo* v. *McQueen* (1), *Mahomed Mozuffer Hossein* v. *Kishori Roy* (2), *Bhugwan Doss* v. *Upooch Singh* (3), would not be good law, as it undoubtedly is. We hold that in this case it is for the plaintiff to show that the defendants Nos. 2 to 6, when they obtained their mortgages from the 1st defendant, had notice of the plaintiff's title.

[Their Lordships then discussed the evidence and allowed the appeal in part.]

Appeal partly allowed; Decree modified.

V.R.P.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2541 OF 1915.

May 5, 1916.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

NARINJAN DASS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DEVI DASS—PLAINTIFF—RESPONDENT.

Will, modification of, by subsequent testamentary declaration—Construction—Codicil—Pleadings—Nuncupative Will—Strictness of proof.

A person who sets up a nuncupative Will is bound to strictness of pleading, and must allege, as well as prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. [p. 901, col. 2.]

Baboo Beer Pertab Sahee v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1 at p. 28; 20 E. R. 241; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348, referred to.

A person who seeks to establish a modification of the provisions of a Will by a subsequent testamentary declaration, must prove an actual intention to revoke the clauses which he seeks to avoid and if the testator's expressions are declaratory only of a future design, they will not be sufficient. [p. 900, col. 1.]

Where a Will contains a clear and unambiguous disposition of property, real or personal, it cannot be revoked by a codicil, except by the use of words equally clear and distinct. [p. 900, col. 2.]

Kellett v. *Kellett* 3 H. L. 160 at 167, referred to.

First appeal from the decree of the Subordinate Judge, 1st class, Lahore, dated the 21st June 1915.

Mr. *Kirkpatrick* and Diwan *Mehr Chand*, for the Appellants.

The Hon'ble Mr. *Mohammad Shafi*, K. B., and Mr. *Brij Lall*, for the Respondent.

JUDGMENT.—Rai Bahadur Gopal Dass, the father of the plaintiff Rai Sahib Devi Dass and the grandfather of the defendants Lala Narinjan Dass and Lala Narsingh Dass, was the owner of the house, which is the subject-matter of the litigation between the parties. By a Will, executed in January, 1912, he devised the house to Lala Devi Dass subject to the following conditions: –

"(*a*) Till my or my wife's death (whichever takes place afterwards) this big *haveli* shall be occupied by both my grandsons, Narinjan Dass and Narsingh Dass, sons of Lala Narain Dass, deceased, and nobody can oust them therefrom. During this time they shall occupy the entire portions of the *haveli* with stable which are in my possession. Devi Dass shall only remain in possession of the large room which is on the second storey towards the *bazar* and which I have given him for dwelling purposes.

"(*b*) After my or my wife's death (whichever takes place afterwards) the big *haveli* with stable shall be possessed by both my grandsons Narinjan Dass and Narsingh Dass, sons of Lala Narain Dass, deceased, for three years, and none of my descendants can eject them from this *haveli*. They shall possess the whole of that part of the big *haveli* and stable which is possessed by me now a days.

"Devi Dass shall only remain in possession of the large room on the second story towards the *bazar*, and shall have no concern with any other part of the *haveli* and stable. If he wishes that after three years Narinjan Dass and Narsingh Dass shall give up possessions of the big *haveli* and stable, he must, after my or my wife's death (whichever takes place afterwards), pay within three years a sum of Rs. 6,000 to both my grandsons, Narinjan Dass and Narsingh Dass, in equal shares. If he after my or my wife's death fails to pay this sum within three years, or avoids paying

it, he shall cease to have any proprietary right in the *haveli* and stable, and this whole *haveli* and stable shall be considered as belonging to both my grandsons Narinjan Dass and Narsingh Dass without the partnership of anybody else, and they shall be the sole owners of the *haveli*. Only Devi Dass shall have a right of residence for his lifetime in the room on the second story towards the *bazar*. I do not create any right of the descendants of Devi Dass in this *haveli*, for I have purchased for them a bungalow near Muzang, and it is sufficient for them."

This Will was duly executed and deposited by the testator with the Registrar and was opened after the testator's death, which took place on the 9th July 1912. Neither party disputes the execution or the validity of the testament, and in fact the defendants are willing to recognize the plaintiff's title to the house upon his complying with the aforesaid conditions. The plaintiff, however, brought the present action on the allegation that the testator during his lifetime revoked the conditions after receiving the sum of Rs. 1,665 and in support of the allegation he relied upon a document P. 5, dated the 12th May 1912, "by virtue whereof" he contended that "he became the absolute owner of the *haveli* in dispute;" *vide* plaint, paragraph 2. This contention has been accepted by the Subordinate Judge, who has decreed plaintiff's claim subject to his paying to the defendants Rs. 737-12-7½, his share of the funeral expenses incurred on the usual ceremonies in connection with the deaths of the testator and his widow *Musammat* Uttam Devi.

Against this decree the defendants have preferred to this Court a first appeal, and the crucial question for determination is whether the plaintiff, on whom the *onus* clearly rested, has established a modification of the provisions of the Will by a subsequent testamentary declaration. We may state at the outset that to discharge the *onus* the plaintiff must establish an actual intention to revoke the clauses of the Will imposing the conditions, which he seeks to avoid, and that if the testator's expressions are declaratory only of a future design they will not be sufficient. It must be remembered that the Will bequeaths to the defendants a sum of Rs. 6,000 to be paid to them by the plaintiff, and also the right of residence in the house for a period of three years from the death of the testator's widow, which event took place on the 9th May 1913. Further, upon the plaintiff's failure to fulfil within the prescribed time the conditions imposed by the testator, the entire house was to become the absolute property of the defendants. Now it is a well-recognized principle of construction that where the Will contains a clear and unambiguous disposition of the property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil. "The principle is perfectly clear", observed Lord Cairns, L. C., in *Kellett* v. *Kellett* (1), "that where you have a distinct disposition made by a Will, that disposition cannot be revoked by a codicil, except through the medium and use of words equally clear and distinct."

What, then, is the evidence to prove the revocation of the testamentary disposition in favour of the defendants, such as would satisfy the above requirements of law? A perusal of the pleadings makes it abundantly clear that in the trial Court the plaintiff placed his reliance upon Exhibit P. 5, which he called a codicil and which according to him is to be transliterated in the following terms:—

Ek hazar chhe sau painsath rupaye nisfi ath sau battis rupaye ath ane bar muaviza haveli kalan wehrewala Devi Dass se aj wasul kar ke baki usko muaf kar diya. Rajistari men tazkra uska kara jaega. Almarkum tera Mai san unnis sau bara, Lahore.

(*Dastkhat*) *Gopal Dass.*

Ex facie the document is a receipt, pure and simple, acknowledging a certain sum of money, and in fact it bears a stamp of one anna usually required for a receipt. It does not purport to be a codicil and does not contain the slightest indication of the testamentary wishes of the executant. The document is couched in a very cryptic language, and some of the words contained therein are almost illegible. There is absolutely no reference to the Will of January 1912, or to the disposition contained therein; and it is inconceivable that, if the testator intend-

(1) 3 H. L. 160 at p. 167.

ed it to be his codicil, he would not have made some reference to the Will he was going to modify.

The word alleged to be "*baki*" can be read as "*ale* (?)," and it is not improbable that Rai Bahadur Gopal Dass, who was, it appears, displeased with the plaintiff, took Rs. 1,765 in settlement of his claim of Rs. 2,165 (*vide* Kidar Nath P. W. No. 3 at page 114), remitted the balance and expressed his forgiveness for the plaintiff's remissness in the past. The use of the phrase "*bar muaviza haveli kalan*" no doubt indicates that the money had something to do with the *haveli*, but it cannot possibly be construed to mean that the testator intended thereby to withdraw all the conditions attached to the disposition of the house. If that was his real intention, there should not have been the slightest difficulty in making an express mention of the Will, and in withdrawing the clauses imposing conditions upon the estate given to the plaintiff. It must be remembered that Rai Bahadur Gopal Dass, who was a retired Judicial Officer, was fully acquainted with the ordinary legal formalities, and if he wanted to write a testamentary paper in modification of his previous Will, he could have easily carried out his intention by adding a sentence to that effect in the document in question. On the contrary, we find that at the end of the document he uses the following sentence:—"*Rijastari men tazkra us ka kara jaega*," which shows that he wanted to execute some registered document, and did not regard Exhibit P. 5 as containing an expression of his last wishes.

For the aforesaid reasons we are unable to view this document as a codicil. Indeed, the learned Counsel for the respondent, realizing the difficulties in the way of treating it as a testamentary paper, contended that the cancellation of the conditions was made by the testator orally, and that the document was a receipt evidencing the payment of the money, in lieu of which the testator agreed to modify the original Will to the plaintiff's benefit. Now this is altogether a new case set up for the first time in this Court. In the plaint Exhibit P5 is put forward as the document that abrogated the conditions laid down in the original Will, and in the statement made by him on the 1st December 1914, before the settlement of the issues, the plaintiff distinctly relied upon the document as one by which the testator amended the Will and in his deposition as a witness for himself, he called it a codicil. We have, however, examined carefully the evidence to which our attention has been drawn, and we are not prepared to hold that an oral Will has been established. The witnesses, Rai Bahadur Jai Kishen Dass and Lala Kidar Nath, merely give their recollection of the conversation that took place between them and the testator, and their testimony, taken at its face value, instead of establishing a testamentary disposition, goes to prove a transfer *inter vivos*, that was to take effect immediately,—a transaction which even the plaintiff himself did not set up either in this Court or in the Court of the first instance. Indeed Kidar Nath deposes that the testator told him that he would build a new house within three or four months and then deliver possession of the house in suit to the plaintiff. If this account is to be accepted, it appears that the alienation was intended to be a gift and not a devise.

It is manifest that we have not got the exact words used by the testator, and it is, therefore, very difficult to ascertain his real intention as to the devolution of this property. As pointed out by their Lordships of the Privy Council in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (2), "If any party is bound to strictness of pleading it is he who sets up a nuncupative Will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place." Judged by this test, plaintiff's contention as to the alleged oral Will is hopelessly weak and must be rejected.

We are unable to hold that the testator deprived his widow of the right of residence in the house, and his grandsons of a similar right for a period of three years, and of a bequest of Rs. 6,000. Neither Exhibit P. 5 nor the witnesses

(2) 12 M. I. A. 1 at p. 28; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 24.

refer to any words which would have that effect, and it is difficult to believe that there was an implied revocation of the bequest in favour of the widow and the grandsons. The absence of any document expressing in clear and unequivocal language, the wishes of the testator must militate against the case set up by the plaintiff, and, as observed already, there is absolutely no reason why, if he intended to do as alleged by the plaintiff, he should not have written a testamentary paper giving expressions to his views. An ordinary paper without any formality of any sort or kind would have been sufficient for the purpose. Indeed the plaintiff in his application, dated 25th July 1912, states in the clearest possible terms that his father promised to execute a fresh registered Will; and to the same effect is his statement before the Registrar (*vide* page 97) and also before the Subordinate Judge (*vide* page 118). His omission to write a new Will clearly shows that even if he had any intention to favour the plaintiff, he did not, for some reason or other, carry out that intention.

Upon an examination of all the oral and documentary evidence referred to by the learned Counsel on both sides, we are of opinion that the plaintiff has failed to prove his allegation as to the subsequent modification of the terms of the written Will. Nor has he shown any adequate reason for holding that the amount spent on funeral expenses was less than that deposed to by the defendants. They have adduced not only oral evidence, but also documentary evidence, specifying various items of expenditure, and we observe that no serious attempt was made by the plaintiff in the Court of first instance to challenge these items.

Upon our finding upon the main issue in the case the plaintiff's suit as laid in the plaint is liable to be dismissed. But the defendants to avoid further litigation have expressed their willingness to surrender their claim to the house in the event of the plaintiff's complying with the terms of the Will. Accordingly we accept the appeal, and modifying the decree of the Subordinate Judge, we grant the plaintiff a decree for possession of five rooms of the *haveli*, and for a declaration as to the rest of the house conditional upon his paying the defendants Rs. 6,000 within the period prescribed by the Will, in addition to his share of the funeral expenses. As the plaintiff has been defeated on the real point in controversy between the parties, we direct him to pay the costs of the defendants in both the Courts. The cross-objections are dismissed with costs.

Appeal accepted; Decree modified, Cross-objections dismissed.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

July 7, 1916.

Present:—Lord Shaw, Lord Sumner, Lord Parmoor, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

Sri Rajah CHELIKANI RAMA RAO AND OTHERS—RESPONDENTS.

Maritima incrementa *or increase of land by sea —Crown, rights of—Adverse possession, claim by—Burden of proof—Madras Forest Act (Mad. V of 1882), ss. 3, 4, 8, 10—Afforestation proceedings—Decision by District Court—Appeal, maintainability of.*

The ownership of the bed of the sea and the beds of tidal navigable rivers is in the Crown, including the *maritima incrementa* or increase by islands arising *de novo* in the King's seas It is a beneficial ownership which, subject to the public right of navigation, is capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted. [p. 906, cols. 1 & 2; p. 907, col. 1.]

The same is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire. The ownership of the bed of the sea within the three miles' limit vests in it. [p. 907, col. 2.]

Reg. v *Keyn*, (1876) 2 Ex. D. 63; 46 L. J. M. C. 17; 13 Cox C. C. 403, *Fitzhardinge Lord* v. *Purcell*, (1908) 2 Ch. D. 139 at p. 166; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564, *Lord Advocate* v. *Clyde Navigation Trustees*, (1891) 19 Rittie 174, *Lord Advocate* v. *Wemyss* (1900) A. C. 48, "*The Anna*", 5 C. Rob. 373, referred to.

The onus of proving affirmatively adverse possession for 60 years of islands formed at the mouth of a river, which the Government has notified

as reserved under the Forest Act, is on the party asserting such possession. Objectors to afforestation, preferring claims under section 6 of the Forest Act, are in law in the same position as persons bringing a suit in an ordinary Court of Justice for a declaration of right, and the onus of establishing possession for the requisite period, *i. e.*, 60 years under Article 149 of the Limitation Act is on the claimants plaintiffs. [p. 909, cols. 1 & 2.]

Radha Gobind Roy Sahib v. *Inglis*, 7 C. L. R. 364, followed.

Secretary of State v. *Vira Rayan*, 9 M. 175 at p. 184, distinguished.

It is an erroneous view of the law to hold that, on proof of possession by the claimants within 20 years prior to the notification under the Forest Act, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation *i. e.*, within sixty years before the notification. With regard to proof of subsisting title nothing further is needed than the acknowledgment of the undisputed fact that islands formed in the sea or in the mouth of a river belong to the Crown, and it is contrary to all legal principles to permit a squatter to put the owner of the fundamental right to a negative proof upon the point of possession. [p. '08, col. 2: p. 909, col. 1.]

An appeal lies to the High Court against the decision of the District Court in claim proceedings under the Forest Act. When proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with régard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply. [p 905, cols. 1 & 2.]

Kamaraju v. *Secretary of State for India*, 11 M. 309 (F. B.); *Rangoon Botatoung Co*, *Ltd.* v. *Collector of Rangoon*, 16 Ind. Cas 188; 16 C. W. N. 96 ; (1912) M. W. N. 781; 12 M. L T. 195; 16 C. L. J. 245; 23 M. L J. 276; 14 Bom. L. R. 833; 10 A L. J. 271; 39 I. A. 197; 5 Bur. L. T. 205, 207; 6 L B. R. 150; 40 C. 21 (P. C.), referred to.

Appeals from a judgment and decrees of the Madras High Court, dated September 30, 1909, reported as 5 Ind. Cas. 882, reversing two judgments of the District Court of Godaveri, dated July 27, 1904, which had affirmed the orders of the Settlement Officer, dated October 19, 1903.

FACTS of the case are sufficiently set forth in their Lordships' judgment.

Sir *Erle Richards*, *K. C.*, and Mr. *K. Brown*, for the Appellant.—The respondents had no right under the Madras Forest Act to appeal to the High Court against the decisions of the District Court and the High Court, even if it had jurisdiction under the Civil Procedure Code to entertain the appeals, was bound by the findings and inferences of fact of the District Court: Madras Forest Act, V of 1882, sections 3, 6 (*a*) (*d*), 8 (2), 9 (*a*) and (*b*), 10 (1), 11, 12, 13, 15, 39 and 40.

[MR. AMEER ALI: For an appeal the District Judge's decision must be a decree under section 10.]

Section 15 of the Forest Act does not contemplate appeals from the District Judge to the High Court: *Rangoon Botatoung Co., Ltd.* v. *Collector of Rangoon* (1), *Kamaraju* v. *Secretary of State for India* (2).

[Reference was also made to *Parthasarathi Appa Row* v. *Narasayya* (3), *Minakshi Naidu* v. *Subramanya Sastri* (4), *Rani Veeraraghavulu* v. *Bomma Devara Venkata Narasimha* (5).]

[LORD SHAW: - Their Lordships will consider whether there was a right of appeal for the respondents from the District Court to the High Court.]

The judgment of the High Court was erroneous on matters of law. The respondents on the undisputed facts could have title only by adverse possession for sixty years, and they failed to prove adverse or continuous possession for that period. The possessor had to prove adverse possession in order to establish his rights.

[SIR LAWRENCE JENKINS: Regulation XI of 1825. Does this apply to Madras? If a large island is thrown up in the river or sea, it would belong to Government. The Bengal Regulations have been held to apply to India as the Common Law in England.]

In *Eswara Doss* v. *Pungavanachari* (6) this Regulation was referred to as applicable to Madras. Reference was made to Madras Forest Act, V of 1882, sections 6 (*b*), 10, 28; Act XV of 1877, Articles 142, 144, 149, *Maharajah Koowar Baboo Nitrasur Singh* v. *Baboo Nund Lall Singh* (7), *Karan Singh* v. *Bakar Ali Khan* (8) and *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadoor Singh* (9).

(1) 16 Ind. Cas. 188; 16 C. W. N. 96; (1912) M. W. N. 781; 12 M. L. T. 195; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 39 I. A. 197; 5 Bur. L. T. 205, 207; 6 L. B. R. 150; 40 C. 21 (P. C.).

(2) 11 M. 309 (F. B.).

(3) 6 Ind. Cas. 988; 37 I. A. 110; 33 M. 177; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 C. L. J. 233 (1910) M W N. 466; 12 Bom. L R. 648.

(4) 14 I. A. 160; 5 Sar. P. C. J 54; 11 M. 26 P. C.).

(5) 25 Ind. Cas. 305; 41 I. A. 258; 16 M. L. T 262; (1914) M. W. N 695; 1 L. W. 779; 27 M L. J. 45; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom. L. R. 853.

(6) 13 M. 361.

(7) 8 M. I. A. 199; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 19 E. R. 506; 1 W. R. (P. C.) 51.

(8) 9 I. A. 99; 5 A. 1 (P. C.); 4 Sar. P. C. J. 882.

(9) 3 I. A. 85 at p. 88; 3 Sar. P. C. J. 570.

SECRETARY OF STATE *v.* CHELIKANI RAMA RAO.

[LORD SUMNER: The purpose of the Forest Act is to safeguard against possession and not against claim of title.]

Innasi Muthu Udayan v. *Upakarath Udayan* (10), *Secretary of State for India* v. *Krishnamoni Gupta* (11) and *Radha Gobind Roy Saheb* v. *Inglis* (12).

[LORD SHAW: Things must be under Article 144.]

Sir *R. Finlay, K. C., M. P.* (with him Mr. *Dube*), for the Respondents.—This was not a case under Article 142 or 144.

[SIR JOHN EDGE: If the adverse possession is not proved, his suit would fail. If you say you were in possession for 20 years, would that entitle you to judgment?]

[LORD SUMNER: If the adverse possession has been for 60 years, he gets title. If 20 years, then there is presumption of prior title. Would this be carried to 60 years?]

[LORD SHAW: Is it possible for an island to grow in a short time? Is the Government of India in a position to establish that he has not been in possession for 20 years?]

It started with the proposition that he had been in possession *Secretary of State for India* v. *Kota Bapanamma Garu* (13) was an important authority. *Mohima Chunder Mozoomdar* v. *Mohesh Chundar Neogi* (14), *Anangamanjari Chowdhrain* v. *Tripura Sundari Chowdhrani* (15) and *Krishna Aiyar* v. *Secretary of State for India in Council* (16).

[SIR E. RICHARDS: *Secretary of State for India* v. *Krishnamoni Gupta* (11) refers to *Kally Churn Sahoo* v. *Secretary of State for India* (17), which was overruled.]

Possession had not become adverse. The natural inference was that it had not become adverse. *Kamaraju* v. *Secretary of State for India* (2) was acted on in other cases. There was possession for a much longer period than 20 years. If suit were brought to establish claim of title the plaintiff would have to prove that there was adverse possession for 60 years and then Article 142 or 144 applied. It was incumbent on the Crown either to show that possession of the proprietary rights claimed was within 60 years or that the respondents' possession commenced or became adverse within the period of limitation: *Secretary of State for India in Council* v. *Vera Rayan* (18), *Mohima Chunder Mozoomdar* v. *Mohesh Chundar Neogi* (14) and *Anangamanjari Chowdhrain* v. *Tripura Sundari Chowdhrani* (15).

Sir *E. Richards*, in reply.

JUDGMENT.

LORD SHAW.—These are consolidated appeals from two decrees of date the 30th September 1909,* pronounced by the High Court of Judicature at Madras. The appeals relate to certain parcels of land claimed by two *zemindars*. These *zemindars*' claims were, on the 19th October 1903, in certain proceedings under the Madras Forest Act (V of 1882), dismissed by the Forest Settlement Officer of Godaveri. His judgments were affirmed by two decisions of the District Court of Godaveri, dated the 27th July 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The appellant is His Majesty's Secretary of State for India.

The question for determination is whether the appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near the mouth or delta of the river Godaveri. The Godaveri is a tidal and navigable river. The islands are within a short distance, much under 3 miles of the mainland. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The respondents object, and claim the lands. Their asser-

(10) 26 I. A. 210; 7 Sar. P. C. J. 620; 23 M. 10.
(11) 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269.
(12) 7 C. L. R. 364 (P. C.); 3 Suth. P. J. 809.
(13) 19 M. 165.
(14) 16 I. A. 23 at p. 26; 16 C. 473; 5 Sar. P. C. J. 321.
(15) 14 I. A. 101 at p. 110; 14 C. 740; 5 Sar. P. C. J. 45.
(16) 5 Ind. Cas. 121; 4 Ind. Cas. 1070; 33 M. 173; 6 M. L. T. 306; 20 M. L. J. 71.
(17) 6 C. 725; 8 C. L. R. 90.
(18) 9 M. 175 at p. 184.

*See 5 Ind. Cas. 882.

tion is that these lands have been possessed by them and their predecessors-in-title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (section 3) that the Governor in Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (section 4) containing this declaration, specifying "as nearly as possible the situation and limits of such land," and appointing a Forest Settlement Officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (section 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof." Thereafter the Forest Settlement Officer is to enquire and to record evidence (section 8). And (section 10) the Forest Settlement Officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part." If the claim be admitted, there are stipulated proceedings for the surrender, exclusion or acquisition of the right. But (section 10, *ii*) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *Secretary of State for India* (2), a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that the case of *Rangoon Botatoung Co., Ltd.* v. *Collector of Rangoon* (1) enounced a principle, which formed a precedent for excluding all appeal from the decision of the District Court in such cases as the present. Their Lordships do not think that that is so. In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two Judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court." The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried and the provisions of the particular Statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the Statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation. The objection taken is accordingly repelled.

Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the King hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, *viz.*:—

"1. Increase *per projectionem vel alluvionem.*
2. Increase *per relictionem vel desertionem.*
3. *Per insulæ productionem.*"

The lands in dispute fall under the third category, which is thus dealt with

by Hale:—"3. The third sort of maritime increase are islands arising *de novo* in the King's seas, or the King's arms thereof. These upon the same account and reason *prima facie* and of common right belong to the King; for they are part of that soil of the sea, that belonged before in point of propriety to the King; for when islands *de novo* arise, it is either by the recess or sinking of the water, or else by the exaggeration of sand and slubb, which in process of time grow firm land environed with water."

The date of formation of these islands is not certain. Plans have been produced showing that from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond 3 miles, should be the extreme range of cannon fire, or should be even more if the *locus* be claimed to be *intra fauces terræ*—no such questions arise here. The point is geographically within even 3 miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.

The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg.* v. *Keyn* (19). The Crown, admitted to be owner of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the Franconia case had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of 3 miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the Cornwall case—but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In the case of *Fitzhardinge (Lord)* v. *Purcell* (20), Lord Parker, then Parker, J., expressed himself thus:—" . . . . Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and *a fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *incrementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as the King's royal waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership

(19) 2 Ex. D. 63; 46 L. J. M. C. 17; 13 Cox. C. C. 403.

(20) (1908) 2 Ch. D. 139 at p. 166; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

It is true that the case cited dealt merely with the right of fowling: but it was necessary in the determination as to that right to settle the true nature of the right in the land itself.

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees* (21) was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of three miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kyllachy, who expressed himself thus: "..... with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, *viz.*, the strip or area of sea within cannon-shot or 3 miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within 3 miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium*; but nonetheless is it, in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property." In the Inner House this view of the law was not dissented from, and Lord Young expressly agreed with it.

Last of all may be mentioned the case of *Lord Advocate* v. *Wemyss* (22). The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord Watson was expressed as follows: "I see no reason to doubt that by the law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas or from the coast outward to the 3-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results: the confusion that might be produced by leaving islands, emergent within the 3-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen: he would, of course, hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country even when its enforcement has operated to the advantage or supposed advantage of foreign States. Lord Stowell dealt with such a position of affairs in "*The Anna*" (23). The case had reference to the capture of a vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was 2 miles off certain islands. Those islands, at the mouth of the Mississippi,

(21) (1891) 19 Rettie 174.
(22) (1900) A. C. 48.

(23) 5 C. Rob. 373.

were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord Stowell observed: — "Consider what the consequence would be if lands of this description were not considered as appendent to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America. It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or of solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated, is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Godaveri river is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the Forest Settlement Officer, and then by the District Court. In their Lordships' opinion the attitude of both these tribunals was correct in law.

Before the reversal of their decisions by the High Court is remarked upon, the following facts may be noted: —

It appeared that certain squatting had taken place, and that two *zemindars*, whose successors are respondents in this appeal, were rivals in seeking to set up some kind of right in the islands. They did not arrive at any settlement of their disputes until in or about the year 1882. The Forest Settlement Officer, in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883, and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government.

In the District Court the same result was reached and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts, as it must accept, the finding. Confirmation of the District Court's judgment would have followed that finding as a matter of course but for the view taken by the High Court on a point of law. It is thus expressed:—"The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for sixty years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still, as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i.e.*, within sixty years before the notification, *Secretary of State for India in Council* v. *Vera Rayan* (18), *Secretary of State for India* v. *Bavotti Haji* (24) and *Secretary of State for India* v. *Kota Bapanamma Garu* (13). As the several islands were formed gradually and probably appeared and became capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within sixty years prior to the notification. In the case of such land the title of the Crown must be a subsisting title. In the case of lands which came into existence as land capable of occupation more than sixty years prior

(24) 15 M. 315.

to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period. We must, therefore, ask the District Judge to return a finding as to whether the Crown has a subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south."

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition If it were not correct it would be open to the possessor for a year or a day to say, "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fufil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear, because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the respondents must accordingly fail.

This conclusion is in no way varied by reason of the shape of the present proceedings. In November and December 1901, in pursuance of the Act, the Governor of Madras in Council published a notification proposing to constitute the lands into a reserved forest. The respondents put in their claims before the Forest Settlement Officer on the 14th and 23rd February 1902. It apparently did not occur to them at that stage to view the law otherwise than has been stated above, because in the one petition the claim was that—"for over seventy years your petitioners' estate has been in the exclusive and absolute enjoyment of the land and forest now said to be reserved as Government forest," and in the other petition the claim was—"that by the long and peaceful enjoyment of the same by the petitioners and their predecessors-in-title the petitioners have acquired a title by prescription to the said lands and forests, and the rights, if any, of others to the same are excluded by lapse of time."

In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of Justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by Article 149. In an ordinary suit for declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy Saheb* v. *Inglis* (12) decided by this Board. Reference was made to various cases decided in lower Courts and stress was especially laid upon the decision in the Malabar case, *Secretary of State for India in Council* v. *Veera Ayan* (13). The facts therein were essentially different from the present. After a historical survey of the peculiar position of the lands there in question the learned Judges found: "That the land appertains to the District of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part by it, that forest lands are the property of the Crown." The ratio of the decision was founded in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of the case of *Radha Gobind Roy Sahab* v. *Inglis* (12).

Finally, their Lordships have some difficulty in understanding the view of the High

Court to the following effect:—"Though the title was originally in the Crown, still as the possession of the claimants for twenty years, prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification."

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of date the 27th July, 1904, should be restored. The respondents will pay the costs of this appeal and in the Courts below.

Appeals allowed.

Solicitor for the Appellant: Solicitor, India Office.

Solicitors for the Respondents: Mr. *Douglas Grant.*

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 286 OF 1916.

July 25, 1916.

Present: - Mr Justice Broadway.

KALA MAL—DEFENDANT—PETITIONER

versus

SOHARA MAL—PLAINTIFF AND OTHERS, DEFENDANTS—RESPONDENTS.

Partnership—Contribution, suit for, by one partner against another, parties to—Accounts, rendition of, whether can be asked in defence when claim barred.

In a suit for contribution brought by one or more members of a partnership which has come to an end, if there has been no adjustment, it is necessary to implead all the partners. [p. 911, col. 1.]

Pearee Mohun Roy v. *Chundar Nath Roy*, 18 W. R. 408, referred to.

In such a suit if the plaintiff is in possession of the partnership accounts or property, he is bound to render an account of profit and loss and give the defendant credit for his share of the profits, if any, even though the claim for rendition of accounts is barred by time. Plaintiff must act on the maxim that he who seeks equity must do equity. [p. 911, col. 1.]

Amin Chand v. *Gujar Mal*, 73 P. R. 1906; 78 P. L. R. 1906, distinguished.

Petition, under section 44 of Act III of 1914, for revision of the decree of the Subordinate Judge, 1st class, Multan, dated the 29th February 1916, affirming that of the Munsif, 1st class, Multan, dated the 20th November 1915.

Mr. *Gokal Chand Narang*, for the Petitioner.

Mr. *Nehal Chand Mehra*, for the Respondents.

JUDGMENT.—The plaintiff in this case sues Kala Mal for contribution in the following circumstances. He, together with Kala Mal and others, entered into a contract to purchase certain sugarcane in 1907 for a sum of Rs. 1,100; Kala Mal was to pay Rs. 359 out of the purchase-money. He did not do so, alleging that he had severed his connection with the partnership. The partnership ended in 1907 about the month of March. Whether there was or was not profit on the transaction has not been determined. In 1909, Wahab, the vendor of the sugarcane, brought a suit against all the partners for recovery of Rs. 300 and obtained a decree. Kala Mal in that suit pleaded that the suit was barred, but this plea was decided against him. In 1913, Wahab executed the decree with costs against the partnership; and recovered the

money from the plaintiff, whereupon the plaintiff instituted the present suit. The learned Munsif decreed the claim and his opinion was upheld by the lower Appellate Court.

Kala Mal's contention throughout has been that if it be held that he is a partner and as such liable, the plaintiff should bring all the accounts into Court and give him credit for his share of any profits that had accrued from the partnership dealings. Plaintiff contended that this amounted to a claim for rendition of accounts and was time-barred and this plea has been upheld by the Courts below. Mr. Mehra for the respondents in this Court urges that the decisions of the lower Courts should not be interfered with on revision when substantial justice has been done, and claims that in this case substantial justice has, as a matter of fact, been done. It seems to me, however, that it is inequitable to make Kala Mal pay this sum of money after so many years on the ground that he was a partner from the outset and had not severed his connection with the partnership or the partnership accounts. Mr. Mehra referred me to *Pearee Mohun Roy* v. *Chunder Nath Roy* (1), in which it was held that in a suit for contribution brought by one or more members of a partnership which had come to an end, if there had been no adjustment, it was necessary to make all the partners parties to the suit. It seems that the object of this *dictum* is to enable the Courts to adjudicate finally upon the respective claims and liabilities of all the members of the partnership. If plaintiff claims equity he must do equity and if there was a profit on this transaction, Kala Mal must be credited to the extent of his share before he can be held liable to make this payment. Mr. Gokal Chand urges, on the authority of *Amin Chand* v. *Gujar Mal* (2), that what the plaintiff is now claiming virtually amounts to a suit for rendition of accounts and that the present suit is accordingly barred. In my opinion *Amin Chand* v. *Gujar Mal* (2) is clearly distinguishable from this case.

I, therefore, accept this revision and setting aside the decrees passed by the lower Courts, under Order XLI, rule 22, Civil Procedure Code, remand the case to the Court of the learned Munsif, who will go into the question carefully and endeavour to ascertain whether there was or was not a profit made by the partnership, and if there was, he will give Kala Mal credit to the extent of his share in such profit, taking into account the amount which is now in suit and which Kala Mal *prima facie* appears to be liable for. Costs will be costs in the suit. Stamp on this appeal will be refunded.

The money already paid into Court by Kala Mal will remain in Court till the case is decided.

Revision allowed ; Case remanded.

(1) 18 W. R. 408.
(2) 78 P. R. 1906; 78 P. L. R. 1906.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 313 OF 1916.

July 31, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

MUHAMMAD AHMAD SAID KHAN—PLAINTIFF—APPELLANT

versus

MADHO PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption—Talab-i-istishhad, *necessity of.*

Under the Muhammadan Law it is absolutely necessary for the success of a pre-emptor that he should have made the second demand (*talab-i-istishhad*). [p. 912, col. 2; p. 914, col. 1.]

Second appeal against a decree of the Second Additional Judge, Aligarh, dated the 8th of December 1915.

Mr. *G. W. Dillon*, Munshi *Haribans Sahai* and Mr. *Iqbal Ahmad*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Pandit *Kailas Nath Katju* and Babu *Panna Lal*, for the Respondents.

JUDGMENT.

RICHARDS, C. J. This appeal arises out of a suit for pre-emption. The property is situate in the town of Koil. The property, which was sold, consisted of a portion of a *muafi* plot. The plaintiff based his title, *first*, on an alleged custom, and *secondly*, on the Muhammadan Law. The ancient his-

tory of Koil is not in evidence, and the only document which relates thereto is the *wajib-ul-arz* of 1872. This document in Chapter I states that the *kasba* is a perfect *pattidari* tenure comprising an area of 3,256 *bighas*. The area of each of the *pattis* is then given. It would seem that there was only one *patti*, which was *zemindari* in the ordinary sense. The other *pattis* consisted of *muafi pattis*, resumed *muafi* and buildings. Chapter II is headed the rights of "co-sharers", but if the different paragraphs are read it would seem to refer to the *zemindari patti*. For example paragraph 6 states "that the Government was the *zemindar* of this *kasba* and before the Mutiny it was settled with farmers. After the Mutiny it was granted to my husband Govind Singh for his services and loyalty during the Mutiny and for the same reason he was appointed the *lambardar*. Now I have been in possession and the *lambardar* since the date of his death." The whole of this chapter seems, when carefully considered, to relate to the *zemindari*. Paragraph 18 relates to pre-emption and is as follows:—"Every co-sharer has every kind of power to transfer his right and share at first to co-sharers descended from the same ancestor and if they do not take, to other co-sharers in the *patti* and if these also refuse to take, then to any person he likes." Chapter III relates to the rights of *shikmi* co-sharers. It says that there are 2,280 *bighas* and 3 *biswas* of *muafi* land, and that there are 2,840 *bighas* of resumed *muafi*. There is no cross-reference to show that the provisions of Chapter II apply to the *muafidars*. No doubt there may have been groups of persons interested in the *muafi* and resumed *muafi* plots, otherwise there seems to have been no community of interest between the *muafidars* and the proprietors of the *zemindari*, nor does there even seem to be any community of interest between the different sets of *muafidars*. The proprietor of each *muafi* plot was entitled to the entire profits of the *muafi* plot and was not liable to account for these profits to the other *muafidars*, unless by chance they happened to be joint owners with him of a particular plot.

Both the Courts below have held that the custom of pre-emption does not exist. So far as this is a finding of facts it is binding on this Court in second appeal. It has been held between these very parties, though possibly under circumstances that would not amount to *res judicata*, that the custom does not exist. The plaintiff gave in evidence, besides the extract from the *wajib-ul-arz* to which we have referred, some cases in which pre-emption had been claimed. A number of these were cases which arose after the *wajib-ul arz* of 1872 had been signed by the *muafidars* as well as the *zemindar*, and whilst the settlement was still in force. It was held that the *wajib-ul-arz* bound every one. Cases which arose during the currency of that settlement and decided upon these grounds can have little or no weight. Cases which were based upon Muhammadan Law also can have no weight. One must also bear in mind that the first entry as to the right of pre-emption is in the year 1872, a comparatively speaking recent date. Bearing in mind the importance of persons being co-sharers one with the other and thus basing community of interest on the question of the probability or improbability of the custom having grown up, we think the Courts below were justified in holding that no custom existed which gave a right to one *muafidar* against another *muafidar*. It is said in the present case that the plaintiff pre-emptor is actually a co-sharer in the plot which is sold. Assuming this to be so, we do not think that even this custom has been proved and that we ought to accept the finding of the Courts below. The next question is as to whether the plaintiff ought to succeed on the ground of Muhammadan Law. An attempt was made to prove that the preliminaries required by Muhammadan Law were duly performed. The first Court held, on the evidence, that no demand was made. The lower Appellate Court held on the evidence that the first demand was made, but that the second demand was not made. We must accept this finding. It is contended, however, that under the Muhammadan Law a second demand is not absolutely necessary. It has always been accepted in this Court as settled law that a second demand is necessary. I think that we are bound to follow this established practice.

RAFIQUE, J.—I am also of opinion that this appeal must fail and agree in the reasons given by the learned Chief Justice for its

dismissal. I wish, however, to say a few words as to whether "*talab-i-ist shhad*" is an indispensable formality or not. The learned Counsel for the appellant contends that under the Muhammadan Law all that is necessary for the success of a pre-emptor is that he should have made the "*talab-i-mowasibat*", the *talab-i-istishhad* is not absolutely necessary and as long as the *talab-i mowasibat* is made and is found to have been made, the claim of the pre-emptor must prevail. It is conceded by the learned Counsel that the English books on Muhammadan Law (such as those of Ameer Ali, Baillie, Hamilton and Wilson) are against his contention and lay down that *talab-i-istishhad* is one of the indispensable formalities to be observed by the pre-emptor; but he says that the learned authors have misunderstood the original texts. In support of his contention he relies on certain passages of Fatawa-i-Alamgiri, Fatawai Kazi Khan and Raddul Muhtar. The said passages, with their translations in Urdu and in English, have been printed and produced before us. The English translation, which I accept for the purpose of this case as accurate, is as follows:—

Fatawa-i-Alamgiri:

"*Talab-i-istishhad*" means invocation (by pre-emptor) of persons to bear witness to (his making) immediate claim in order to give strength to the fact that he has immediately claimed (pre-emption). The calling of persons to witness is not necessary for the validity of a claim (for pre-emption); it is, on the other hand, (intended) to strengthen the right of pre-emption when the vendee denies (the pre emptor's) having laid claim to pre-emption, "when you got knowledge rather you desisted from making the claim and went away from the meeting" and (the pre-emptor) says, "(No) I did make the claim," in which case the words of the vendee are to be believed. Hence, the calling of persons to witness at the time of claiming pre-emption is necessary in order to make the claim firm. And the "*talab i-istishhad*" is correct when it is made either in the presence of the vendee or the vendor or on the premises. So, (the pre-emptor) should say in the presence of either of them that such a man has purchased this house, or such a house, and give the boundaries thereof and (add), "I have a right of pre-emption, to which I have laid claim and which I still claim. Bear witness, thereof, to the fact."

Raddul Muhtar:

"And for it (*talab-i-mowasibat*) the calling of persons to witness is not necessary." This is the view adopted in Hidaya and other books; because immediate claim is (intended) not to prove the right but to give out that he (the pre-emptor) has not relinquished (his right of) pre-emption.—Nihaya and Miraj. "It (the calling of witnesses) is, on the other hand, done through fear of denial," that is to say, the denial by the vendee of the (pre-emptor's) making the claim—as they (the jurists) have said in the case when a father makes a gift in favour of his son and calls persons to bear witness to the fact, and they have mentioned the calling of persons to witness not because it is necessary for the validity of a gift but because it is necessary to prove the gift when denied by the father—Miraj."

Now on a careful examination of these passages it is quite obvious that the learned writers do not mean to lay down that the '*talab-i-istishhad*' is unnecessary but they explain the reasons why the law requires '*talab-i-istishhad*'. To explain the reasons of a purview of law is one thing and to say that it is not mandatory is another.

The passage from Fatawai Kazi Khan is as follows:—

"After the pre-emptor has made '*talab-i-mowasibat*' as soon as he gets knowledge of the sale he is required to call persons to witness. The second '*talab-i-istishhad*' is so called-not because the invocation of witnesses is necessary (for pre emption) but because it may become possible for the pre-emptor, on denial by the opponent, to prove that he has made the claim. Then, if the pre-emptor is present at the meeting of the sale and claims pre-emption in the presence of the vendor and the vendee, it is sufficient for him and he is no longer required to do the other thing (the calling of persons to witness)".

The very opening sentence of this passage shows that the pre-emptor is required to make the "*talab-i-istishhad.*" The learned author requires a case where both the demands, *i. e.*, "*talab-i-mowasibat*" and *talab-i-istishhad*" may be made together at the same time in the presence of the vendor

and the vendee. He first lays down that after the "*talab-i-mowasibat*", "*talab-i-istishhad*" should be made and then explains the reason why the law requires "*talab-i-istishhad*". He then supposes a case where both the demands may be combined at the same time and place in the presence of the vendor and the vendee. The passage in question is no authority for the proposition that "*talab-i-istishhad*" need not be made. Moreover in the present case it is not pretended that the "*talab-i-mowasibat*" was made in the presence of the vendor and the vendee. In fact according to the evidence it was made in their absence at the house of a friend or relative of the appellant. The authorities relied upon by the appellant do not bear out his contention. I, therefore, hold that the omission of the "*talab-i-istishhad*" is fatal to the claim of the appellant-pre-emptor.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 386 OF 1915.

July 21, 1916.

Present—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Jwala Prasad.

KHARAGNATH MISRA *alias* SUNDAR MISRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NAKCHEDDI JHA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 16—Arbitration—Award—Decree in accordance with award—Appeal—Revision—Material irregularity.

No appeal lies from a decree passed in accordance with an award of arbitrators, except in so far as the decree is in excess of or not in accordance with the award. [p. 914, col. 2.]

It is discretionary with a Court to grant or refuse time for producing evidence in support of objections to an award, and where it has acted with due care and attention the High Court will not interfere in revision. [p. 915, col 1.]

Durga Baksh Singh v. *Fateh Bahadur Singh*, 33 Ind. Cas. 10; 14 A. L. J. 425, dissented from.

Appeal from a decision of the District Judge, Darbhanga, dated the 6th May 1915.

Babu *Baldeo Narain Singh*, for the Appellants.

Babu *Harnarayan Prosad*, for the Respondent.

JUDGMENT.

CHAMIER, C. J.—We have before us a second appeal against a judgment and decree of the District Judge of Darbhanga reversing a decree of the Munsif of Madhubani and also an application for revision of the decree of the District Judge. The decree of the Munsif followed upon a judgment pronounced in accordance with an award made by arbitrators. Schedule II, paragraph 16, of the Code of Civil Procedure provides that no appeal shall lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. Therefore, it is clear that no appeal lay to the District Judge against the decree passed by the Munsif. There has been some difference of opinion as to whether under such circumstances a second appeal lies to the High Court or the proper remedy is by way of application for revision. As we have before us both an appeal and an application for revision, we need not stop to consider this question. It is clear that the decree of the District Judge must be set aside. But we are asked to consider whether in the exercise of our revisional jurisdiction we ought not to set aside the decree passed by the Munsif, on the ground that he acted with material irregularity in the exercise of his jurisdiction. It appears that at the request of all parties to the suit the matters in dispute were referred to the arbitration of certain Pleaders practising in the Munsif's Court. On November 23rd, 1914, the arbitrators made their award and filed it in Court. Thereupon the Munsif directed that it should be put up on December 4th and that in the meantime notice should be given to the parties. Notice was given to the parties and the case came up on December 4th. In the meantime on December 2nd the present appellants and applicants had filed objections to the award. When the case came on for hearing on December 4th they applied for further time. The Munsif rejected their application observing that their objections were frivolous. He then proceeded to pass a decree in terms of

the award. It is contended that the Munsif ought to have allowed the applicants further time in order that they might produce evidence. The objections are of such a nature that probably no evidence could have been available in support of them. For the most part they are on the face of them frivolous. But apart from that it appears to me that the Munsif had to consider whether in all the circumstances further time should be allowed. In the exercise of his discretion he decided that further time should not be allowed. The applicants rely upon a decision in the case of *Durga Baksh Singh* v. *Fateh Bahadur Singh* (1), where Mr. Justice Walsh interfered in revision with an order passed by a Subordinate Judge in circumstances not unlike those of the present case. I observe that Mr. Justice Piggott, the other member of the Bench which disposed of the case, said that he did not formally dissent from the order proposed by his colleague as the matter had already occupied a disproportionate amount of the time of the Court. But he made it quite clear that if he had been sitting alone he would have rejected the application. In my opinion, he would have been right in doing so. In my opinion, we have no jurisdiction to interfere with the order of the Munsif. There is nothing whatever to suggest that he acted without due consideration of the circumstances of the case. He had a discretion to exercise and I assume that he exercised it with due care and attention. I would set aside the decree of the District Judge and restore the decree passed by the Munsif. The respondent will pay the applicant's costs of the application for revision and also the applicant's costs in the Court of the District Judge. There will be no order as to costs of the second appeal. Hearing fee in the application for revision one gold *mohur*.

JWALA PRASAD, J.—I agree.

Appeal accepted.

(1) 33 Ind Cas. 30; 14 A. L. J. 425.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1882 OF 1914.

May 30, 1916.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

BHOJ RAJ—DEFENDANT—APPELLANT

versus

RAM NARAIN—PLAINTIFF—RESPONDENT.

Pre-emption—Mortgage prior to Transfer of Property Act—Transfer of Property Act (IV of 1882), s. 72, applicability of—Mortgagor liable to pay Government Revenue—Mortgagee paying the amount—Sale—Pre-emptor, if bound to pay whole amount.

A mortgage executed prior to the passing of the Transfer of Property Act, 1882, provided that the mortgagor would pay the Government revenue and if he failed to do so, the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent. per mensem. The mortgagee had to pay and did pay the Government revenue and got a sale-deed executed in his favour by the mortgagor of the equity of redemption for the original money and the Government revenue paid by him. On a suit for pre-emption of the property:

Held, that the principle of equity contained in section 72 of the Transfer of Property Act existed before and governed the case and that the vendee was entitled to the full amount contained in the sale-deed. [p. 916, col. 1.]

Second appeal from a decree of the District Judge, Aligarh.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

The Hon'ble Mr. *Motilal Nehru*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The first Court decreed the claim, the lower Appellate Court modified the decree. The defendant-vendee has appealed.

It appears that as far back as the year 1873 the property was mortgaged with possession to the vendee. On the 19th of October 1911, the mortgagor sold his equity of redemption to the vendee-defendant for the sum of Rs. 8,000. This sum of Rs. 8,000 was made up of Rs. 3,000, the original money advanced on the mortgage, and Rs. 5,000 Government revenue which the vendee said he had paid in respect of the property. The mortgage-deed contained a clause that the mortgagor would pay the Government revenue and that if he failed to do so, then the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent. per mensem. Both Courts

have found that as a matter of fact the mortgagee had to pay and did pay the Government revenue. The question which we have to consider in the present appeal is, what sum the plaintiff should pay as a condition precedent to obtaining possession of the property It may be taken as a fact that the property is not really worth Rs. 8,000. It is contended on behalf of the plaintiff that having regard to the terms of the mortgage and also having regard to the fact that the mortgage was executed before the Transfer of Property Act came into operation, the mortgagee was not entitled to the benefit of section 72, which entitles a mortgagee in possession to pay money in order to save the mortgaged property and to add it to its principal. On the other hand, it is contended that the principle underlying the provisions of section 72 of the Transfer of Property Act is not new, that the same principle of equity existed before. There seems to us considerable force in this latter contention. In any event, the mortgagor may well have considered that his property was really liable for the Government revenue which had been paid by the mortgagee and that, therefore, he could not redeem the property without paying that amount together with Rs. 3,000, the original advance. If, therefore, we assume the genuineness of the earlier mortgage and the *bona fides* of the parties, it seems to us that the plaintiff, in order to entitle him to be substituted for the vendee, must do what the vendor had agreed to do, *viz.*, to discharge the claims that were made by the vendee and in consideration of which he transferred the equity of redemption. It is argued, however, that the mortgage in 1873 was really a sale and that the agreement by the mortgagor to pay Government revenue was fictitious. This argument is based upon the alleged fact that the property was never worth even Rs. 3,000. The answer to this contention is that if the transaction of 1873 was really a sale, the suit ought to have been to pre-empt that, not the sale which took place in 1911. Such a suit is long barred by time. If the transaction was a fraud, it can hardly be said that the pre-emptor did not know of it, because the presumption that it is a fraud is based upon the fact that the property was not worth anything like the three thousand advanced. In our opinion the consideration must be Rs. 3,000 together with the Government revenue which has been found to have been paid by the mortgagee, but in calculating this amount interest will only be allowed at annas ten per cent. per mensem on the Government revenue so paid. We modify the decree of the Court below accordingly. The interest will be calculated by the office on the amount paid for the Government revenue, that is to say, each time the mortgagee paid the Government revenue, he will be entitled to get annas ten per cent. per mensem simple interest upon each payment. We extend the time to six months from this date. If the plaintiff does not pay the amount ascertained within the time aforesaid, the suit will stand dismissed in all Courts. The appellant must have his costs of this appeal.

Decree modified.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1468 OF 1915.

June 28, 1916.

Present: - Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

SAHDEO LAL BHAGAT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KESHO MOHAN THAKUR AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s 42 Declaratory suit—Dispossession from streamlet, what amounts to —Temporary disturbance of possession, effect of.

An attempt to confer a right to catch fish in a streamlet on third persons, or the fact that some persons have caught fish in the streamlet does not amount to dispossession of owners from the streamlet. [p. 917, col 2.]

A mere temporary disturbance of possession is no bar to a suit for a declaration. [p. 917, col. 2.]

Appeal from a decision of the Additional Subordinate-Judge, Bhagalpur, dated the 23rd March 1915.

Babu *Naresh Chandra Sinha*, for the Appellants.

Mr. *Lal Mohan Ganguly*, for the Respondents.

JUDGMENT.

CHAMIER, C. J. - The plaintiff and defendants second party are the proprietors of a

SAHDEO LAL BHAGAT *v.* KESHO MOHAN THAKUR

village called Pararia. Defendants first party are the proprietors of a village called Kasba. Between these two villages there flows a small streamlet which is called the Kalia. The object of this suit was to obtain a declaration that so much of the streamlet as lies on the eastern boundary of Pararia is within and forms part of that village. The plaintiffs alleged that the lands of Pararia have always been irrigated with water obtained from the Kalia. They further alleged that in or about 1320 *Fasli* the defendants first party wished to take water from the streamlet but the appellants refused to allow them to do so. At that time defendants first party alleged that the streamlet lay within the boundaries of the village Kasba and the plaintiffs then discovered that the streamlet had been shown in the survey map as lying within the village of Kasba. Defendants first party denied all the material allegations of the plaintiffs. They said that the portion of the streamlet in dispute lay entirely within the village Kasba and that the proprietors of Pararia had not been in possession of it within 12 years of the suit. They also denied that the water of that portion of the streamlet had ever been used for irrigating the lands of Pararia. The Munsif struck 9 issues. On the 7th issue he found that the disputed portion of the streamlet lay within Pararia, but he also found that the possession of the plaintiffs had been disturbed because some persons acting under or on behalf of some of the defendants had taken fish from the streamlet. He dismissed the suit on the ground that the plaintiffs might and ought to have claimed further relief and were not entitled to a mere declaration. On appeal the Additional Subordinate Judge dismissed the suit on the ground that the plaintiffs' possession had been disturbed in the manner above mentioned, therefore they could not sue for a declaration only. He did not even record a finding that the plaintiffs had established their possession or their title. He apparently assumed these two points in their favour, but dismissed the suit on the ground that a claim for mere declaration was not maintainable even if the plaintiffs had established title and previous possession.

We must dispose of this case on the assumption that plaintiffs have proved their title to Pararia and also that they were previously in possession of Pararia and of the streamlet. The question is, whether the proved fact that some persons have taken fish from the streamlet shows that the plaintiffs have been dispossessed and are, therefore, not entitled to sue for a mere declaration of title. All that the Additional Subordinate Judge says on the question of dispossession is, "There can be no doubt that the plaintiffs' possession has been disturbed, that is to say, the defendants' people have caught fish in the disputed portion of the river". The Munsif went into the matter somewhat more fully and it would appear from his judgment that the defendants first party on two occasions granted the right to catch fish in the streamlet to other persons not parties to the suit. Defendants first party may have attempted to confer on other persons the right to catch fish in the streamlet. Such an act would not amount even to disturbance of possession, still less to dispossession, nor, in my opinion, does the fact that some persons have at times caught fish in the streamlet show that the plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession. From the findings it would appear that the disturbance was only temporary. In my opinion, the Courts below were wrong in finding that a suit for declaration could not be maintained merely because some persons not before the Court had caught fish in the streamlet. I would allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court to be restored to the pending file and disposed of in accordance with law. The costs of this appeal will be costs in the cause.

SHARFUDDIN, J.—I concur.

Appeal allowed; Case remanded

NARAYANA CHETTIAR *v.* VEERAPPA CHETTIAR.

MADRAS HIGH COURT.

APPEAL SUIT No. 41 OF 1915.

August 16, 1916.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Srinivasa Aiyangar.

A. R. P. NARAYANA CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 6—APPELLANTS

versus

KANA PANA VEEANNA RANA VEERAPPA CHETTIAR AND OTHERS—DEFENDANTS NOS. 1 TO 5—RESPONDENTS.

Straits Settlement Bankruptcy Ordinance, 1882, s. 30 (4)—*Bankrupt, discharge of, in Singapore, effect of—Liability of bankrupt's properties in British India for his debts in Singapore—'Jointly bound' meaning of—Son, whether 'jointly bound' with father—Liability of son of bankrupt—Hindu Law—Debts—'Pious obligation' of son to pay fathers' debt, nature and extent of.*

Defendants Nos. 1 and 3 were discharged under the Straits Settlement Bankruptcy Ordinance by the Supreme Court at Singapore. Plaintiffs, to whom the defendants Nos. 1 and 3 were indebted, were parties to the bankruptcy proceedings, proved their debts in bankruptcy and received dividends. They subsequently sued the bankrupts and their undivided sons in the Court of the Subordinate Judge of Sivaganga for the said debts, on the ground that they owned property within the jurisdiction of the Court. The sons were impleaded as being 'jointly bound' with their fathers under clause 4 of section 30 of the Singapore Ordinance, which provides that "an order of discharge shall not release any person who, at the date of the receiving order, was *jointly* bound or had made any *joint* contract with him":

Held, (1) that the release of the debt under the Bankruptcy Law of Singapore operated as a discharge of it everywhere and the rule was unaffected by the fact that the parties had their domicile in British India; [p. 924, col. 1.]

(2) that the special liability of a Hindu son to pay his father's debts on the pious obligation theory was not a 'joint' liability with the father within the meaning of section 30, clause (4), of the Straits Settlement Ordinance; [p. 924, col. 2.]

Ramasami Nadan v. *Ulaganatha Goundan*, 22 M. 49 (F. B.); 8 M. L. J. 312; *Periasami Mudaliar* v. *Seetharama Chettiar*, 27 M. 243 (F. B.); 14 M. L. J. 84, referred to.

(3) that the suit was not maintainable against the sons alone during the lifetime of their fathers after the extinction of the latter's liability. [p. 924, col. 1.]

Under the Hindu Law no suit can be instituted against the sons alone so long as the father is alive and the family is undivided, even though the father's liability is subsisting. *A fortiori* the extinction of the father's liability extinguishes the liability of the sons, their pious obligation lasting only so long as the father's liability subsists. [p. 925, col. 1.]

The joinder of a son with his father in a suit to enforce payment of the father's debt is for the purpose of enabling the Court to exercise the power, which the father has, of selling family property, including his son's share, to pay his own private debts, provided they are not illegal or immoral, and to prevent the son from questioning the nature of the debt in execution in the event of the decree against the father being executed by attachment and sale of the family property, including the son's share. [p. 924, col. 2.]

Quære.—Whether, if the adjudication in bankruptcy has been made by a *forum* of the domicile, the power of the father to sell the shares of his sons for the payment of his debts is a power which can vest in the assignee under the bankruptcy. [p. 925, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 86 of 1913.

FACTS are clear from the following material extracts from the judgment of the Subordinate Judge:—

"The plaintiffs and 6th defendant owned a money-lending firm at Singapore under the mark and style of A. R. P. and the defendants Nos. 1 to 5 owned a similar firm in the same place of the mark and style of K. P. V. R. K. R. Money dealings were carried on between these two firms from April 1906 to May 1908 and, as a result, the defendants Nos. 1 to 5 were found to owe to the plaintiffs and 6th defendant 8,700 dollars for principal and 2,074·14 dollars for interest. It is also alleged that on 18th November 1907 the plaintiffs and 6th defendant deposited in the said firm of the defendants Nos. 1 to 5 a sum of 3,000 dollars, the interest on which amounted to 164·68 dollars up to May 1908. Thus, on the whole, (13,956·80) dollars was due from the Nos. 1 to 5 defendants K. P. V. R. K. R. firm to plaintiffs and 6th defendant's firm A. R. P.

2. It is further set forth in the plaint that the Nos. 1 to 5 defendants' firm was adjudged insolvent by the Supreme Court of Singapore at the motion of its partners owing to their inability to pay their debts. In the bankruptcy proceedings the said debt due to the A. R. P. firm was proved and accepted as 13,286 dollars 34 cents. Plaintiffs and 6th defendant got two dividends from the assets realised from the assets of the Nos. 1 to 5 defendants' firm in the said bankruptcy proceedings, the

1st defendant being paid 940·4 dollars on 4th March 1910 and the 2nd defendant 1,275·49 dollars on 8th December 1910. The partners of the Nos. 1 to 5 defendants' firm got their final discharge on 8th August 1913.

3. The plaintiffs seek to recover the balance of their debt in this suit from defendants Nos. 1 to 5 who own properties in this country, on the ground that the bankruptcy proceedings in Singapore cannot exonerate the said properties from liability. Grounds are also alleged in the plaint for taking the suit out of limitation. Defendants Nos. 2, 4 and 5 are impleaded on the ground that the 2nd defendant as the undivided son of the 1st defendant and defendants Nos. 4 and 5 as undivided sons of the 3rd defendant are bound along with their fathers to discharge the suit debt.

4. The 3rd defendant put in a written statement which the 1st defendant adopted. He pleads that, inasmuch as the dealings referred to in the plaint took place in Singapore, the cause of action in respect of the suit debt must have arisen there within the jurisdiction of the Supreme Court at Singapore, that the defendants applied to that Court to be declared insolvent and accordingly a receiving order was made on the 18th May 1908 and the Official Assignee of the said Supreme Court was constituted Receiver of the properties of the defendants in India and elsewhere, that they were finally discharged on 8th August 1913 in spite of the stern opposition on the part of the 6th defendant, that under section 30, sub-section 3 of the Straits Settlements Bankruptcy Ordinance of 1882, the said order of discharge released them from all debts probable in bankruptcy including the plaint claim, that the plaintiffs' firm, having proved the suit debt as a creditor through one of its partners, namely, the 6th defendant and proceeded as such in the said bankruptcy proceedings and further having received two dividends in 1910, cannot seek to recover the same debt (by) suit again, that having assigned their property to the Official Assignee at Singapore the defendants cannot be sued in any other Court in the British Dominions for a debt provable and proved under the said bankruptcy, that the cause of action to recover the suit debt having arisen within the jurisdiction of the Supreme Court at Singapore, the discharge of these defendants from the said debt and liability, under the bankruptcy law prevalent there, operates as a discharge everywhere else and that the plaintiffs and 6th defendant have lost their right to sue defendants Nos. 1 to 5 on the suit debt. Objections were also taken regarding the rate of interest claimed and on the score of limitation and the jurisdiction of this Court to try this suit,

5. The defendants Nos. 2, 4 and 5 ignor the suit dealings and disclaim all int eres in the K. P. V. R. K. R. firm at Singapore and contend that the suit is barred by time, that they are not liable to pay the suit debt and that this Court has no jurisdiction to entertain this suit. In other (respects) they adopt the statement of the 3rd defendant.

6. A preliminary point was raised by the defendants' Pleader * * * * * To cover that point, the following issue was framed:—Whether this suit is not maintainable owing to the result of insolvency proceedings at Singapore referred to in the pleadings. Arguments were addressed to me subsequently on this point and I am first to decide the question involved in the said issue.

7. The money dealings between the plaintiffs' firm and the firm of defendants Nos. 1 to 5, who will hereafter be called the defendants, took place in Singapore, both the firms being situated there It may, therefore, be presumed that the performance of the contracts of loan created in the course of such dealings was by implication agreed to be made in Singapore itself. There is nothing in the plaint to show that the place of performance was to be outside Singapore. I think it may fairly be taken on the strength of the above mentioned circumstances that the place of performance was Singapore and that the said contracts are foreign contracts With reference to a contract entered into in Colombo but not alleged to be performed, as in this case, in India, it was held by the Madras High Court that it must be taken to be a foreign

contract [*Deivanayagam Pillai, A. T. S.* v. *Muthukumarasawmy Pillai* (1)].

8. The facts stated in the written statement regarding the insolvency proceedings at Singapore are all of them admitted by the plaintiffs. Exhibit A is a copy of the insolvency petition filed by the defendants' firm and Exhibit B is a copy of the receiving order passed by the Supreme Court at Singapore. Exhibit I shows that the defendants assigned over to the Official Assignee all their properties including those in India. Exhibit II, dated 5th August 1913, is a copy of the final order of discharge of the insolvents. It appears therein that the 6th defendant opposed the motion for discharge. It is thus sufficiently clear that in the insolvency proceedings the 6th defendant, who is one of the partners of the plaintiffs' firm, took part, proved the suit debt, had it estimated at a certain figure (*vide* paragraph 6 of the written statement) and further got two dividends from the Official Assignee at Singapore, which fact appears in the plaint itself. On these admitted facts the learned Vakil for the defendants contended that the plaintiffs have lost their right to bring a suit upon the suit debt again in India. He referred to section 30 of the Straits Settlement Bankruptcy Ordinance, 1888, clause 3, which runs as follows: "An order of discharge shall release the bankrupt from all other debts provable in bankruptcy." Clause 4 of the said section runs as follows: "An order of discharge shall be conclusive evidence of the bankruptcy and the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt, who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge and may give this Ordinance and the special matter in evidence." The contention of the defendants' Vakil is that, by the combined operation of clauses 3 and 4 of section 30, the defendants have been completely released from the suit debt, which was included in the schedule of the insolvents filed in the said bankruptcy proceedings (*vide* paragraph 4 of the plaint). I think that this contention is perfectly sound. Clause 3 shows that the discharge of the insolvents releases them from all debts provable under the bankruptcy. The suit debt was not only provable under it but was actually proved. The word 'released' used in clause 3 evidently denotes that the debt was completely extinguished by virtue of the order of discharge. In *Thompson* v. *Cohen* (2) quoted by the defendants' Vakil, the word 'released' is used in the sense of extinguishment or destruction. It was decided that, by virtue of the Bankruptcy Act, 1869, where the word 'released' was used, the defendant in that action was completely discharged from his debts. The defendants' Vakil also quoted other English rulings [*Gardiner* v. *Houghton* (3), *Burrows* v. *Jemino* (4) and *Potter* v. *Brown* (5)], according to which a discharge of an insolvent from his debts under the law of a foreign country would act as a discharge everywhere and may be pleaded in defence to an action, if the contract on which it is based is a foreign contract in the sense that it came into existence in a foreign country and was also performable there. In other words, if according to the law of the foreign country, the insolvent was freed from all liability with reference to any debt, he cannot again be sued elsewhere as regards foreign contracts, whereas as regards English contracts he can still be so sued. This distinction is well marked in the said decisions. If the law of the foreign country does not put an end to the debt, but simply suspends the remedy or if the contract be an English contract, a suit can be maintained in England and this point was decided in *Ellis* v. *McHenry* (6) [*vide Antony Gibbs & Sons* v. *La Societe Industrielle Et. Commerciale Des Metaux* (7)]. In *Quelin* v. *Moisson* (8) it was decided that a bankrupt who had assigned his property under a French commission of bankruptcy could not afterwards be sued in a Court of Justice in the British Dominions by one of his creditors for a debt proved under it.

(1) 14 Ind. Cas. 560.

(2) 7 Q. B. D. 527 at p. 532; 41 L. J. Q. B. 221; 26 L. T. 693.

(3) 121 E. R. 1247; 2 B. & S. 743; 127 R. R. 544.

(4) 93 E. R. 815; 2 Str. 733.

(5) 102 E. R. 1016; 7 R. R. 663; 1 Smith 351; 5 East 124.

(6) 6 C. P. 228 at pp. 230, 234; 40 L. J. C. P. 109; 23 L. T. 8 1; 9 W. R. 503.

(7) 25 Q. B. D. 399.

(8) (1828) 1 Knapp. P. C. C. 266; 12 E. R. 320.

9. It was also argued that the plaintiffs are under a particular disability standing in the way of their maintaining this suit by virtue of their having got dividends during the administration of the defendants' estate by the Official Assignee at Singapore. From *Ex parte Robertson, In re Morton* (9) it appears that such a conduct amounted to a sort of undertaking on their part not to bring a suit in India on the debt with reference to which the dividends were obtained. Sir James Bacon, C. J., expressed himself as follows as regards the effect of a creditor coming in under the liquidation proceedings of a foreign Court: "He came in under the liquidation, and what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed, and sealed and sworn to the terms of it—that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the Court, and the Court has jurisdiction to decide all questions of whatever kind, whether of law, fact or whatever else, the Court may think necessary in order to effect a complete distribution of the bankrupt's estate." Taking it for argument's sake that the suit debt was due on an Indian contract, a foreign contract with regard to Singapore, the plaintiffs by reason of their submitting to the jurisdiction of the insolvency side of the Supreme Court of Singapore and obtaining the said dividends must be taken, according to the principle above laid down, to have agreed to the administration of all the properties of the insolvents situated in Singapore and elsewhere by the Official Assignee at Singapore for the equal benefit of all the creditors under the insolvency. The properties in India, which are now sought to be proceeded against after obtaining a decree in this suit, were also included in the schedule of insolvency filed in Singapore and, therefore, if the plaintiffs are allowed to maintain this suit, they would reap an improper advantage over the other creditors in the insolvency. Having contracted, as it were, that they would not reap such an advantage, the plaintiffs cannot be allowed to go back on such a contract by being permitted to maintain this action. When they came in under the bankruptcy at Singapore and accepted dividends, it must be taken that they held out to the Supreme Court at Singapore that they would not take any further proceedings anywhere else so as to prejudice the even administration of the insolvents' effects included in their schedule, and that the said dividends were paid to them in pursuance of such a representation. They are, therefore, now estopped from bringing this action setting aside such a representation.

10. Hitherto it was assumed that the contracts on which the suit debt is based were foreign contracts (Singapore contracts). But assuming that they are Indian contracts, it appears from *Phillips* v. *Allan* (10), quoted by the learned Vakil who appeared for the defendants, that the plaintiffs are equally debarred from maintaining this action. It was stated in the said case that, if an English subject had claimed to have the benefit of the Scotch Law of insolvency and to take a distributive share of the property of the insolvent under that law, he cannot bring a suit upon the same debt in England after the passing of an order of discharge in the Scotch Court in the insolvent's favour. What was actually decided in that case was that by merely opposing the discharge of the insolvent in the Scotch Court, the English subject was not debarred from maintaining an action in the English Court, as it could not be said that by such appearance alone he consented to be bound by the judgment of the Scotch Court. In this connection Bailey, J., added that if he had asked to have the benefit of the Scotch Law and to receive a share of the defendant's property, there might have been ground for saying that he had consented to become bound by that law and by the judgment of the Scotch Court. According to this opinion of that learned English Judge, the plaintiffs in this case must be taken to have consented to the insolvency jurisdiction of the Singapore Court, even assuming that their contract was an Indian contract, as they

(9) 20 Eq. 733 at p. 737; 44 L. J. Bk. 99; 32 L. T. 697; 23 W. R. 906.

(10) 108 E. R. 1120; 8 B. & C. 477; 2 Man. & Ry. 576; 7 L. J. K. B. (o. s.) 2; 32 R. R. 450.

did not stop with merely opposing the discharge of the insolvents, but claimed and were paid two dividends. They are, therefore, debarred according to the opinion expressed in the said English ruling from maintaining this suit.

11. In *Rangasawmy Padayachi* v. *Narayanaswamy Padapachi* (11), quoted by the other side Vakil, it did not appear that any order of discharge in favour of the insolvent had been made. Moreover, the law of the foreign country where the insolvency proceedings took place was not cited to show what effect they had upon the creditors. All that was decided in that case was that insolvency does not by itself operate as a discharge in all jurisdictions. It is not insolvency by itself that is pleaded as a bar in this suit, but that plus something more. The insolvency proceedings in the case cited as *Rangasawmy Padayachi* v. *Narayanaswmy Padayachi* (11) occurred in Griqualand and there was no evidence as to the laws prevailing there regarding insolvency. The Court had, therefore, no materials from which it could be satisfied that the insolvent's estate in India had become vested in the trustee in bankruptcy in Griqualand. But in this case there is clear evidence to show that the insolvent included his properties in India in the schedule filed by him in the Singapore Court and that the same became vested in the Official Assignee.

12. Section 42, Bankruptcy Ordinance, 1888, lays down that the property of the bankrupt divisible among his creditors comprises of (1) such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve on him before his discharge, (2) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, etc. In the definition of property given in section 21 no exception is made in respect of properties situated outside Singapore. There are also provisions in the Ordinance enabling the Official Assignee to compel the insolvent before his final discharge to help him towards the realisation of all his properties. The argument of plaintiffs' Pleader that if this suit be dismissed there would be no means of making the insolvent's property in India liable to pay his debts, has, therefore, no force. The Official Assignee should have been moved before the insolvents' discharge to compel the insolvent to execute a conveyance, if necessary, in his favour or to do any other thing necessary to realise the insolvents' effects in India. It was held in *Hookamchand Sarupchand* v. *Nowroji Sorabji Talati* (12) that the Insolvent Debtors Court at Bombay could order the property of the insolvent at Shanghai to be handed over to it by the insolvent. Moreover section 42 (2) clearly shows that the Official Assignee has derived the capacity to exercise and take proceedings for exercising all powers in or over or in respect of insolvents' properties in India without any help from the insolvents. All that the plaintiffs can do, under the circumstances, will be to move the Official Assignee to take steps to realise the insolvents' properties in India and to pay them a dividend from the realisation.

13. The plaintiffs' Pleader argued that the objection based upon the insolvency proceedings in Singapore could only touch the suit as again defendants Nos. 1 and 3 who were declared insolvent there, but that it could not affect the maintaining of this suit as against defendants Nos. 2, 4 and 5. In support of this argument, he relied upon section 30, clause 4, according to which an order of discharge does not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him or any person who was surety or in the nature of a surety for him. According to him, defendants Nos. 2, 4 and 5 and undivided sons of defendants Nos. 1 and 3 were jointly bound to pay the suit debt and, therefore, they can be proceeded against in this suit under the said reservation in section 30. But I think that section 30, clause 5, is not applicable to this case at all. The undivided sons of a Hindu father are, by virtue of their being such sons, under a pious obligation to pay their father's debts and the right of the

(11) 7 Ind. Cas. 417; 34 M. 247; 8 M. L. T. 120; (1910) M. W. N. 695.

(12) 10 Bom. L. R. 345.

creditor to implead them in a suit against the father or to proceed against them separately after his death arises not out of any joint contract made by them and their father or out of the facts which gave rise to liability against the father, but only arises from such obligation on their part. Moreover, their obligation is limited by Hindu Law to their shares in the assets of their father. Their liability to be sued for the father's debt depends upon (1) the existence of the debts, (2) assets of the father in their hands, and in the very nature of the case their liability is of a secondary character. If the debt itself due by the father is discharged by operation of law as in the present case, I gravely doubt if the sons would still remain liable under it. The words 'are jointly bound with him' occurring in section 30, clause 5, do not in my opinion, cover the case of undivided sons of a Hindu father being bound to pay the latter's debts. They seem to contemplate cases in which two or more persons are, by the virtue of their joint act or otherwise, equally liable in every respect to another and the nature of whose liability is of the same kind. It is well known that the sons of a Hindu father are not liable to pay the father's debts from their self-acquired property and that even the liability with regard to the joint family property is limited to debts not of an immoral or illegal character. The liability of the father and that of the sons, therefore, cannot be said to be of the same kind and they cannot, therefore, be said to be jointly bound within the meaning of the said section.

14. There is another reason which will clearly show that this suit cannot be proceeded with against the sons separately. They are not personally liable to pay the suit debt nor are they liable to pay it from their self-acquired properties. They are impleaded in this suit only to enforce their liability as undivided sons of the defendants Nos. 1 and 3, who alone are described as partners of the K. P. V. R. K. R. firm (*vide* paragraph 12 of the plaint), evidently in order to enable the plaintiffs to proceed against their shares in the ancestral properties of defendant Nos. 1 and 3, in the view that those properties are not affected by the insolvency proceedings in Singapore. But it must be observed that the vesting order in favour of the Official Assignee in Singapore must have transferred their properties in India, including the shares of their undivided sons, to the Official Assignee according to the Hindu Law, to which the defendants Nos. 1 to 5 belong and which, as law of personal status, must be taken to govern them wherever they may be. When the insolvents included their properties in India in their schedule, it must be taken that the shares in them of their undivided sons were also included. This principle has been well established in *Fakirchand Motichand* v. *Motichand Hurruckchand* (13) and *Rangayya Chetti* v. *Thanikachalla Mudali* (14). It was held in the former case that, under the Mitakshara Law, a father has the right to dispose of his sons' interest in ancestral immoveable estate for the payment of his own debts not contracted for immoral purposes, and that any order made under section 7 of the Insolvency Act would vest that right in the Official Assignee who can, therefore, give a good and complete title to such ancestral immoveable estate to his purchaser. It is nobody's case that the debts in respect of which the defendants Nos. 1 and 3 were declared insolvents were immoral or illegal. It, therefore, follows that the whole joint family estate of defendants Nos. 1 and 3 including the shares therein of their sons, namely, defendants Nos. 2, 4 and 5, has been already vested in the Official Assignee at Singapore and, therefore, no part of it remains to be availed of for the purpose of enforcing the payment of the suit debt. For these reasons, I hold that the suit cannot be maintained against defendants Nos. 2, 4 and 5 also.

Mr. *A. Krishnaswami Aiyar*, for the Appellants.

Messrs. *C. P. Ramaswami Aiyar* and *P. S. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the lower Court and it is unnecessary to re-state them. Two points are taken for the appellants in the appeal.

First, it is contended that the discharge of the bankrupts under the Straits Settlement Bankruptcy Ordinance by the Singapore

(13) 7 B. 434.
(14) 19 M. 74.

Court does not operate as a discharge from the debts in this country. It is conceded that the discharge operates as an extinguishment of the debt and not merely as a bar of the remedy so far as Singapore is concerned. The plaintiffs and the defendants are trading at Singapore, the debts were contracted there and were payable there. The plaintiffs proved their debts under the bankruptcy, received dividends and were really parties to the order of discharge. In these circumstances a release of the debt under the Bankruptcy Law of Singapore is a discharge of it everywhere. The fact that the parties have their domicile in this country and the defendants have some property here is immaterial. The rule is, we think, accurately stated in Rule 115 of Mr. Dicey's book on the Conflict of Laws.

The *next* point is equally baseless, and it is this. The 1st defendant and his brother the 3rd defendant were adjudicated bankrupts. The 2nd defendant is the son of the 1st and defendants Nos. 4 and 5 are the sons of the 3rd. All the five are members of a joint Hindu family and they have some family property here. The contention is that the effect of the discharge is only to release the father from liability but that does not affect the Hindu Law liability of the sons to pay the debts of the father, and that the creditor is entitled to sue the sons and recover the debts from out of their shares of the joint family property. This, it is said, follows from clause 4 of section 30 of the Bankruptcy Ordinance, which like section 28 of the English Bankruptcy Statute declares the effect of an order of discharge. The material portion of the clause is as follows, "an order of discharge shall not release any person who, at the date of the receiving order, *was jointly bound* or had made any joint contract with him". The question is whether a Hindu son is *jointly bound* with his father to pay the debts within the meaning of the section. We think, not. The liability of a Hindu son to pay the debts of his father not being illegal or immoral (Avyavaharika) has been developed, by judicial decisions, from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English Law, in fact it is difficult to bring it under any particular legal category of the English Law. In the case *Ramasami Nadan* v. *Ulaganatha Goundan* (15), which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. Bashyam Aiyangar in his interesting argument repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case, *Periasami Mudaliar* v. *Seetharama Chettiar* (16), Bashyam Aiyangar, J., treats it as settled law that the son could not be sued alone, during his father's lifetime, for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action, though judgment had been recovered against the father. These positions shew clearly that a Hindu son was not *jointly bound* with his father.

The joinder of the son with the father in a suit to enforce payment of the father's debt is, for the purpose of enabling the Court to exercise the power, which the father had, of selling family property, including his son's share, to pay his own private debts, provided they were not illegal or immoral, and to prevent the son from questioning the nature of the debt, in execution, in the event of the decree against the father being executed by attachment and sale of the family property including the son's share. There were also processual difficulties (which have been removed by the present Code) in case the father died before the execution of the decree and the son was not a party to the decree.

The matter may also be viewed in another way. The effect of the discharge was undoubtedly to release the 1st and 3rd defendants and no suit could have been instituted against them. If, as already stated, no suit can be instituted against

(15) 22 M. 49 (F. B.); 8 M. L. J. 312.
(16) 27 M. 243 (F. B.); 14 M. L. J. 84.

In the matter of REGINA GUHA.

the sons alone, at any rate so long as the father is alive and the family undivided, even though the father's liability is subsisting, the present suit against the sons alone must *a fortiori* be bad. This, we think, is the necessary result of the extinction of the liability of the father, for it is only so long as the liability of the father subsists that the pious obligation of the son lasts. It is argued with some force that the power of the father to sell the shares of his sons for the payment of his debts is not a power which can vest in the assignee under a bankruptcy and it is hard on the creditors that they should be deprived of all remedy to make the shares of the sons available for the payment of the debts. Whether such a power would vest in the assignee or trustee in bankruptcy if the adjudication had been made by the *forum* of the domicile, it is unnecessary to consider, as that would depend on the language of the particular Statute [See *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitaswamy* (17)]. It is, however, clear that the adjudication and assignment of the bankrupt's property under the Straits Settlements Ordinance in this case does not operate as an assignment of immoveables or even of moveables in India. This is really no hardship, for presumably the Singapore creditors looked to the assets there for payment. The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

V. R. P.

(17) 26 M. 214.

CALCUTTA HIGH COURT.
SPECIAL BENCH
APPELLATE CIVIL JURISDICTION.
August 29, 1916.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir Asutosh Mookerjee, Kt., Justice Sir William Chitty, Kt., Mr. Justice Teunon and Mr. Justice Chowdhury.

In the matter of REGINA GUHA—PETITIONER.

Pleader, enrolment of—Woman, right of, to admission as Pleader—Legal Practitioners Act (XVIII of 1879), s. 6, interpretation of—Rules of Calcutta High Court thereunder, r. 27, whether ultra vires—*General Clauses Act (I of 1868), s. 2—Legal profession in British India, history of.*

Under the law as it now stands a person of the female sex (having the necessary qualifications) is not entitled to be admitted to the ranks of the legal profession. [p. 931, col. 2; p. 937, col. 1; p. 938, col. 1.]

The rules of the Calcutta High Court made in pursuance of section 6 of the Legal Practitioners Act (XVIII of 1879), which clearly contemplate the admission of men only as Pleaders in the subordinate Courts, were made in accordance with and for the purpose of carrying out the intention of that Act and are not *ultra vires*. [p. 931, cols. 1 & 2; p. 938, col. 1.]

Section 2 of the General Clauses Act, 1868, does not remove the disability on the admission of women created by Act XVIII of 1879. [p. 931, col 1; p. 933, col. 2; p. 937, col. 2.]

History of the Legal profession in British India traced. [p. 929 to p. 931, col. 1; p. 932, col. ; p. 934, col. 1.]

Per *Sanderson, C. J.*—Reading the sections of the Legal Practitioners Act relating to the admission of Pleaders without reference to the General Clauses Act of 1868, they obviously contemplate the admission of a male person only and the pre-existing disability of women to be admitted as Pleaders was not removed by that Act. The progressive character of recent legislation has only been in the direction of removing restrictions on the qualifications of men. Having regard to the constitution of the profession of Pleaders existing at the date of the passing of the 1879 Act and the fact that the whole trend of legislation for a long time had been to confine the profession to men, both the subject-matter of the legislation and the context are repugnant to a construction of the Act which would include females. It could not be intended that such a disability should be removed by a mere interpretation clause. [p. 930, col. 2; p 931, col. 1.]

Bebb v. *Law Society*, (1914) 1 Ch. D. 286; 83 L. J. Ch 363; 110 L. T. 353; 58 S J. 153; 30 T. L. R. 179, referred to.

Per *Mookerjee, J.*—Neither the preamble nor the provisions of any of the sections of the Legal Practitioners Act afford any indication of an intention on the part of the Legislature to widen the profession of Pleaders by the admission of women into its ranks. There may, obviously, be weighty reasons why, in the University Act, words importing the masculine gender may be taken to include females, while in the Pleaders Act no such intention can be reasonably attributed to the Legislature; the subject-matters of the two Statutes and the historical antecedents thereof are entirely different. [p. 934, cols. 1 & 2.]

An examination of the decisions pertaining to the subject discloses that, in favour of allowing women to practise law under old Statutes which mentioned men only, the Courts have reasoned (1) that every word importing the masculine gender only may extend to and be applied to females, (2) that Statutes, whenever they might have been passed, should be construed as if they were recently enacted and not with reference to what was in the mind of the Legislature at the time of their enactment, (3) that all Statutes are to be construed, as far as possible, in favour of equality of rights and all restrictions upon human liberty and claims for special privileges

In the matter of REGINA GUHA.

are to be regarded as having a presumption of law against them, (4) that the status of women has, in the eye of law and in popular acceptation, so changed as not only to prevent their admission to the Bar but practically to demand it. In refusing to admit women to practise law, the reasoning employed has been substantially the opposite of that which favoured their admission, (1) that words importing the masculine gender cannot be read so as to include women, unless the subject matter and the contest justify such a contention, (2) that as the Legislature never contemplated the admission of women, as indicated by the history of the profession, words of the masculine gender in the Statute should not be interpreted to include women, (3) that an extended interpretation should not be put on Statutes, because women are generally unfitted for the duties of the legal profession, (4) that, if the status of women has altered in the eyes of law and popular acceptation, the proper remedy is legislation and not an alteration of the law in the guise of judicial exposition of the existing law. [p. 935, cols. 1 & 2.]

English and American decisions reviewed. [p. 934, col. 2 to p. 936, col. 1.]

No trace of women legal practitioners can be found in Hindu or Buddhistic times or during the Muhammadan period. When in 1793, for reasons assigned in the preamble to Regulation VII, the profession was re-organized and given a legal status, the Legislature contemplated men alone as members of the profession. There has never been a departure from that policy. There is no possible escape from the conclusion that, on the law as it stands, women are not entitled to be admitted to the ranks of the legal profession. [p. 936, col. 2; p. 937, col. 1.]

Per *Chitty, J.*—The Legal Practitioners Act was not framed to create a new profession but to regulate one which had been in existence for many years, during which no woman was enrolled or applied to be enrolled as a Pleader. To read the Legal Practitioners Act to include females would certainly be repugnant to the subject. [p. 937, col. 2; p. 938, col. 1.]

It is doubtful whether the General Clauses Act can apply to rules framed by the Calcutta High Court, though, in framing such rules under an Act of the Legislature, the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. [p. 938, col. 1.]

Application under rule 18 of the Rules framed by the High Court, Calcutta, under clauses A, B, C and D of section 6 of Act XVIII of 1879.

FACTS appear from the judgment.

Mr. *Eardley Norton* (with him Messrs. *P. K. Mazumdar, M. N. Kanjilal* and *Manmotha Nath Mukherjee*), for the Petitioner.—This is an application by Miss Regina Guha for enrolment as a Pleader under the rules framed in conformity with section 6 of the Legal Practitioners Act (XVIII of 1879). Miss Guha passed the M. A. Examination in 1913 and headed the list. She has also passed the B. L. Examination this year. So there is no doubt that she has got the necessary qualifications. She after passing the B. L. Examination applied to the Court of the District Judge of 24-Perganas for admission as a Pleader under rule 27 of the Legal Practitioners Act. But a letter was forwarded to Miss Guha intimating to her that as there was no precedent of permission having been granted to ladies to practise as Pleaders, the question should be judicially disposed of by the High Court. In consequence of that the mattter has been brought to the notice of your Lordship the Chief Justice, and this Speccial Bench has been constituted to consider the matter.

Under section 6 of Act XVIII of 1879 the High Court has framed rules and rule 27 says that any person who has passed the B. L. Examination may be admitted as a Pleader, provided he makes the application within a year of *his* obtaining the degree.

[SANDERSON, C. J.—The word there is "his."]

Yes "any person" - male or female. I rely upon the word "person." The definition of "person" as given in the General Clauses Act says that it includes both males and females and the rules cannot abrogate the rights.

[SANDERSON, C. J.—The section says that the applicant should be a "proper person."]

That is another argument. I say that the word "person" includes a woman. The right has been given to me by an Imperial Act and that right cannot be cut down by any rules framed under that Act.

[SANDERSON, C. J.—My learned brother, Mr. Justice Chitty, points out to me that the General Clauses Act (X of 1897) only applies to Acts which were passed afterwards.]

There is another General Clauses Act (I of 1868). In clause 2, sub-section 1, of that Act it is stated that the masculine gender should include the feminine gender. Section 6 of the Legal Practitioners Act must include both sexes and consequently Miss Guha is not excluded.

[SANDERSON, C. J.—I suppose the Pleaders did not come into existence in consequence of this Act. They existed long before that. What was their status? By what authority were they regulated before this Act came into existence?]

I believe, Act XX of 1865.

In the matter of REGINA GUHA.

There is nothing inside the Act of 1879 which says that women should not be allowed to practise. The word "person" there means both sexes.

[SANDERSON, C. J.—The rules as they stand at the present moment contemplate the admission of men only.]

That is my point I deny with great respect their right to limit it to men only.

[SANDERSON, C. J.—What sort of person was contemplated by the Legislature when the Act of 1879 was passed?]

If there is a single thing in any Act suggesting that the Pleaders, who would be admitted, should be only men, then I have nothing more to say. I submit that we cannot eliminate woman from the word "person." As regards "proper person" it has reference to moral character, social status and it does not refer to sex at all. Rule 21 of the General Rules of the High Court, Appellate Side, states that the word "proper" has some other connotation than sex. Practice cannot, I submit, interfere with the meaning of the word. It appears from the case reported as *Bebb* v. *Law Society* (1) that under the Common Law the privilege was not extended to women. But the conditions of women in England and in India are quite different. The question is, does the Common Law apply here? I submit that it does not. In support of my contention I rely upon the case reported as *Governor of Bengal in Council* v. *Moti Lal Ghose* (2).

Then we find that Regulation VII of 1793 was repealed by Regulation XXVII of 1814. In the Act of 1793 the word 'man' appeared, but in the Act of 1814 the word 'person" was substituted in place of "man" and the limitation was removed. That shows the tide of advance. The Act of 1814 was repealed by Act I of 1846, and there has been a further advance since then. In 1793 the existing circumstances were entirely different and at that time they thought of "men' only. But the Act was not intended to provide for the necessity of all times. They did not legislate in 1793 for the future. The Legislature acted on the position as it stood then. At that time no one would think that none but men should be legal practitioners. Since then up to now the legislation is gradually progressing, having its object to remove all the obstacles. The cumulative effect of all these is the extension of privilege, and as there is nothing to show that the word "person" should be limited to "man" only, the application of Miss Guha should be granted.

Sir S. P. Sinha, Advocate-General, for the Bar (with him Babu *Ram Charan Mitra*, Senior Government Pleader, for the Vakils).—I would refer your Lordships to Harington's Analysis, Volume I, page 147. It points out that Regulation VII of 1793 practically laid the foundation of the Vakils' profession in this country. Then came the Regulation of 1814, which was replaced by the Act of 1846. At the time when the profession was constituted it was clearly contemplated that the profession should consist of men only. The classes from which the members of the profession were selected as well as their qualifications make it almost impossible to think that the Legislature contemplated the admission of the other sex into the profession. But as Mr. Norton has said, undoubtedly the legislation has been progressing.

The word "person" as defined in the General Clauses Act implies both the masculine and feminine gender. But the difficulty is not so much with regard to the word "person" as with regard to the personal pronouns, *he*, *she*, *his*, *her* The question is whether having regard to the history of the profession it can be said that "he" includes "she."

The case cited by Mr. Norton is of no assistance to us. But in this connection I may say that Common Law is applicable to Calcutta.

Mr. *Mazumdar*, in reply.—The rules framed by the High Court must be subject to the General Clauses Act. As regards the applicability of the Common Law in Calcutta, I submit that in exercising the jurisdiction of the Appellate Side your Lordships cannot apply the Common Law.

JUDGMENT.

SANDERSON, C. J.—This matter comes before this Court upon a petition of Miss Regina Guha.

The circumstances are set out therein as follows:

1. "That your petitioner obtained the Degree of the Bachelor of Law of the University of Calcutta in the year 1916."

(1) (1914) 1 Ch. D. 286; 83 L. J. Ch. 353; 110 L. T. 353; 58 S. J. 193; 30 T. L. R. 79

(2) 20 Ind. Cas. 81; 17 C. W. N. 1253; 14 Cr. L. J. 321; 41 C. 173; 18 C. L. J. 452 (F. B.).

In the matter of REGINA GUHA.

2. "That your petitioner desiring to be admitted to practise as a Pleader in the District of 24-Perganas paid into the Government Treasury of the said District the fee prescribed by rule 27 of the Rules framed by the Hon'ble High Court under the Legal Practitioners Act and also presented her diploma, the receipt for the said fee and a stamp paper of necessary value of her first certificate to practise to the learned District Judge of 24-Perganas together with the necessary application for admission."

3. "That the learned District Judge of 24-Perganas by a memorandum, dated the 3rd April 1916, forwarded the said application to the Hon'ble High Court for orders as to your petitioner's enrolment."

4. "That about the 16th of June 1916 your petitioner received a memorandum from the learned District Judge, being Memorandum No. 912 dated 15th June 1916, forwarding for her information a copy of the communication addressed to him by the Registrar of the Appellate Side of the said Hon'ble Court. The said memorandum is annexed herein to and marked with the letter A."

5. "That your petitioner accordingly begs humbly to move your Lordships and prays that, in view of the fact that she is a person duly qualified under the rules to be entitled to enrolment as a Pleader, your Lordships may be graciously pleased to order her to be enrolled as such or pass such other necessary orders as to your Lordships may seem fit and proper."

In consequence of the petition this Court was formed for the purpose of hearing this application argued and deciding in a judicial capacity what the law relating to the application is. As it is a matter of considerable importance both to the public and the legal profession, I directed that notice should be given to the Advocate-General and the Senior Government Pleader so that we might have the benefit of their assistance. It should be clearly understood that it is not the function of the Court to express any opinion as to whether it is desirable that women should be admitted as Pleaders in the Courts subordinate to the High Court and that this Court was formed merely for the purpose of deciding the question in a judicial capacity.

The question depends upon the true construction of the Legal Practitioners Act (XVIII of 1879), section 6, and the rules made by the High Court in pursuance thereof.

It was argued by the learned Counsel for the applicant

(1) That the words used in the said section are large enough to include both sexes and consequently that women are not excluded.

(2) That the rules do not exclude women.

(3) That if the rules do exclude women, the rules are *ultra vires*.

Chapter XI, Part I, of the General Rules of the High Court contains the rules as to the qualification, admission and certificates, etc., of Pleaders and Muktears in Courts subordinate to the High Court framed under clauses (*a*), (*b*), (*c*) and (*d*) of section 6 of Act XVIII of 1879, and rules 3 to 6 inclusive are the rules directly in point in this matter. The applicant has obtained the Degree of Bachelor of Law at the University of Calcutta, one of the qualifications specified in rule 3, and has made her application within a year as provided by the said rule.

The first question is, what is the proper construction to be placed on section 6 of the Legal Practitioners Act, 1879. The language used in section 7 and following sections, such as the words "him" and "his", point to an intention of the Legislature that it was a male person only who could be admitted as a Pleader of the subordinate Courts, but by the General Clauses Act of 1868 (I of 1868), section 2, it was provided that in all Acts made by the Governor-General of India in Council after that Act should have come into operation, unless there was something repugnant in the subject or context, words importing the masculine gender should be taken to include females: so that the use of the language above referred to in the Act of 1879 is not conclusive.

It is necessary, therefore, to consider what was the subject with which the Legislature was dealing and what was the position of affairs relating to the profession of Pleaders at the time the Legal Practitioners Act of 1879 was passed. It is clear that the Legislature was dealing with a profession

In the matter of REGINA GUHA.

which was well known and which had been established for a long time.

A summary of the Regulations, setting forth the origin of the profession of the Pleaders in Bengal and the reason for their appointment, is to be found in Harington's Analysis, Volume I, page 147.

The first Regulation dealing with this matter was Regulation VII of 1793, the preamble to which, after referring to the unsatisfactory state of affairs with regard to the practice in the Courts, provided "that it is, therefore, indispensably necessary for enabling the Courts duly to administer and the suitors to obtain justice that the pleading of causes should be made a distinct profession; and that no persons should be admitted to plead in the Courts but *men* of character and education versed in Muhammadan or Hindu Law and in the Regulations passed by the British Government; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trust." This was the origin of the "profession" of Pleaders as recognised by the law and it is to be noted that the Pleaders were to be chosen from "*men*" of character and education and that they were to be Muhammadans or Hindus.

The Regulation by its various clauses provided for the appointment and selection of Pleaders.

Clause II. "The Sudder Dewanny Adawlat is empowered to appoint, from time to time, such a number of Pleaders of the Muhammadan or Hindu persuasion, as may appear to them necessary to plead the causes of the parties in suits in the Sudder Dewanny Adawlat, the Provincial Courts of Appeal and the Courts of Dewanny Adawlat in the several *zillaas* and the cities of Patna, Dacca and Murshidabad."

Clause V. "The Pleaders are to be selected from amongst the students in the Muhammadan College at Calcutta and the Hindu College at Benares, who may be qualified and be desirous of being admitted to plead in any of the Courts, if the Colleges shall not furnish a sufficient number of Pleaders, the Sudder Dewanny Adawlat is to admit any other persons, provided they be Muhammadans or Hindus, previously, however, ascertaining that they are men of good character and liberal education and giving a preference, in all cases, to persons of this description who have been bred to the study of the Hindu or Muhammadan Law."

Various Regulations were subsequently passed. To these I need not refer. In 1814 however, Regulation XXVII was made for the purpose of reducing into one Regulation with amendments and modifications the several rules which had been passed regarding the office of Vakil or native Pleader in the Courts of Civil Judicature.

"Whereas it has been deemed expedient to transfer to the Provincial Courts the control now exercised by the Sudder Dewanny Adawlat in the appointment and removal of Vakils or native Pleaders in the *zillah* and city Courts and in the Provincial Courts, and whereas the speedy adjustment of disputes may be facilitated by empowering the authorised Vakils to receive certain fees for legal opinions furnished by them and by vesting them with authority to act as arbitrators under the general Regulations, and whereas it will contribute to the public convenience to reduce into one Regulation, with amendments and modifications, the whole of the provisions which will be applicable to the office of Vakil or native Pleader, the following rules have been passed by the Governor-General in Council, to be in force from the 1st of February 1815 throughout the whole of the Provinces immediately subject to the Presidency of Fort William"

Clause 3 (1). "The Sudder Dewanny Adawlat and the several Provincial Courts are empowered to appoint to the office of Vakil in their respective Courts, such a number of persons being natives of India and duly qualified for the situation as may from time to time appear to them necessary."

Clause 3 (3). "In the nomination and appointment of persons to the office of Vakil the Judges of the Sudder Dawanny Adawlat of the several Provincial Courts, and of the *zilla* and City Courts, are restricted to individuals of the Hindu and Muhammadan persuasion and are required to give preference to candidates who may have been educated in any of the Muhammadan or Hindu Colleges established or supported by Government, provided that such candidates are in other respects duly qualified for the situation."

In the matter of REGINA GUHA.

By Act I of 1846 it was enacted that clause III, section 3, of Regulation XXVII of 1814 should be repealed and by section 4 it was provided as follows:—

Clause 4. "And it is hereby enacted that the office of Pleader in the Courts of the East Indian Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted a Pleader in any of those Courts unless he *have* obtained a certificate, in such manner as shall be directed by the Sudder Courts, that he is of good character and duly qualified for the office, any law or Regulation to the contrary notwithstanding."

By this clause the restriction that a Pleader must be a Muhammadan or a Hindu was removed and the office of Pleader was thrown open to all persons of whatever nation or religion.

It is to be noted that the word "persons" is used in the section, but from the context it is clear that *male* persons were referred to.

By Act XX of 1865 so much of Regulation XXVII of 1814 as had not already been repealed was thereby repealed and by section 4 it was provided as follows:—

"The High Court is hereby authorised and required, within six months after this Act shall take effect in the Territories in which such Court exercises jurisdiction, to make rules for the qualification, admission and enrolment of proper persons to be Pleaders and Muktears of the Courts in such territories for the fees to be paid for the examination, admission and enrolment of such persons and subject to the provisions hereinafter contained for the suspension, and dismissal of the Pleaders and Muktears so admitted and enrolled. The High Court may also from time to time vary and add to such rules."

By this section the High Court is the authority to make rules and the persons to be admitted are "proper persons," the same words as there used in the Legal Practitioners Act of 1879.

Section 5 provides as follows:—

"Except as hereinafter provided, no person shall appear, plead or act as a Pleader, or appear or act as a Muktear in any Court to which this Act extends, unless he shall have been admitted and enrolled and shall be otherwise duly qualified to practise as a Pleader or as a Muktear, as the case may be, pursuant to the provisions of this Act and unless he shall continue to be so qualified and enrolled at the time of his practising as a Pleader or Muktear as aforesaid: Provided that every person who at the time at which this Act shall come into operation in any part of British India shall be or shall be qualified to act as a Pleader in any Court in such part by virtue of any law, rule or order in force therein shall be entitled to be admitted and enrolled as a Pleader in the High Court pursuant to the provisions of this Act, without passing any examination but subject to the conditions of any certificate or diploma held by him as to the class of Courts in which such certificate or diploma authorises him to practise." It is evident from the language used that the Legislature contemplated the admission of male persons only as Pleaders. This is corroborated by the fact that although section 2 provides that words importing the singular shall include the plural, etc., and Pleader includes Vakil, there is no mention that words importing the masculine gender should include females.

In my judgment it is clear that the intention of the Legislature was to deal with a recognised existing profession, *viz.*, that of Pleaders which up to that time was constituted of men only, and to which men only could belong.

In 1868 the first General Clauses Act, already referred to, was passed and it was not retrospective.

In 1879 the Legal Practitioners Act was passed. It repealed Act XX of 1865 and it is the Act which is now applicable to this matter.

Reading the sections without reference to the General Clauses Act of 1868, they obviously contemplate the admission of a male person only: and the pre-existing disability of women to be admitted as Pleaders was not removed by that Act. The question remains, whether by reason of the application of the aforesaid provisions of the General Clauses Act to the Act of 1879 the Legislature intended to remove the *above mentioned* pre-existing disability.

The subject-matter of the legislation now under consideration was the long established and well recognised profession of Pleaders, which had consisted for over 80 years of men only, and in respect of which

In the matter of REGINA GUHA.

it was admitted that no woman had ever yet applied for admission as a Pleader.

It is true that the legislation of the past had been to some extent progressive, but only in the direction of removing the restrictions as to the qualifications of men.

The provisions of the 1879 Act, upon the matters which are material to this question, were practically a re-enactment of Act XX of 1865 and I cannot think that the Legislature in 1879 intended to make such a radical change in the constitution of the profession of Pleaders as would be caused by the admission of women, merely by the application to the 1879 Act of the provisions of the General Clauses Act of 1868. Further, having regard to the constitution of the profession of Pleaders, existing at the date of the passing of the 1879 Act and to the fact that the whole trend of legislation for a long time had been to confine the profession to men, in my judgment both the subject-matter of the legislation and the context are repugnant to a construction of the Act which would include females.

In my judgment, it could not be intended that such a disability as above mentioned should be removed by a mere interpretation clause. This opinion is confirmed by the decision in *Bebb* v. *Law Society* (1). There the disability arose from the Common Law of England, and it was held that the disability could not be removed, even though the Act which was under consideration, itself contained an interpretation clause similar to the one in the General Clauses Act, 1868.

In view of the above conclusion, it is not necessary to consider the question as to the applicability of the Common Law of England to this question. I need only mention the reference to it made by the learned Advocate-General, *viz.*, that the Common Law of England obtains in Calcutta and if this is to be taken as a material factor in the construction of the Legal Practitioners Act, 1879, the result might be that there would be a disability upon women in Calcutta and none in the *mofussil*, a result which could not have been intended by the Legislature.

The rules of the High Court in my judgment clearly contemplate the admission of men only as Pleaders in the Subordinate Courts and in view of the conclusion I have arrived at as to the construction of the Legal Practitioners Act of 1879 the rules were made in accordance with, and for the purpose of carrying out the intention of, that Act and are not *ultra vires*.

In my judgment, therefore, the answer to be given to the application must be that as the law now stands Miss Regina Guha is not entitled to be enrolled as a Pleader of the subordinate Courts.

We have only to determine what the law is, and if there is to be any change, it is one which must be effected by the Legislature.

MOOKERJEE, J.—This is an application by Miss Regina Guha for enrolment as a Pleader in one of the Courts subordinate to this Court, under the rules framed in conformity with section 6 of the Legal Practitioners Act, 1879. As this is the first instance of an application by a lady for enrolment as a Pleader, her application has been heard by a Special Bench for judicial determination of the question, whether the Legal Practitioners Act contemplated women practitioners. Three questions, consequently, require consideration, namely, *first*, does the Legal Practitioners Act contemplate women practitioners; *secondly*, if the Legal Practitioners Act contemplates women practitioners, has the High Court by its rules excluded them; and *thirdly*, if the rules exclude them, are the rules *ultra vires*. The applicant contends that as she has been admitted to the Degree of Bachelor of Law by the University of Calcutta she is qualified for enrolment under the rules, although the rules refer in terms to male persons. She relies upon the well-known principle of construction embodied in section 13 of the General Clauses Act, 1897, that "in all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females". A provision similar to this, it may be observed, found a place in section 2, clause (1), of the General Clauses Act, 1868: "In this Act, and in all Acts made by the Governor-General of India in Council, *after this Act shall have come into*

operation, unless there be something repugnant to the subject or context, words importing the masculine gender shall be taken to include females." This rule of interpretation is not of direct assistance to the petitioner, unless its operation be extended to the construction of statutory rules. Assume that such extended application is legitimate, still the question remains, whether there is something repugnant in the subject so as to exclude the proposed interpretation. There is thus no escape from the problem, does the Legal Practitioners Act contemplate the existence of women practitioners?

The preamble to the Legal Practitioners Act as also the language used in section 6 make it plain, what indeed is well known, that the profession of Pleaders was not created by the Legal Practitioners Act. The earliest Regulation on the subject, passed by the Governor-General in Council as a Legislative body, was made on the 1st May 1793 and is known as "A Regulation for the appointment of Vakils or native Pleaders in the Courts of Civil Judicature in the Provinces of Bengal, Behar and Orissa" (Regulation VII of 1793). The preamble shows that even before the Regulation was made, there was a profession of Vakils in the Courts of Civil Judicature in the British Territories in Bengal, "*Men*, who followed the business of a Vakil to obtain a livelihood and appeared in the Courts of Justice or wherever the concerns of their constituents required their attendance." This is made manifest by an examination of the Regulations for the Administration of Justice made by the Governor-General in Council between the 21st August 1772 and the 23rd November 1792 and collected by James Edward Colebrooke in his Supplement to the Digest of the Regulations and Laws (1807); to take one illustration only, reference may be made to sections 46 and 84 of the Regulation for the Administration of Justice passed in Council on the 5th July 1781; these recognize the existence of Vakils, and the context shows that *men* alone at that time constituted the profession.

The preamble to Regulation VII of 1793 describes in vivid terms the mode in which these men discharged their duties, their ignorance of the Laws and Regulations, their lack of regularity and diligence, and their disregard of the interests of their clients. The preamble then proceeds to formulate the necessity for the constitution of a distinct profession and the advantages to the public likely to result from the adoption of such a step: "it is, therefore, indispensably necessary for enabling the Courts duly to administer and the suitors to obtain justice, that the pleading of causes should be made a distinct profession; and that no persons should be admitted to plead in the Courts but *men* of character and education versed in the Muhammadan or Hindu Law and in the Regulations passed by the British Government; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts." Later on, the preamble states that in order that "*men* of education and respectable character may be solicitous to be admitted as Pleaders in the Courts, their appointments ought to be secured to them as long as they conform to the Regulations under which they act." It is beyond controversy, as appears from the language used in the preamble to the Regulation and throughout the various provisions thereof, that the Indian Legislature in 1793 contemplated the admission of *men* alone as what is described in the Regulation as "Public Pleaders." This was obviously natural, the Legislators themselves had been brought up in a system which knew not women Legal Practitioners and the circumstances of the country intended to be benefited by their legislation rendered it impossible for them to imagine that women could appear in Courts of Justice as "Public Pleaders." This Regulation was repealed and replaced by Regulation XXVII of 1814 passed on the 29th November 1814 "for reducing into one Regulation, with amendments and modifications, the several rules which have been passed regarding the office of Vakil or native Pleader in the Courts of Civil Judicature." The preamble enumerates the changes which were intended to be effected in the pre existing Law on the subject, and it is sufficient for our

In the matter of REGINA GUHA.

present purpose to state that there is not the remotest indication of an intention to effect a departure of so fundamental a character as the admission of women into the ranks of Legal Practitioners. On the other hand, we find that throughout the Regulation, language is repeatedly used which is appropriate to *men* only as Legal Practitioners (see, for instance, sections 4, 5, 10, 11, 12, 13, 14, 18, 20, 21, 22, 30, 35, 37). This Regulation, however, introduced by section 3, sub-section 3, the restriction that Pleaders were to be either of the Hindu or Muhammadan religion and that preference was to be given to candidates who might have been educated in any of the Muhammadan or Hindu Colleges established or supported by Government. This restriction was removed by an Act passed on the 7th January 1846 (Act I of 1846 , the fourth section whereof laid down that the office of Pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted as a Pleader in any of those Courts, unless *he* have obtained a certificate, in such manner as shall be directed by the Sudder Courts, that *he* is of good character and duly qualified for the office. Here again, there is no indication that women might be Legal Practitioners; while section 12 like section 4 uses language appropriate only to *men* practitioners. Before I pass on to the next stage, I may mention that the history of the institution of a legal profession in the Courts of the East India Company is lucidly set out in the great work on the Bengal Regulations by John Herbert Harington, for many years Chief Judge of the Sudder Court (See Volume I, First Edition, page 1471, which states the law as in 1809, and Volume I, 2nd Edition, page 148, which states the law as it stood in 1821). The next legislation on the subject was in 1865, when Act XX of 1865 came into force on the 10th April 1865. Regulation XXVII of 1814, in so far as it had not been already repealed, as also Act I of 1846, Act XVIII of 1852 and Act XX of 1853 were repealed; it may be stated parenthetically that the language used in those two Acts shows that the Legislature contemplated *men* alone as Legal Practitioners. There is no indication whatever in Act XX of 1865 that the Legislature had in view a departure from what had unquestionably been the Law from before 1793. On the other hand, section 5, and the form of certificate to be granted to Pleaders as contained in the Second Schedule, make it manifest that in 1865, as in 1793, the Legislature contemplated *men* alone as Legal Practitioners. It is further worthy of note that this Act contains an interpretation clause; section 2 enacts that, unless there is something repugnant or inconsistent in the subject or context, words in the Act importing the singular number include the plural and words importing the plural number include the singular. This corresponds with what was subsequently enacted in section 2 (2) of the General Clauses Act (I of 1868); but we miss in Act XX of 1865 what does find a place in section 2 (1) of Act I of 1868, *namely*, the provision that words importing the masculine gender shall be taken to include females. The omission becomes significant, when we find that in the Indian Penal Code (Act XLV of 1860), enacted on the 6th October 1860, the Legislature had in section 8 stated that the pronoun "he" and its derivatives are used of any person, whether male or female. The inference is legitimate that if the Legislature in 1865 had contemplated the admission of women as Legal Practitioners, they would have inserted in the interpretation clause a provision about gender as they did in 1860 in the case of the Indian Penal Code. It is not as if they were oblivious of this point. Take, for instance, Act XI of 1865 (Mufassil Small Cause Courts Act), which came into force on the 15th March 865, that is less than a month before the Pleaders Act, 1865, came into operation we find in the interpretation clause (section 4) a provision that "words importing the masculine gender include females." Take again Act X of 1865 (the Indian Succession Act), which came into force on the 15th March 1865, that is, after the Small Cause Courts Act but before the Pleaders Act; we find in the interpretation clause (section 3) a provision that words importing the male sex include females. This occurs along with a provision about number which re-appears in the Small Cause Courts Act and in the Pleaders Act; but the provision about gender,

as we have seen, re-appears in the Small Cause Courts Act, but not in the Pleaders Act. It thus looks as if the provision about gender had been deliberately omitted from the Pleaders Act. The contrast is emphasised when we take another Act passed a few days later on the 17th April 1865, namely, Act XXIII of 1865 (Punjab Chief Court of Judicature Act), where, in the interpretation clause (section 1), we find provisions about both number and gender. The position, then, is that in 1865, when there was no interpretation Statute, when the Legislature used to insert interpretation clauses in various Acts, we find that in Acts made immediately before and after the Pleaders Act, words indicative of the male sex are expressly stated to include the female sex, but there is no such provision in the Pleaders Act: the inference seems almost conclusive that the omission was intentional, and this conclusion is substantially strengthened when we find that from 1772 onwards men alone as Legal Practitioners were in the contemplation of the Legislators and although the Pleaders Act was amended on the 22nd December 1865 by Act XXIX of 1865, no change was made in this direction. The Pleaders Act, 1865, was, as we have already seen, repealed by the Legal Practitioners Act, 1879, which was passed on the 29th October 1879. Neither the preamble nor the provisions of any of the sections of the Act afford any indication of an intention on the part of the Legislature to widen the profession of Pleaders by the admission of women into its ranks. I do not overlook the fact that the Act of Incorporation of the University of Calcutta (Act II of 1857), which came into force on the 24th January 1857, authorised the Senate to confer degrees in various Faculties inclusive of the Faculty of Law and that notwithstanding the absence of an interpretation clause, the Act of Incorporation has been interpreted to authorise the University to grant degrees to men as well as to women in all Faculties. There may obviously be weighty reasons why in the University Act words importing the masculine gender may be taken to include females, while in the Pleaders Act no such intention can reasonably be attributed to the Legislature; the subject-matters of the two Statutes and the historical antecedents thereof are fundamentally different. For the reasons stated, I see no escape from the position that the Legislature in this country never contemplated the admission of women to the rank of Legal Practitioners.

Reference was made in the course of argument to the fact that under the Common Law of England, women were under a disability to become attorneys or solicitors, and that the disability continued, notwithstanding the interpretation clause (section 48) of the Solicitors Act, 1843, which provides that words importing the masculine gender shall extend to a female, *Bebb* v. *Law Society* (1). The decision just mentioned, no doubt, does not directly assist us in the solution of the question we have to determine; but I think it furnishes valuable aid as to the mode in which the problem should be approached. Cozens Hardy, M. R., referred to Lord Coke (Co. Litt., 128a) to show that women were not allowed to be attorneys, and Lord Coke in his turn relied upon the Mirror of Justices (Book II, Chapter 31) (Selden Society's Edition, page 88; Robinson's Edition, page 137) to show that "the law will not suffer women to be attorneys." The Master of the Rolls then observed that no woman had ever been an attorney-at-law or had applied to be or attempted to be an attorney-at-law. The Solicitors Act, 1843, did not in express terms destroy a pre-existing disability or confer a fresh and independent right; consequently notwithstanding the interpretation clause in the Solicitors Act, 1843, which had to be construed with the previous legislation and the Common Law, it could not be successfully maintained that the Legislature had departed from what had been the constant practice and inveterate usage. [See also the judgment of Willis, J., in *Chorlton* v. *Lings* (3), Co. Litt., 119 (127); 3 Blackstone's Commentary 362; 4 Blackstone's Commentary 395]. The line of argument which was unsuccessfully adopted in the case of *Bebb* v. *Law Society* (1) has sometimes found favour in the Courts of the United States; but has been on other occasions emphatically repudiated. It is not necessary for my present purpose to review in detail the conflicting principles applied in the different Courts of the United States in

(3) 4 C. P. 374 at. p. 390; 38 L. J. C. P. 25; 19 L. T. 534; 17 W. R. 284; 1 Hopw. & C. 1.

the determination of the question; but an examination of their decisions, which are by no means harmonious, discloses that the same difficulty has been felt there as elsewhere as to the inference properly deducible from the circumstance that women have not hitherto entered the ranks of the legal profession. In favour of allowing women to practise law under old Statutes which mentioned men only, the Courts have reasoned, *first*, that every word importing the masculine gender only may extend to and be applied to females [*In re Thomas* (4)]; *secondly*, that Statutes, whenever they might have been passed, should be construed as if they were recently enacted and not with reference to what was in the mind of the Legislature at the time of their enactment [*In re Hall* (5)]; *thirdly*, that all Statutes are to be construed, as far as possible, in favour of equality of rights, and that all restrictions upon human liberty and all claims for special privileges are to be regarded as having a presumption of law against them [*In re Leach* (6), *In re Hall* (5)]; and *fourthly*, that the status of women has, in the eye of law and in popular acceptation, so changed as not only to permit their admission to the Bar but practically to demand it. [*In re Thomas* (4), *In re Hall* (5)]. In refusing to admit women to practise law, the reasoning employed is substantially the opposite of that which favours their admission to the Bar, namely, *first*, that words importing the masculine gender cannot be read so as to include women, unless the subject-matter and the context justify such a construction [*In re Maddox* (7)]; *secondly*, that as the Legislature never contemplated the admission of women, as indicated by the history of the profession, words of the masculine gender in the Statutes should not be interpreted to include women [*In re Robinson* (8), *Re Leonard* (9), *In re Goodell* (10)]; *thirdly*, that an extended interpretation should not be put on Statutes, because women are generally unfitted for the duties of the legal profession [*In re Bradwell* (11), *In re Lockwood* (12)]; and *fourthly*, that if the status of women has altered in the eye of law and in popular acceptation, the proper remedy is legislation and not an alteration of the law in the disguise of judicial exposition of the existing law [*In re Maddox* (7), *In re Robinson* (8); *In re Leonard* (9), *In re Bradwell* (11), *Ex parte Griffin* (13)]. The most powerful opinion in the Courts of the United States against the construction of a Statute in terms applicable to men only, so as to confer a new privilege upon women, is that of Chief Justice Gray in *In re Robinson* (8), where he emphasised the impropriety of an extended construction of a Statute in the absence of all indications of an intention on the part of the Legislature to reverse the policy of their predecessors or to introduce a fundamental change in long established principles of law. To the same effect are the weighty words of Lawrence, J., in *In re Bradwell* (11): "Female attorneys-at-law have been unknown in England, and a proposition that a woman should enter the Courts of Westminster Hall in that capacity or as a Barrister would have created hardly less astonishment than one that she should ascend the Bench of Bishops or be elected to a seat in the House of Commons. If it is maintained that a change of so radical a character has been effected in the law it must be shown that there is express legislation to that effect" [see also *Myra Bradwell* v. *State of Illinois* (14) and *In re Lockwood* (15), where the Supreme Court of the United States held that in view of the familiar history of the constitution of the profession, the term "person" or "citizen" in a Statute relating to the enrolment of attorneys and counsellors-at-law could not be deemed to include a woman]. The question was elaborately discussed recently by a Full Bench of the Supreme Court of New Burnswick in the case of *Re French* (16), and the Court came unanimously to the conclusion that statutory authority in express terms is neces-

(4) 16 Colo. 441; 13 L. R. A. 538.
(5) 50 Conn. 131; 47 Am. Rep. 625.
(6) 134 Ind. 665 at p. 671; 21 L. R. A. 701.
(7) (1901) 93 Md 727; 55 L. R. A. 298.
(8) 131 Mass. 376; 41 Am. Rep. 239.
(9) 12. Oreg. 93; 53 Am. Rep. 323.
(10) 39 Wis. 232; 20 Am. Rep. 42.
(11) 55 Ill. 535 at p. 539.
(12) V. U. S. 9 Ct. C. 346.
(13) 71 S. W. 746.
(14) 16 Wallace. 130; 21 L. E. 442
(15) 154 U. S. 116; 38 L. E. 116.
(16) (1905) 37 N. Bruns. 359.

sary to enable a woman to be admitted to the ranks of the profession; in other words, that the intention of the Legislature to make a radical change must be made out beyond doubt.

It will be noticed that Swinfen Eadey, L. J., in his judgment in the case of *Bebb* v. *Law Society* (1) applied to the matter before him the following passage from the speech of Lord Loreburn, L. C., in *Nairn* v. *St. Andrews University* (17):

"Not only has it been the constant tradition, alike of all the three kingdoms, *but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times down to this day. Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of Law in probing the origin of so inveterate an usage.*"

It is interesting to investigate the matter from the point of view thus indicated. We have seen that ever since the foundation of British Courts in this country in 1772, women have never been admitted to the rank of legal practitioners. It is by no means easy to determine with absolute certainty whether women were recognised as legal practitioners in Hindu or Muhammadan Courts in this country. As regards Hindu Courts, it is clear that the legal profession existed in the seventh century of the Christian era, when Asahaya wrote his commentary on the Institutes of Narada (see the edition of Narada Smriti, edited by Joly, for the Bibliotheca Indica Series, Book I, verse 6, page 48; Sacred Books of the East series, volume XXXIII, page 43; see also Introduction, section II, verse 22, S. B. E. Volume XXXIII, page 29). To the same effect are texts of Vrihaspati, Katyayana and Vyasa quoted by Raghunandan in his Vyavahara Tatwa. It is also fairly clear from Buddhistic books that the profession of lawyers existed in the first century before the Christian era; they were known as "sellers of law", "or traders in law", who "explained and re-explained, argued and re-argued" [Milinda Panho, Book V, 23, Trenckner's Edition, pages 344, 345; translation by Rhys Davids, Sacred Book of the East, Volume XXXVI, pages 236-238]. There are also references to Pleaders in the Dhammathats or the Laws of Manu [Richardson's Laws of Manu page 50]. Similarly, the Sukraniti (IV, 5, 10, 13, 26, 80—82) mentions Pleaders. It is remarkable that wherever Pleaders or Advocates are so mentioned the reference is to men and not to women. I cannot find any instance where in Hindu or Buddhistic times the jurists contemplated the possibility of women as members of the legal profession. As regards the Courts in Muhammadan times in this country, I have not been able to obtain any information, but I am not unmindful that there are indications that the legal position of women under the Islamic Law, as administered in countries beyond India, was based on very advanced conceptions. Thus, Syed Ameer Ali observes, in his Lecture on the Legal Position of Women in Islam (page 21), that Abu Hanifa, the founder of the Hanfia School of Musalman Law had declared in the eighth century of the Christian era, that a woman was entitled to hold the office of Judge or Qadi equally with a man. A'l Suyuti in his History of the Caliphs (Tarikh-ul-Khulafa, page 391) states that Shaab or Shaghab, the mother of the Abbasid Caliph-al-Muqtadir (295 A. H.=907 A. D.) herself presided at the High Court of Appeal, listened to applications surrounded by Qadis and Dignitaries of State and issued edicts in her own writing. In the celebrated Maqamat or Assemblies of Al Hariri (Assembly IX tr. Chenery, and Assembly XL. tr. Steingass, both in the Oriental Translation Fund, New Series), we find instances of women litigants appearing before Qadis and holding their own against their husbands or other male adversaries (see also Kitab-ul-Adhkeya of Ibn al-Jouzi published in Cairo, which records many instances of women litigants appearing before Caliph Omar, Abu Hanifa, and other eminent doctors of Muhammadan Jurisprudence). Even in Islam, however, there have been rifts and the author of the well known work Al-Ashbah Wa'l-Nazair (Analogies and Precedents, Lucknow Edition, page 507) urges that women should not be invested with the office of Qadi, though it may be lawful and valid for her to hold the appointment, excepting matters of criminal law. The substance of the matter is that no trace of women legal practitioners can be found in Hindu or

(17) (1909) A. C. 147 at p. 160; 78 L. J. P. C. 54; 100 L. T. 96; 53 S. J. 161; 25 T. L. R. 100.

Buddhistic times, and though the Islamic Law may have tolerated the appearance of women litigants in Court and possibly the appointment of women as Judges, there is no trace of women legal practitioners in the Courts of this country during the Muhammadan period. When the British Courts were first constituted in 1772, the rulers found men alone as Legal Practitioners, and when in 1793, for reasons assigned in the preamble to Regulation VII, the profession was, as it were, re-organised and given a recognised legal status, the Legislators contemplated men alone as members of the profession. There has never been a departure from that policy. It is impossible for us to hold that, on the law as it stands, women are entitled to be admitted to the ranks of the legal profession; when I say this, I do not forget that our duty as Judges of this Court is strictly limited to a declaration of the Law as it is; whether any change in that Law would be wise or expedient is a question, not for the Court, but for the Legislature. In my opinion, there is no possible escape from the conclusion that the application must be refused.

CHITTY, J.—This is an application made by Miss Regina Guha under rule 18 of the rules framed by this Court under section 6 of the Legal Practitioners Act (XVIII of 1879), praying that she may be enrolled as a Pleader and permitted to practise as such in the subordinate Courts of the 24-Perganas. It is conceded that she possesses the necessary qualifications required by the rules and that she has paid the fees prescribed by rule 27. The only question is whether, as the law and our rules now stand, a person of the female sex can be admitted as a Pleader. We are not here to say what we think the law ought to be, but what it is. Counsel for the petitioner based his argument on the interpretation to be placed on the word "person" and the pronouns following it in the Legal Practitioners Act of 1879. By section 2 (1) of the General Clauses Act, I of 1868, which governed the Act of 1879, "words importing the masculine gender shall be taken to include females." It was argued that by virtue of this provision the word "person" in the Act of 1879 must be taken to mean a person of either sex, the pronouns following and referring to that word "he," "him", "his" being read as "he" or "she," "him" or "her," "his" or "hers," and so forth. The same argument was used without success in the case of *Bebb* v. *Law Society* (1), where a lady in England was desirous of being admitted as a Solicitor. Section 48 of the Act of 1843, under which she applied, contained a similar provision. It was, however, pointed out that that section, like section 2 of the General Clauses Act of 1868, is only to be employed, where there is nothing repugnant in the subject or context. It was held in that case that, inasmuch as there had never been a solicitor of the female sex, the Act of 1843, which neither created a new right nor removed an existing disability, did not contemplate such a contingency. So in the case before us the Legal Practitioners Act of 1879 was not framed to create a new profession but to regulate one which had been in existence for many years. The first Regulation which we find dealing with Pleaders' profession is Regulation VII of 1793. This described them as "men" and provided that they must be Hindus or Muhammadans. Successive Regulations and Acts were passed, in which no doubt the class of persons eligible was gradually widened and enlarged, but in which there was never any question as to the sex of the profession. Thus we find Regulation XXVII of 1814, Act I of 1846, Act XV II of 1852, and Act XX of 1865 all dealing with the subject. Before the passing of the General Clauses Act of 1868 it was necessary to have a special section providing that words importing the masculine gender should be taken to include females (*e. g.*, Indian Penal Code Act, XLV of 1860, section 8). No such section is to be found in any of the Regulations or Acts above referred to. Although in India in the matter of Pleaders one may not be able to go back so far as they did in England in the matter of solicitors, we find that the profession of Pleaders has been in existence for over 120 years as a profession, and that never during that period did any woman become enrolled, or, so far as we know, apply to be enrolled, as a Pleader. We may, therefore, conclude that in passing the Legal Practitioners Act

of 1879 the Legislature did not contemplate the enrolment of Pleaders of the female sex, and to read the Act to include females would be certainly repugnant to the subject. I feel some doubt whether the General Clauses Act can apply to rules framed by this Court. No doubt in framing such rules under an Act of the Legislature the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. But this does not mean that in framing those rules the Court must be taken to have framed them for women as well as men. The rules were framed to meet existing circumstances, that is to say, a profession of Pleaders consisting entirely of men, and cannot by implication be read as including Pleaders of the opposite sex. It has not been, and indeed could not successfully be, argued that the rules as they stand are *ultra vires*. As the Law stands I am of opinion that a woman cannot be enrolled as a Pleader. I, therefore, agree that the application should be refused.

TEUNON, J:—I agree in the judgment that has been delivered by the learned Chief Justice and have nothing further to add.

CHAUDHURI, J.—I also agree in the judgment delivered by the learned Chief Justice and have nothing further to add.

Application rejected.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No 866 OF 1916.

February 23, 1916.

Present:—Sir Donald Johnstone, KT., Chief Judge.

DAYA RAM AND OTHERS—DEFENDANTS—PETITIONERS

versus

Musammat JATTI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 2—Judgment written and pronounced by Judge after transfer, validity of.

Under Order XX, rule 2, of the Code of Civil Procedure a judgment written and pronounced by a Judge after his transfer is not illegal. [p. 938, col. 2.]

Girjashankar Narsiram v. *Gopalji Gulabbhai*, 30 B. 241; 7 Bom. L. R. 951; *Sundar Kuar* v. *Chandreshwar Prasad Narain Singh*, 34 C. 293; 11 C. W. N. 501 referred to.

Civil revision from the order of the Senior Subordinate Judge, Amritsar, dated the 2nd October 1915.

Mr. *Nand Lal*, for the Petitioners.

Mr. *Todar Mal*, for the Respondent.

JUDGMENT.—In this case a revision has been filed in which the only point which requires discussion is, whether the order under revision having been delivered by Mr. Harsukh Rai as Senior Subordinate Judge of Amritsar on the 2nd October 1915, is a nullity because, as is alleged, Mr. Harsukh Rai ceased to be Senior Subordinate Judge on the forenoon of that day. It is alleged that the order was delivered on the afternoon of the 2nd October. Efforts have been made to discover exactly when Mr. Harsukh Rai gave over charge to Diwan Som Nath, and all I can find is that Diwan Som Nath took over charge of the office of Senior Subordinate Judge on the forenoon of the 2nd October. I am asked to assume from this that Mr. Harsukh Rai was no longer Senior Subordinate Judge after midday of that day. Of course he may have ceased to be Senior Subordinate Judge some time previously, but there can be no doubt that the case was heard by Mr. Harsukh Rai, and in these circumstances, under Order XX, rule 2 of the Civil Procedure Code, interpreted in the manner adopted in *Girjashankar Narsiram* v. *Gopalji Gulabbhai* (1) and *Sundar Kuar* v. *Chandreshwar Prasad Narain Singh* (2) I must hold that the order complained of is not illegal because it may have been written by Mr. Harsukh Rai after he had been transferred.

No doubt in those two rulings the judgments were written by the transferred officers and delivered by the new incumbents, while Mr. Harsukh Rai himself appears to have actually pronounced this order, but I do not think that this really makes any difference. What the Legislature intended evidently was that an order passed by an officer, who had heard the case and had given his mind to the matter, is no less legal because it was written after he gave over charge of his office.

(1) 30 B. 241; 7 Bom. L. R. 951.
(2) 34 C. 293; 11 C. W. N. 501.

For these reasons I dismiss the revision with costs.

Revision dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 254 OF 1915.

August 9, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

A. S. AIYA NADAR—APPELLANT

versus

TENAMMAL BY GUARDIAN SANGANNA NADAR, AND ANOTHER—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of—Guardian of incapacitated person, whether can be appointed Receiver—Appellate Court, powers of, to interfere with appointment once made.

It is not an inflexible rule of law that the guardian of an incapacitated person should not be appointed Receiver to his estate The whole circumstances of the particular case must be looked at, and an Appellate Court will not in any case interfere lightly with an appointment, unless a general principle can be shown to have been infringed.

Stone v. *Wishart*, 2 Madd. 64; 56 E. R. 258; *Taylor* v. *Oldham*, (1882) 1 Jac. 527; 37 E. R 949; *Rukmani Ammal* v. *Advocate-General of Madras*, 31 Ind. Cas. 908; 1916) 1 M. W. N. 10; *Cookes* v. *Cookes*, 2 De G. J. & S. 526 at p. 530; 46 E. R. 479, referred to.

Appeal against the order of the Court of the Subordinate Judge, Ramnad at Madura, in I. A. Nos. 379 and 403 of 1915 (in Original Suit No. 80 of 1915).

Mr. *S. Srinivasa Aiyangar*, Advocate General (with him Messrs. *T. R. Venkatarama Sastri*, *K. R. Guruswami Aiyar* and *A. Swaminatha Aiyar*), for the Appellant.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondents.

JUDGMENT.—The only objection to the lower Court's order, which, in our opinion, merits detailed reference, is that 2nd respondent is ineligible for the Receivership, because he is guardian of the incapacitated 1st defendant.

No doubt in some English cases, *Stone* v. *Wishart* (1) and incidentally in *Taylor* v. *Oldham* (2), the proposed Receiver was held disqualified for that reason. But there is, so far as we have been shown, no inflexible rule; and several instances of the contrary view being taken are referred to at page 951, Seton on Judgments and Orders, (7th Edition, Volume II). In *Rukmani Ammal* v. *Advocate-General of Madras* (3) a Bench of this Court refused, independently of the English authorities, to recognise the rule as binding. The whole circumstances of the particular case must be looked at, and the Appellate Court will not in any case interfere lightly with an appointment, unless a general principle can be shown to have been infringed. *Cookes* v. *Cookes* (4).

Looking at the circumstances, we do not think that reason has been shown for interference. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

V. R. P.

(1) 2 Madd 64; 56 E. R. 258.

(2) (1882) 1 Jac. 527; 37 E. R. 949.

(3) 31 Ind. Cas. 908; (1916) 1 M. W. N. 10.

(4) 2 De G. J. & S. 526 at p. 530; 46 E. R. 479.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

June 26, 1916.

Present:—Lord Chancellor, Lord Atkinson and Sir John Edge.

Musammat RADHA KUNWAR—APPELLANT

versus

Thakur REOTI SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Privy Council, appeal to—Certificate of value by High Court—Certificate, whether conclusive as to value when based on wrong principle—Mortgage, suit for sale under—Adverse claimants—Appeal restricted to portion of subject-matter—Valuation, principle of—Causes of action, misjoinder of.

In a suit for sale under a mortgage, which was valued at Rs. 38,000, the plaintiff impleaded as defendants certain persons who claimed adversely to the mortgagor. The High Court found that one of these claimants was not entitled to the portion of the mortgaged property to which he set up a claim and that the entire property was liable for the mortgage.

The aggrieved party applied for a certificate for leave to appeal to the Privy Council. In granting

the certificate the High Court held that the value of the proposed appeal was not the value of the property sought to be exempted from the mortgage but the amount of the decree which imposed on the property a liability for Rs 38,000:—

Held, (1) that the High Court erred in confusing the value of the mortgage with the value of the land and that as between the respondent (who was seeking to enforce his mortgage) and the appellant, the subject-matter of the suit was not Rs 38,000, but was simply the value of the property which the appellant claimed; [p. 940, col. 2.]

(2) that the certificate of the High Court was not conclusive as to value, where, on the face of it, it was based on a wrong principle; [p. 940, col. 2.]

(3) that the joinder, in a mortgage suit, of a claim to obtain a declaration of right against an adverse claimant with the enforcement of rights under a mortgage was irregular. [p. 940, col. 2.]

Appeal from a judgment and decree of the High Court, Allahabad, dated March 12th, 1912, varying a judgment and decree of the Subordinate Judge of Aligarh, dated June 8th, 1910.

FACTS of the case are sufficiently set forth in their Lordships' judgment.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Dube*), for the Respondent, raised a preliminary objection as to the value of the suit being under Rs. 10,000 and, therefore, the judgment of the High Court being not appealable to the Privy Council.

[LORD CHANCELLOR: You apply for foreclosure, but you bring before the Court a thing which has nothing to do with mortgage.]

Section 85 of the Transfer of Property Act lays down that the action must be brought against one for whose non-joinder as a party the suit might be dismissed. No objection was taken either in the High Court or at the Privy Council.

[LORD CHANCELLOR: You could join nothing with it without leave of the Court, but what you joined in it was a totally different thing in a claim against another mortgagor. The suit was not properly constituted].

There was misjoinder of the causes of action, but section 99 covered that.

[LORD CHANCELLOR: You ought to have said that you had a claim against one which had nothing to do with mortgage.

[LORD CHANCELLOR: Is it or is it not incumbent on appellant to show that value of suit is Rs. 10,000? I think it is.]

Reference was made to *Banarsi Prasad* v. *Kashi Krishna Narain* (1).

(1) 28 I. A. 11; 23 A. 227 (P. C.); 5 C. W. N. 193.

Sir *W. Garth*, in reply, argued that as the value of two *biswas* was not ascertained the appeal should be remitted to the High Court for ascertainment of the value.

JUDGMENT.

LORD CHANCELLOR.—It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense, to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these: In 1884 a mortgage was executed of certain property for a sum of Rs. 2,000 with interest at 12 per cent. On the 30th November 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was Rs. 38,494 and they asked for an order for payment of that sum against the defendants, and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors, but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

What followed was this: The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to four *biswas* of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good the mortgagor would have completely failed, so far as her share of the estate was concerned: if it had been held that her claim was bad she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th June 1909, a decree was made by the Subordinate Judge, in which he declared that the appellant was entitled to

one-half of the four *biswas* which had been set up as her original claim. From that decree an appeal was taken to the High Court, and on the 14th November 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim, and as to one-half there were differing judgments. The appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgment of the High Court, and for that purpose it was essential that she should satisfy the condition of section 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, "and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

Upon the appellant's application for a certificate that the value of the subject-matter exceeded the Rs. 10,000, there appear to have been arguments before the High Court, and a certificate has been given in her favour. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

Their Lordships think that the respondent's contention in this respect is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the two *biswas*, while the appellant asserted that it related to the whole subject-matter of the suit, which was Rs. 38,000. This latter argument was enforced by suggesting that if the appellant's case failed the mortgage would operate over the whole of the property, and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage-debt; that as the mortgage-debt affected equally every part of the property subject to the original mortgage, it affected the whole of those two *biswas*, and the subject-matter of the dispute, therefore, was Rs. 38,000. This contention prevailed before the High Court, and they state in terms that the decree which was the subject of appeal, had imposed on the property a liability for Rs. 38,000 and that, in consequence, the value of the subject-matter of the appeal exceeded the necessary prescribed sum.

Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject-matter of the suit was not Rs. 38,000. The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage, nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

Their Lordships think that the subject-matter of this appeal is nothing but the two *biswas* to which the Subordinate Judge found that the appellant was entitled.

Then Sir William Garth urges that, in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those two *biswas* would support the value of Rs. 10,000 and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those two *biswas* exceeded Rs. 10,000—a perfectly simple and straightforward thing to do—all this difficulty as

between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgment of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the two *biswas*, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage-debt. It was the latter contention which the High Court wrongly adopted.

Their Lordships will, therefore, humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant:- Mr. *Douglas Grant.*

Solicitors for the Respondent: Messrs. *Barrow, Rogers* and *Nevill.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 38 AND 50 OF 1912.

December 16, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

THE MERCANTILE BANK OF INDIA, LTD., MADRAS AND OTHERS—APPELLANTS

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 57—Notice to creditor of intention to suspend payment, what amounts to—Inference—Act of bankruptcy—Transaction between creditor and insolvent after notice, effect of—Bona fides, *whether necessary under s 57—English decisions, value of.*

An intimation to a creditor that a debtor is insolvent is not an act of insolvency. But where the intimation is expressed in such a manner as to lead to the inference that the debtor had suspended or is about to suspend payment, it is an act of insolvency. It is a question of inference from the terms of the notice in each particular case. [p. 947, col. 1.]

Clough v. *Samuel*, (1905) A. C. 442 at p. 446; 74 L. J. K. B. 918; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Manson, 347, referred to.

Though the protection afforded to a transaction with an insolvent under section 57 of the Presidency Towns Insolvency Act is dependent only on the creditors not having notice of the presentation of the insolvency petition, and not, as under the English Law, of any available act of bankruptcy, a creditor who deals with the debtor with the knowledge that he had committed such an act does not act *bona fide* and is not entitled to the benefit of the section. [p. 948, col. 2.]

Under section 57, the question is not narrowed down to a consideration of whether the transaction is a real transaction, and if so, whether it is protected by the words of the section. The Court is bound to consider whether a transaction is contrary to the policy of the Bankruptcy Law, although it does not come within the four corners of any particular section. [p. 948, col. 2; p. 949, col. 1.]

Wright, In re, Arnold, Ex parte, (1876) 3 Ch. D. 70; 45 L. J Bk. 130; 35 L. T. 21; 24 W. R. 97; *In re Slobodinsky, Ex parte Moore*, (1903) 2 K. B. 517; 72 L. J. K. B. 883; 89 L. T. 190; 52 W. R. 156; 10 Manson, 341; 19 T. L. R. 616, 65 ; *In re Jukes, Ex parte Official Receiver*, 1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W R. 560; 9 Manson, 249; *Shears* v. *Goddard*, (1896) 1 Q. B. 406; 74 L. T. 128; 65 L. J. Q. B. 344; 44 W. R. 402; 3 Manson, 24; *In re Badham, Ex parte Palmer*, (1876) 10 Morrell, 252; 5 R 521; 69 L. T. 356; *In re Dunaklay, Ex parte Waller*, (1905) 2 K. B. 683; 74 L. J. K. B 963; 93 L. T 248; 54 W. R. 171; 12 Manson, 384; 21 T. L. R. 707, referred to.

When an Act of the Indian Legislature is to be construed which in many instances is taken word for word from an English Act and a branch of Law is to be dealt with which is essentially English Law, the greatest respect must be paid to the decisions of the English Court of Appeal, though they may not be actually binding on the Indian Courts. [p. 948, col. 2.]

The Solicitor of *V* wrote to the Mercantile Bank, one of *V*'s creditors, that *V* was in insolvent circumstances and warned the Bank to remove certain goods lying in *V*'s godown, and the debtor gave them a letter of lien to secure past and future advances and overdrafts. The Bank, thereupon, took possession of the goods and put their board on the godown. The next day *V* filed his petition in insolvency:

Held, (1) that the notice, under the circumstances, amounted to an act of insolvency by *V*; [p. 947, col. 2.]

(2) that the transaction with the Bank was not *bona fide* and the Bank was not entitled to the benefit of the protection in section 57 of Act III of 1909; [p. 945, col. 1.]

(3) (*obiter*), that the transaction was not a fraudulent preference. [p. 950, col. 1.]

Appeal from the order and judgment of Wallis, J., in the Insolvency Jurisdiction of the High Court, in Insolvency Petition No. 302 of 1911.

MERCANTILE BANK OF INDIA, LTD., MADRAS *v.* OFFICIAL ASSIGNEE OF MADRAS.

FACTS.—Messrs. M. Venkatasawmi Naidu and sons, merchants carrying on business in Madras, having applied to be declared insolvents, Messrs. Rosham M. A. Manulla Hussain Saib and Company took out a notice of motion for an order declaring them owners and entitled to the possession of 33 bundles of skins lying in the godowns of the insolvents and in the custody and possession of the Official Assignee.

Notice was served upon the Official Assignee and on the Mercantile Bank, who had put up their board on the godown and claimed to be entitled to the skins under letters of lien given to them by the insolvents. The applicants stated that they never sold the skins to the insolvents but that by a usage of trade they sent them to the insolvents for inspection and the price was to be fixed only after the weighment, and that, therefore, the property in the goods never passed to the insolvents. Mr. Justice Wallis, sitting in insolvency, held that there was a completed sale to the insolvents in whom the property had vested before the date of the insolvency. As to the dispute between the Official Assignee and the Bank, His Lordship observed:

"As I have already said, the Mercan tile Bank had letters of lien over the goods in the godowns of the insolvents in Madras and also in the godown at Kodembakkam, and the effect of the letters of lien was, in my opinion, to make them 'true owners' of the goods within the meaning of those words as used in section 52, sub-section 2 (*c*), of the Presidency Towns Insolvency Act, which provides that 'The property of the insolvent shall comprise the following particulars, . . . all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.' I think it cannot be questioned that on the morning of the Tuesday, which was the day immediately preceding the filing of the petition, these goods were 'in the order and disposition of the insolvents by consent and permission of the true owner (the Mercantile Bank under such circumstances that the insolvents were the reputed owners thereof.' However, in order that the order and disposition clause should take effect, it is necessary that the goods should be in the order and disposition of the insolvent *at the commencement* of the insolvency. The policy of the Insolvency Act is to prevent unfair dealings on the eve of insolvency by making the insolvency relate back to the first act of bankruptcy, and where it has been found that scope was left for any sort of unfair dealing the Legislature has, in the later Acts, met that by adding to the list of acts of bankruptcy. Thus, in the Act of 1883 two new acts of bankruptcy were created, namely, giving fraudulent preference and giving notice of intention to suspend payment. The provisions of the English Bankruptcy Act of 1883 have been reproduced in the Indian Act. 'If, in British India or elsewhere, he makes any transfer of his property or of any part thereof, which would, under this or any other enactment in force, be void as a fraudulent preference if he were adjudged an insolvent', and 'If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.' These new acts of bankruptcy have been included in the present Act and the result of them is that the commencement of the bankruptcy is antedated to the time when such acts of bankruptcy are committed. In the present case it is alleged that what happened amounted to acts of bankruptcy under each of those heads, namely, fraudulent preference and giving notice of intention to suspend payment. With regard to the latter I think the test which has to be applied is that which was laid down by Lord Watson in *Crook* v. *Morley* (1):—'My Lords, the Bankruptcy Act, 1883, does not prescribe any form of words for a notice under section 4 (1) (*h*)' (*i. e.*, the intention to suspend payment). 'It, therefore, appears to me that any notice will be sufficient for the purposes of sub-section (*h*) which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts.' And Lord Bowen, in an earlier case, has observed that each case with regard to this must be tried upon its own facts and that

(1) (1891) A. C. 316 at p. 323; 65 L. J. Q. B. 97; 65 L. T. 389; 8 Morrell, 227.

it would be disastrous if the Court were to attempt to decide each case with reference to the facts of all the other cases which had preceded it. I must, therefore, deal with this case with reference to its facts only."

[His Lordship then considered the evidence and continued as follows:—]

"Now it is in evidence that that communication was made by Mr. Short to the Bank at the time when he was acting as Solicitor and, therefore, as agent of the insolvents and after communication with the insolvents. It is also plain that the object of the notice was that the Bank might take possession of the goods under the lien and so to avoid the operation of the order and disposition clause when the petition was filed.

"It is quite clear that what the Bank did was immediately to put up the board on the Madras godown and motor out and put up the board on the Kodambakkam godown. And the conclusion that I have come to, is that what they understood from Mr. Short was that there was not a moment to be lost in putting up their board. I think also, that a good deal more was understood than was expressed and the question is whether what happened did not really amount to a notice by the insolvents to the Bank, who were their creditors, that they were about to suspend payment of their debts. On a full consideration of the case, I have come to the conclusion that that is the proper inference to draw from what passed. Further, it is a mere attempt to evade the Act for a trader, who has decided to file his petition forthwith, to send warning to a creditor to remove his goods by an emissary who refuses to give any reasons for the warning; and such a transaction must, I think, be treated on the same footing as if the emissary had told the creditors the real reason, namely, that the trader was intending to file his petition. If that is so, the result is that the goods become affected by the order and disposition clause, because, at the giving of that notice which was the commencement of the bankruptcy, the goods were in the order and disposition of the insolvents, and the boards had not yet been put up and the goods had not been taken into possession of the Bank who were the true owners.

"However, that does not dispose of the case, because Mr. Grant says that this was a protected transaction or dealing within the meaning of section 57 of the Insolvency Act. Now section 57 is as follows: "Subject to the foregoing provisions with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences, nothing in this Act shall invalidate in the case of an insolvency any contract or dealing by or with the insolvent for valuable consideration: Provided that any such transaction takes place before the date of the order of adjudication and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor.' It would be enough to take this dealing out of the protection, to hold that this was a fraudulent preference within the meaning of section 56, which provides that 'Every transfer of property . . . . . with a view of giving... preference . . . . shall be...deemed fraudulent and void.' It may, however, be said that in this case there was no transfer of property because the property all along was the property of the Bank and that at the most there was a transfer of possession and there may, therefore, be difficulty in relying upon the facts as amounting to a fraudulent preference to take the case out of the protection of section 57. As regards another part of the section I may point out that in this Act and in the Provincial Insolvency Act, there is a departure from the provisions of the English Bankruptcy Act, because the English Bankruptcy Act, section 49, only protects a transaction of this character if (1) the dealing or transaction takes place before the date of the receiving order, and (2) the person (other than the debtor) with whom the dealing or transaction was entered into, has not, at the time of such dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time. If, therefore, the law in India under this Act were the same as it is in England, my finding that the communication by Mr. Short amounted to an act of bankruptcy would be sufficient to dispose of the case. But the Indian Legislature has altered this for reasons which I must say are not at all satisfactory to my mind, seeing that, as far as my experience goes

all unfair dealings on the eve of insolvency at the expense of the general body of creditors require to be guarded against as stringently in this country as elsewhere. We have, however, to apply the rule enacted by the Legislature that the protection shall apply, *provided* that there was no notice of the presentation of the insolvency petition, and, of course, in the present case there was no notice, at the time when Mr. Short made this communication, that the insolvency petition had been presented—which is what is meant by the 'presentation of the insolvency petition.' The unfair dealings which require to be guarded against are likely to occur before notice of the actual presentation of the petition, and the provision would have most unfortunate effects in protecting large numbers of questionable dealings, were it not for the operation of another principle. It is well established that the protection afforded by this and the corresponding sections extends only to *bona fide* transactions; and, therefore, the result of the Indian legislation is that, instead of having, as in England, a simple rule to apply, namely, to find out whether at the time of the transaction there was or was not notice of an available act of bankruptcy, the Indian Courts are left, as the English Courts seem to have been formerly left, to decide what may be a very troublesome question indeed—whether or not the transaction was a *bona fide* one? It is well-settled that, although the words *bona fide* no longer appear in the body either of the English section 49 or the Indian section 57 but only in the marginal note, yet it is only *bona fide* transactions that are protected. I am not going to attempt to lay down any definition as to what would amount to a *bona fide* transaction and what would not. But I think one may safely say this, that a transaction which is not only designed to defeat the operation of the Bankruptcy Law but also in itself amounts to an act of bankruptcy, cannot be considered to be *bona fide*. And that is the case here. The question, of course, is what the Court will regard as *bona fide*, *not* what any private individual or even any Solicitor advising his client may have thought; and on a consideration of the whole circumstances, I am constrained to say that I am not able to regard this transaction as a *bona fide* one or as entitled to the protection of section 57. And, if not, then the case comes within the operation of section 52.

"Several cases were cited and I have carefully read them. But there are only two which seem to me to have much bearing on this point, and they were unfortunately both cases which arose under the Act of 1869 before 'giving fraudulent preference' and 'giving notice of an intention to suspend payment' were made acts of bankruptcy. Therefore, those were cases in which the transactions or dealings in question had not the effect of advancing the commencement of the bankruptcy so as to bring the order and disposition clause into force. The first case was *In re Wright, Ex parte Arnold* (2). There a Solicitor gave notice to a creditor, the holder of a bill of sale, that he was about to file a petition for the insolvent under the liquidation clause of the Bankruptcy Act; and thereupon the creditor at once seized the goods. It was found that this letter was sent out by the Solicitor, without any special instructions from his client, to several creditors and in the ordinary course of business without any intention of giving special preference to the particular creditor. Lord Justice Mellish says: 'If the letter had been sent with the express intention of giving warning to the creditor to come and take possession, I am disposed to think that the transaction would not have been in good faith. But it is not necessary to decide this point, as the evidence shows that the letter was sent in good faith', and he went on to say that as the law then stood, the letter could not be held to amount to an act of bankruptcy, as, of course, it would now. And Lord Justice James says: 'I had at first a suspicion that the letter of the 9th of March was really an invitation on the part of the debtor, that it was tantamount to his saying, I am about to become a bankrupt, come and take possession of the property before I do so. If the thing had originated with the debtor, if it had been a purely voluntary act on his part, I should have had grave doubts whether the transaction could have been supported. But the evidence which has been given to-day shows, in my opinion,

(2) (1876) 3 Ch. D. 70; 45 L. J. Bk. 130; 35 L. T. 21; 24 W. R. 977.

that everything was done *bona fide* and the transaction cannot, therefore, be impeached.' The next case I myself called attention to is *Ex parte Symmons, Jordan, In re* (3). I am now clearly of opinion that this case is not an authority under the present Bankruptcy Act, because there also the taking possession was before the commencement of the bankruptcy as the law then stood, so that the order and disposition clause had no application, and this is the ground upon which the case was decided. But the law is now entirely different, because giving notice of an intention to suspend is made an act of bankruptcy, and the reason why it was made an act of bankruptcy is explained by Lord Macnaghten in *Clough* v. *Samuel* (4). He says: "'Before the year 1883,' Mr. Yate Lee is reported to have said, 'it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors, that was felt to be unfair, and the object of the new Act was to meet the evil by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings.' I do not, of course, cite this passage as an authoritative exposition of the meaning of the Legislature, although it seems to have been accepted by the Court, and the learned Counsel, as some of your Lordships may remember, was a gentleman of great experience in bankruptcy and the author of a well-known treatise on the subject. But I cannot conceive that this enactment could have had any other origin or any other purpose.' Now it is worthy of note that this case, *Ex parte Symmons, Jordan, In re* (3), is not cited by Lord Justice Williams in his book nor is it cited in Halsbury's Laws of England and *In re Wright, Ex parte Arnold* (2) is only cited on another point.

"I am, therefore, of opinion that for the reasons which I have already given, this transaction cannot in law be regarded as a *bona fide* transaction or within the protection of section 57.

(3) (1880) 14 Ch. D. 693; 42 L. T. 106; 28 W. R. 803.

(4) (1905) A. C. 442 at p. 446; 74 L. J. K. B. 918; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Manson, 347.

"The result is that the application made by the applicants and also the claim set up by the Mercantile Bank fails. Each claim must be dismissed with costs in favour of the Official Assignee."

Messrs. *N. Grant* and *M. D. Devadoss*, for the Appellant (the Mercantile Bank).

Messrs. *D. Chamier* and *R. N. Aingar*, for Respondent No. 2 (Rosham and Company).

Mr. *W. Barton* for Respondent No. 1 (Official Assignee).

JUDGMENT.

WHITE, C. J.—I think in this case we may apply the observation made by Lord Justice Williams in one of the cases cited in the course of the argument: it is a difficult case both on the facts and on the law.

The first question we have to consider is, did the property in these skins pass from Messrs. Rosham M. A. Mannulla Hussain Saib and Company to the insolvents before the commencement of the insolvency?

* * * * * * * *

On the whole, as regards this question of fact, I am not prepared to differ from the conclusion at which Mr. Justice Wallis arrived, that the property in these goods did pass to the insolvents before the commencement of the insolvency. If the property passed to the insolvents, it is not necessary to consider whether Messrs. Rosham and Company were the true owners of the goods and whether the goods were in the possession of the insolvents with their consent within the meaning of section 52 of the Indian Insolvency Act. It is also unnecessary for us to consider whether the evidence which was relied upon by Messrs. Rosham and Company as evidence of custom is sufficient to oust the operation of reputed ownership.

I now pass to the case as between the Official Assignee and the Mercantile Bank and I deal with that case on the assumption that the property in the goods as between Messrs. Rosham and Company and the Official Assignee passed to the insolvents before the commencement of the insolvency. The question we have to consider with reference to the case as between the Official Assignee and the Mercantile Bank is—are the Bank entitled to the possession of these goods by virtue of their letters of lien and

by virtue of what they did in pursuance of their letters of lien, as against the general body of creditors? The first point to consider is, did Mr. Short's statement to the Manager of the Bank amount to an act of insolvency within the meaning of section 9 (*g*) of the Insolvency Act? I do not think it was seriously contended that Mr. Short was not the agent of the insolvents. But the question is, did Mr. Short's statements to the representative of the Bank amount to a notice that the insolvents had suspended or were about to suspend payments of their debts? It is not suggested that Mr. Short said in so many words, "My clients Venkatasami Naidu and Sons are about to suspend payment." It is a matter of inference. Mr. Grant has contended that instead of drawing the inference which the Official Assignee asks us to draw we might just as well draw the inference that all that Mr. Short gave notice of, to put it at the highest, was that Venkatasami Naidu and Sons were insolvent; and he relies on *Clough* v. *Samuel* (4) as showing that this is not an act of insolvency. I agree: an intimation to a creditor that a debtor is insolvent is, in my opinion, not an act of insolvency. But I think we have something more in this case. I think the most reasonable inference to be drawn is that Mr. Short intended to convey to the Manager of the Bank the intimation and the Manager of the Bank knew that Mr. Short's intention was to convey the intimation—that the insolvents were about to suspend payment of their debts. In this connection it is material to observe that immediately on the receipt of the information the Bank did an act of putting up their board on the premises of the insolvents, the effect of which was to put it out of the power of the insolvents to continue to carry on business. This to my mind suggests that the Manager of the Bank knew that Mr. Short intended to convey to him not only that Venkatasami Naidu and Sons were in embarrassed circumstances but that they were about to suspend payment. I do not deny that this is a matter of inference and I think we may perhaps be going further than the Courts have gone in any reported cases. But taking into consideration the fact that the general trend of the decisions is certainly in the direction of giving a very liberal interpretation to the words in question and also to the fact that it is in accordance with public policy that a liberal interpretation should be given to these words, I have come to the conclusion that Mr. Justice Wallis on the evidence which he sets out in his judgment—and which I need not repeat here—was right in his conclusion. The doubts which I had in this matter were caused by the judgment of Lord Halsbury in *Clough* v. *Samuel* (4).

I agree with Mr. Justice Wallis that the Bank were the true owners and that the goods were in the possession of the insolvents, as reputed owners, up to the 19th up to the time when the Bank put up their board on the premises of the insolvents. The object of the Bank was to put an end to the consent of the true owners to the goods remaining in the possession of the reputed owners. We may take it that as from some hour on the 19th the goods were no longer in the possession of the insolvents in such circumstances that they were the reputed owners thereof. There can be no question that if there was an available act of insolvency prior to the time when the Bank put up their board on the premises of the insolvents, the title of the Official Assignee under section 51 of the Act would relate back to that act of insolvency. In the view that the giving of the information by Mr. Short amounted to an act of insolvency, an act of insolvency had been committed before the Bank took the goods out of the reputed ownership of the insolvents. There can be no question that the Bank had notice of this act of bankruptcy on the 19th before they put up their board, because it was Mr. Short's information which caused the Bank to put up their board. In this state of things the trustee's title would prevail, unless the Bank can rely upon any provision of law which would protect them. They rely on section 57 of the Insolvency Act which corresponds to section 49 of the English Bankruptcy Act.

It is useful to compare section 57 with the section of the English Act, because it is taken direct from the English Act although there are one or two variations of some importance. In section 49 of the English Act there are two conditions which must be complied with before the party who relies on the

protection of the section can claim the benefit of the section. The first condition is that the transaction should be before the date of the receiving order, and the second is that the person who seeks the protection of the section should have had no notice of any available act of bankruptcy committed by the bankrupt before the transaction. In the Indian Act the conditions are to be found in the proviso (1) that the transaction takes place before the date of the order of adjudication (that corresponds with the first condition of the English Act because we have no receiving order here) and (2) that the person with whom the transaction takes place had not at the time notice—not, as under the English Law, of any available act of bankruptcy, but notice of the presentation of any insolvency petition by or against the debtor. It may be a matter for regret that the Indian Legislature has departed from the English Law; but we have to administer the law as we find it.

The questions we have to consider, are, can Mr. Grant bring himself within the protecting words of the section? (For a moment I leave out of consideration the question of *bona fides*.) If so, is his protection cut down by the words of the proviso? It is clear that if Mr. Grant brings himself within the protection of the section, his protection is not in any way affected by the proviso. Under the English Law it would be otherwise, because at the time of the transaction he had notice of an act of bankruptcy. It is contended that the transaction is protected because Mr. Grant's clients did not have notice of the presentation of an insolvency petition (as a matter of fact the petition was not presented till after the transaction) The question is, was the transaction a contract or dealing by or with the insolvent for valuable consideration? We have been referred to the decision of the Court of Appeal in *Wright, In re, Arnold, Ex parte* (2). There the holder of a bill of sale took possession of the property comprised in the bill of sale after the filing of the petition. It was argued that there was no consideration for the taking possession of the property by the creditor. With reference to this point Lord Justice Mellish says: "In my opinion, a taking of goods out of the bankrupt's possession under the power conferred by a bill of sale, which was originally given to secure a debt, is a dealing for valuable consideration and is, therefore, within the protection of section 94." On the authority of that case I hold that this transaction or dealing, which took place on the 19th of December, was a transaction with the insolvent for valuable consideration. Mr. Chamier has ingeniously tried to distinguish the facts of the present case, on the ground that here all that the Bank had power to do under the letters of lien was to call upon the debtor to deliver the goods whereas in *Wright, In re, Arnold, Ex parte* (2), the creditor had power to take possession. But for the purposes of the question we have to decide, I think, with all respect to Mr. Chamier, that this is a distinction without a difference. If this transaction with the insolvents was for valuable consideration, the Bank is not hit by the proviso because they had no notice of the presentation of a petition, since no insolvency petition had been presented.

Then we come to the question of *bona fides*. That seems to me to be the most difficult point in the case. In the corresponding section of the English Act of 1849 and of the English Act of 1869 we find the word '*bona fide*', or words to that effect, in the body of the section. In section 49 of the English Act of 1883 and in section 57 of the Indian Act, we do not find the word '*bona fide*,' although we find it in the marginal note. It seems to me a reasonable view, a view which I, at one time in the course of the argument, was disposed to take, that the only question of *bona fides* which could arise in connection with the construction of section 57 of the Indian Act would be the question whether the transaction was a real transaction, and, if so, whether, it was protected by the words of the section. It may be argued with some force that a transaction, which may be contrary to the policy of the Bankruptcy Law, is a good transaction unless it can be impugned under some express statutory enactment. But, having regard to the English authorities, I do not think we can take this view. I need scarcely say that when we are construing an Act which in many instances is taken, word for word, from an English Act and when we are dealing with a branch of law which is essentially English Law, though we may not be actually bound by, yet we ought certainly to pay the greatest respect to, the decisions of the English Court of Appeal. Our attention has been called to authorities to show that the Court is bound to consider

whether a transaction is contrary to the policy of the Bankruptcy Law, although it does not come within the four corners of any particular section. I propose to deal with the authorities very shortly.

Mr. Justice Wallis referred to the observations of the Court of Appeal in *Wright, In re, Arnold, Ex parte* (2). They are *obiter* and they were no doubt made in a case decided at a time when giving notice that a man was going to suspend payment was not in itself an act of bankruptcy.

We have also some other authorities. There is *Slobodinsky, In re, Moore, Ex parte* (5), in which we find very strong observations of Mr. Justice Wright on page 525: "The effect of the trustee's title by relation back under section 43 is excluded by section 49 of the Bankruptcy Act, if there has been a contract, or conveyance, or assignment for valuable consideration, provided that the transferee has not at the time notice of any available act of bankruptcy; and although the words 'in good faith' do not occur in the section they must be deemed to be inserted, because in all former Acts those words have been inserted, and it has been since held that the omission was not intended to make any difference, and that the person who takes the conveyance of a debtor's property cannot claim the benefit of section 49 if he had notice of anything wrong or anything that really put him upon enquiry." We have *Jukes, In re, Official Receiver, Ex parte*(6), a decision to the effect that a creditor who takes a transfer of the whole of the property of his debtor in payment of a past debt with notice that there are other creditors, cannot be said to be acting in good faith and is, therefore, not entitled to the protection of section 49 of the Bankruptcy Act. No doubt in this case the transaction was held bad as a fraudulent preference. Mr. Justice Wright in distinguishing *Shears* v. *Goddard* (7) says with reference to the purchasers there: "They were purchasers in good faith and for valuable consideration. But I cannot help thinking that if a creditor of a debtor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith. On the whole, therefore, I hold that the transaction in this case is not protected by section 49 of the Act."

There is another case—*Badham, In re, Palmer, Ex parte* (8). There it was contended that a transaction, which would have been a fraudulent preference if it had been carried out before the commencement of the bankruptcy, was not a fraudulent preference because it was carried out after the commencement of the bankruptcy, the party relying on the transaction having had no notice of any act of bankruptcy. Mr. Justice Vaughan Williams says at page 257: "I wholly dispute and deny that because section 48 defines the circumstances under which I may avoid a fraudulent preference, it follows that I am bound to accord the protection of section 49 to those cases which fall outside section 48. It is in effect said that in every case which does not fall within section 48 I am bound to give the benefit of section 49. I do not agree. In my opinion, I am not bound to give the benefit of section 49 to any transaction which is contrary to the policy of the Bankruptcy Laws." Later, the learned Judge says: "It is, in effect, a Common Law fraud to make a payment contrary to the Bankruptcy Laws, and I do not intend to give the benefit of the protecting section to any such transaction." Mr. Grant on behalf of the bank called our attention to a later decision of Mr. Justice Bigham in *Dunkely, In re, Waller, Ex parte* (9), in which it would seem the learned Judge followed the judgment in *Badham, In re, Palmer, Ex parte* (8), rather reluctantly.

But the learned Judge, in upholding the transaction in the case before him, observed that the transaction not being tainted with bad faith as appeared to have been the case in *Badham, In re, Palmer, Ex parte* (8), he saw no reason why the creditor should not have the benefit of the protection afforded by section 49.

Now in view of those English authorities I do not think we can hold that a creditor who enters into a transaction with his debtor with the knowledge that that debtor had committed an act of bankruptcy at the time

(5) (1903) 2 K. B. 517; 72 L. J. K. B. 883; 89 L T. 190; 52 W. R. 156; 10 Manson, 341.

(6) (1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Manson, 249.

(7) (1896) 1 Q. B. 406; 74 L. T. 128; 65 L. J. Q. B. 344; 44 W. R. 402; 3 Manson, 24.

(8) (1876) 10 Morrell, 252; 5 R. 521; 69 L. T. 356.

(9) (1905) 2 K. B. 68; 74 L. J. K. B. 963, 3 L. T. 248; 54 W. R. 171; 12 Manson, 384; 21 T. L. R. 707.

the transaction was entered into, can claim the benefit of section 57 of the Indian Act.

It was contended by Mr. Chamier on behalf of Messrs. Rosham and Company that this transaction under which the Bank took possession of these goods was a fraudulent preference. This question need not be considered, but I do not think the transaction was a fraudulent preference. See *Symmons, Ex parte, Jordan, In re* (3). Then there was a good deal of argument with reference to section 178 of the Contract Act. In the view we take in this case that question does not arise for consideration.

The result will be that Mr. Chamier's appeal on behalf of Messrs. Rosham and Company and Mr. Grant's appeal on behalf of the Bank must both be dismissed but without costs. The Official Assignee will be allowed to take his costs out of the estate; costs on the original side scale.

SANKARAN NAIR, J.—I concur.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 21 OF 1916.

February 9, 1916.

Present:— Sir Charles Fox, KT., Chief Judge, and Mr. Justice Twomey.

MOOLLA CASSIM— APPELLANT

versus

MOOLLA ABDUL RAHIM AND ANOTHER— RESPONDENTS.

Limitation Acts, applicability of, to applications asking Court to do what it has no discretion to refuse —Probate and Administration Act (V of 1881), s. 98 (1) (3)—Executor or administrator, duty of, to exhibit inventory or account.

The Limitation Act does not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character; but section 98 (1) (3) of the Probate and Administration Act does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. Section 98 (1) itself imposes the duty of doing this on the executor or administrator. If he does not perform it the Court may require him to do so, but that is a matter for its discretion. [p. 951, col. 1.]

Vithal Janardan v. *Vithojirav Putlajirav*, 6 B. 586, *MadhabMoni Dasi* v *Pamela Lambert*, 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337, referred to.

Mr. *Hamlyn*, for the Appellant.

JUDGMENT.

FOX, C. J.—The order appealed against was one dismissing, as barred by limitation under Article 181 of the Limitation Act, an application by a grandson of Moolla Hashim asking the Court to order the executors of his Will to file an inventory of his estate, and an account showing the assets which came to their hands and the manner in which they applied and disposed of them.

Moolla Hashim died in 1884 and Probate of his Will was issued by the Court of the Recorder of Rangoon to the respondents and another of his sons on the 30th January 1885, they having undertaken to administer his estate and to make a true inventory thereof and to exhibit the same in the Court at or before the expiration of six months and to render a true account of the same within one year from the date of the grant. No inventory is upon the record of the case (Civil Miscellaneous Appeal No. 27 of 1885). It appears from it that in May 1888 the executors petitioned the Court for leave to transfer the property of the deceased (which they set out in a schedule) for the purposes of the administration of the estate. Leave was granted to them to do so. From the record of Civil Regular Suit No. 150 of 1901 in this Court it appears that in 1885 one of Moolla Hashim's widows instituted a suit to have his Will set aside, and for administration of his estate by the Court. That suit was by consent withdrawn. In 1887 the parties interested referred questions in dispute in connection with the Will and the estate to the arbitration of one Moolla Ismail. He made his award dated 21st February 1888.

It dealt minutely with the property of the deceased setting out in detail what each legatee and heir should get. Some property in Rangoon, *viz.*, 1st class lot No. 8 in square E and a small amount of cash was allotted to the plaintiff's father as his share, but it was not transferred to him because he had disappeared many years before, and it was not known whether he was alive or not. In 1901 the petitioner-appellant brought a suit (No. 150 of 1901) against the executors and the heirs of Moolla Hashim, claiming the above mentioned immoveable property on the ground that his father was dead and that he as his only heir was entitled to it. The petitioner failed in his claim in the suit, in an appeal to this Court, and in an appeal to His

Majesty in Council. It was held that the burden was on the petitioner to show that his father survived his grandfather, and that as he failed to do so, the well-known principle of Muhammadan Law applied under which if any of the children of a man die before the opening of the succession to his estate leaving children, these grandchildren are entirely excluded from the inheritance by their uncles and aunts, see *Moolla Cassim* v. *Moolla Abdul Rahim* (1). This decision finally decided that the petitioner had no interest in the property which the award had set apart for Moolla Mahomed. . . . . *Prima facie* he has no further interest in the estate of his grandfather, yet in 1915, more than thirty years after the grant of Probate to the executors, he puts in an application asking that the executors may be called upon to do what they should have done thirty years ago. He states no reason for his wanting the inventory and it is not apparent how that could benefit him in any way.

It has been argued that the Court is bound to order the executors to perform the duty imposed upon them by law, and that consequently the Limitation Act does not apply to the case. No doubt it has been held that the Limitation Act does not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character—see *Vithal Janardan* v. *Vithojirav Putlajirav* (2) and *Madhab Moni Dasi* v. *Pamela Lambert* (3), but sub-section (3) of section 98 of the Probate and Administration Act, 1881, does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. Sub-section (1) of the section itself imposes the duty of doing this on the executor or administrator; if he does not do it the Court may require him to do it, but that is a matter for its discretion, and consequently the rulings referred to have no application.

Even if an appeal lies against the order and it is open to the Court to make an order under sub-section 3 of the section, it should not, in my opinion, do so in view of the circumstances of this case. It appears to me that the application was of the nature of an attempt to abuse the process of the Court. I would reject the appeal.

TWOMEY, J.—I concur.

Appeal rejected.

(1) 4 L. B. R. 77; 2 C. L. J. 2 6; 15 M. L. J. 317; 7 Bom. L. R. 892; 2 A. L. J. 798; 10 C. W. N. 33; 33 C. 173; 32 I. A. 177; 8 Sar P. C. J. 893.

(2) 6 B. 586.

(3) 6 Ind Cas 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.

CALCUTTA HIGH COURT.

REFERENCE NO. 1 OF 1916.

April 11, 1916.

Present:—Mr Justice D. Chatterjee and Mr. Justice Beachcroft.

ABDUL QADER KHALIFA—PLAINTIFF

versus

FRITZ KAPP—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 9, 83—Alien enemy, suit against, if maintainable during continuance of war—Internment, effect of.

Even during the continuance of a war an alien enemy can be sued in British Indian Courts and he would have every right to present his case before the Courts in accordance with the laws of procedure, no matter whether the cause of action arose before the war or after the war, and the fact of his having been interned does not cut down his liabilities. [p. 954, col. 2.]

Halsey v. *Lowenfeld*, (1916) 1 K. B. 143; 85 L. J. K. B. 323, referred to.

Reference under Order No. XLVI, rule 1 of the Code of Civil Procedure, made by the Munsif, 4th Court, Dacca.

ORDER OF REFERENCE.

The plaintiff Abdul Qader Khalifa, a Mahomedan British subject of this town of Dacca, has sued Mr. Fritz Kapp, residing in this town at the time of the institution of this suit, for Rs. 19-14-0 due as charges for the making of cotton wearing apparel, etc. The defendant is a German and not a naturalized British subject. This suit was instituted on 23rd August 1915, *i.e.*, long after the declaration of war between His Majesty's Government and the Government of the Emperor of Germany. The defendant had a business in photography which was closed after the declaration of the war. At the time of the service of summons upon the defendant he was at Dacca and within the jurisdiction of this Court, but under orders of internment. He was interned once before but was allowed to return to Dacca. The defendant appeared in Court personally in obedience to the summons and wanted to compromise, but the

parties ultimately could not agree and hence the case is pending for trial. The defendant's Pleader has informed this Court that the defendant is not in the house in which he used to reside and that possibly he has been interned at some place near Darjeeling. He could not thus communicate with his client.

The case set out in the plaint is (1) "that the plaintiff was in the habit of doing tailoring business for the defendant and also supplying him with materials according to his direction since some years"; and (2) "that in November 1914, the defendant cleared his dues to the plaintiff up to October 1914." The present claim for Rs. 19-14-0 is for the work done in November and December 1914 within this town of Dacca.

The plaintiff was asked by this Court "to show that this Court has jurisdiction to entertain and try this suit during the pendency of the war." Thereupon the plaintiff's Pleader cited two cases reported in the Notes portion of the Calcutta Weekly Notes which will be noticed presently.

There is no provision in the Code of Civil Procedure as to what should be the procedure in case of a suit against an alien enemy. Section 83 of the Code provides that alien enemies residing in British India with the permission of the Governor-General in Council may sue in the Courts of British India, as if they were subjects of His Majesty. This provision does not necessarily imply that a suit against an alien enemy is maintainable.

It is not disputed that the defendant is an alien enemy. "An alien enemy is a subject of a nation which is at war with this country"—Wharton's Law Lexicon. Alien is a person born in a foreign country out of the allegiance of the British Crown. He is a foreign-born resident of a country in which he has not citizenship—Webster's Dictionary. Thus the defendant is an alien enemy at present residing in this country under order of internment at the time of the institution of this suit, and now actually interned. Thus he is not treated as if he is a British subject, and is not residing in this country under a license. He is not allowed to carry on his business as a photographer. He is thus under restraint as an enemy.

The question naturally arises whether he is subject to the law in force in British India, *i.e.*, whether he is bound by the provisions of the Indian Contract Act and the Code of Civil Procedure. The answer to the question is not free from doubt. It seems to me at the date of the suit and under the circumstances in which he has been placed they are not applicable to him. For it is said in Austin's Jurisprudence at page 144 that "A positive law is set or directed exclusively to a subject or subjects of its author or that a positive law is set or directed exclusively to a member or members of the community wherein its author is sovereign * * *. Living within the territory, he (a stranger) is liable to be reached by the legal sanctions by which the law is enforced." Being under order of internment the defendant cannot be said to be living in British India, he is rather compelled to live here and he has got little freedom of action or of movement.

The defendant does not fall within the definition of the term "enemy", as defined in the Proclamation of 10th August 1914 or in the Proclamation of 30th September 1914. Besides the term "enemy" is used in those Proclamations for the purposes of those Proclamations only.

Then as to an alien enemy's liability to be sued in England, the earliest case decided after the declaration of the present war is the case of *Robinson & Co.* v. *Manheim Insurance Co.*, (1). It was decided on 16th October 1914 by Mr. Justice Bailhache and noticed in 19 C. W. N. viii. It is stated in the note that his Lordship held that "to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief. * * * I am of opinion that the rule is confined to cases in which the alien enemy is plaintiff and that war does not suspend an action against a defendant alien enemy. The next question is—can he appear and defend either personally or by Counsel? I think he certainly can * * * I have come to the conclusion that there is no rule of the Common Law which suspends an action in which an alien enemy is defendant and no rule of Common Law which prevents his appearing and conducting his defence." In this case the cause of action arose before the war and the pleadings were closed before the war.

(1) (1915) 1 K. B. 155; 84 L. J. K. B. 238; 59 S. J. 7; 31 T. L. R. 20; 19 C. W. N. viii.

The next case is *W.L. Ingle Ltd.* v. *Mannheim Continental Insurance Co.*, (2) (reproduced in Contemporary Law Review, Volume IV, page 20), decided by the same Judge. In this case the cause of action arose after the declaration of the war but before the Proclamation of 8th October 1914. It was held that the Proclamation was not retrospective and that the right of suit accrued before the date of that Proclamation. In this case his Lordship observed that "In the case of individuals, and at Common Law, the question whether a man is to be treated as an alien enemy for the purpose of his contracts, right of suit, and the like, does not depend upon his nationality, or even upon his true domicil, but upon whether he carries on business in this country or not. If he does it is not illegal even during the war to have business dealings with him in the country in respect of the business which he carries on here. He is not in respect of that business divided by the war line, but has what is sometimes called a commercial domicil here" (England). In the present case the defendant has no commercial domicil within the meaning of the passage quoted. Besides, it is doubtful if the Common Law of England referred to in the above two rulings is applicable to India. It has never been introduced into the Mofussil at least [Interpretation of Indian Statutes, page 159, on the authority of *Ameer Khan's* case (3); *Rajah Srinath Roy* v. *Dinabandhu Sen* (4)].

The next and last case cited is the case of *Porter* v. *Freundenberg* (5), decided on the 19th January 1915 by the Court of Appeal in England and reported in 19 C. W. N. lxxviii. In this case it is not clear from the report whether the cause of action arose before or after the declaration of war, and before or after the Proclamation of 8th October 1914. It was held, broadly approving the decision in *Robinson & Co.* v. *Manheim Insurance Company* (1), that an alien enemy can be sued, that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. In coming to this conclusion their Lordships quoted with approval the following passage from Blackstone's Commentaries, 21st Edition, Volume 1, Chapter 10, page 373:—"Alien enemies have no civil rights or privileges, unless they are here (England) under the protection and by permission of the Crown", and held he cannot enforce his civil rights as a plaintiff. "Every right is the creation of law. And, though every obligation and sanction does not imply a right, every right implies an obligation and a sanction."—Austin's Jurisprudence, page 160. "A relative duty is incumbent upon one party, and answers to a right residing in another party."—page 161. If it be said that the alien enemy has no civil right no one can do him any civil wrong. If he has no civil right he has no right to exercise his civil right to defend himself. A right to be heard in defence is a civil right created by Statute. For it is provided in Order VIII, rule 1, of the Code of Civil Procedure that "the defendant may, and if so required by the Court, shall at or before the first hearing, or within such times as the Court may permit, present a written statement of his defence." If he has no civil right he, as defendant, cannot get costs or execute his decree for costs. Still more anomaly will be created if he be allowed to put his judgment-debtor a British subject, in jail for non-payment of such costs. If these and like consequences be taken into consideration, the rule that he has got no civil right should have no qualified meaning; for otherwise anomalies in the administration of justice are created. It seems to me from the notes on his Code of Civil Procedure by Mr. S. C. Roy, B.A., LL.B. (Cantab.), Bar-at-Law, that there is no English Statutory rule corresponding to Order VIII, rule 1, of the Code of Civil Procedure quoted above.

In the English cases cited above it appears the decisions were based more or less on the absence of any Common Law there; and no reference was made to the International Law, which seems to me to be the true guide where the defendant being an alien enemy is not allowed to carry on any business and is under order of internment or is actually interned as restraint is put upon his civil right to work and earn his livelihood and to

(2) (1915) 1 K. B. 227; 84 L. J. K. B. 491; 59 S. J. 59; 31 T. L. R. 41.

(3) 6 B. L. R. 392.

(4) 25 Ind. Cas. 467; 20 C. L. J. 385; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 16 Bom. L. R. 901; 41 I. A. 221; 42 C. 489 at p. 525 (P. C.).

(5) 19 C. W. N. lxxviii; (1915) 1 K. B. 857; 84 L. J. K. B. 1001.

do all lawful acts lawfully to that end. He cannot be said to be residing in this country with the implied or express permission of the Government of India or of the Crown. In such a case the reasonable rule seems to be that the "remedy only remains suspended and revives on the restoration of peace:" Halsbury's Laws of England, Volume 1, page 311; and, in my opinion, this rule is to be taken liberally, *i. e.*, whether the alien enemy is the plaintiff or the defendant, and, as in this case, the contract having been completed during war, no cause of action can arise until peace is restored.

As to the rule laid down in the last English case, the circumstances being not quite similar, I doubt how far it is binding upon the Courts in India, which are to decide according to justice, equity and good conscience, and are to be guided by the principles of English Law applicable to a similar state of circumstances, although the English Law is not obligatory upon the Courts in the Mofussil (Interpretation of Indian Statutes, pages 333 to 335).

I, therefore, beg to submit for the decision of the Honourable High Court:

1. Whether this suit for work done by a British Indian subject during war is at present maintainable against an alien enemy, under order of internment, the contract having been made and the breach thereof having occurred during war?

2. Whether the trial or hearing be suspended until restoration of peace?

Babu *Ram Charan Mitra*, against the Reference.

JUDGMENT.—The plaintiff is a British Indian subject, a tailor in the town of Dacca. The defendant, a subject of the German Emperor, was a photographer in that town. In November 1914, *i e.*, after the declaration of war with Germany, the plaintiff did some tailoring work for the defendant, and the present suit was brought for the recovery of wages, etc., due on that account. The question referred is whether such a suit would lie during the pendency of the war. We think the suit would lie, and there is nothing in law to prevent its being tried before the restoration of peace.

Section 9 of the Civil Procedure Code provides that the Courts shall have jurisdiction to try all suits of a civil nature, excepting suits the cognizance of which is expressly or impliedly barred. Section 83 provides that alien enemies residing in British India with the permission of the Governor-General in Council may sue in the Courts of British India, but an alien enemy residing in British India without such permission shall not sue in such Courts There is no provision in the Code barring suits against alien enemies, and we see no reason why such suits should not be heard and decided during the continuance of the war. No matter whether the cause of action arose before the war or after the war, an alien enemy can be sued in our Courts and would have every right to present his case before the Courts in accordance with the laws of procedure. The latest case in England is that of *Halsey* v. *Lowenfeld* (6). In that case Mr. Justice Ridley held after discussing previous cases that a suit for rent accrued due after the declaration of the war was maintainable in the British Courts against an alien enemy. We see nothing in our own Code of Procedure to prevent us from taking the same view. The fact that the defendant has been interned does not make any difference, as the object of internment is to prevent him from doing mischief and not to cut down his liabilities. The case, therefore, must be tried in due course of law.

Case remitted.

(6) (1916) 1 K. B. 143; 85 L. J. K. B. 323.

PRIVY COUNCIL.

APPEALS FROM THE BOMBAY HIGH COURT.

June 22, 1916.

Present:—Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

RAMDAS VITHALDAS DURBAR—
APPELLANT
versus
S. AMERCHAND & CO. AND ANOTHER—
RESPONDENTS.

Contract Act (IX of 1872), ss. 102, 103—Railway receipt, whether 'document of title' or 'instrument of title'—'Title,' meaning of—Stoppage in transitu, right of seller to, as against pledgee of railway receipt.

A railway receipt issued to the consignor of goods is a 'document' or 'instrument' of title as defined in sections 102 and 103 of the Indian Contract Act wherein "document" and "instrument" are interchangeably used, and the assignee or pledgee of such a receipt has a right of delivery of or previous payment of an advance on goods as against an unpaid seller's right of stoppage *in transitu*. [p. 958, col. 1.]

RAMDAS VITHALDAS DURBAR v. AMERCHAND & CO.

Whenever any doubt arises as to whether a particular document is a "document showing title" or "a document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. [p. 956, col. 2; p 957, col. 1]

Quære:—Whether apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act (II of 1900) would be conclusive on the point? [p. 957, col. 1.]

The word "title" in the expressions "documents showing title" and "instruments of title" in sections 102 and 103 of the Indian Contract Act relates only to the right to receive delivery of the goods to which the document or instrument relates. It has nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title, but, if so, the same is true of all other documents contained in the genus "documents of title" the fact that a document confers title in this sense cannot be used as a distinguishing mark of a particular species of the genus. The only point in which a bill of lading differs from other documents of title is that its assignment, whether upon a re-sale or by way of pledge, operates as constructive delivery of the goods to which it refers. [p. 958, col. 1.]

Section 102 of the Indian Contract Act is intended to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, who, by virtue of the assignment of the bill obtains constructive delivery of the goods. Section 103 is intended to do the same in favour of a *bona fide* pledgee for value that the previous section does in the case of assignments upon a re-sale. [p. 957, col. 2; p. 958, col. 1.]

The Indian Contract Act is an amending as well as a consolidating Act and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. [p. 957, col. 2.]

Consolidated appeals from a judgment and decree of the High Court, Bombay, dated March 31, 1913, reported as 21 Ind. Cas. 343, reversing two judgments and decrees, dated January 11 and February 12, 1912, of the same Court in its Ordinary Original Civil Jurisdiction.

FACTS.—The appellant, who was a commission agent, consigned certain goods to one Chagan Lal Kalidas and the railway receipt was sent to the latter.

The said consignee assigned and endorsed over the receipt to respondents to secure an advance. While the goods were in transit the appellant, alleging that the consignee was insolvent, gave notice to the Railway Company to stop the goods *in transitu*. The Company thereupon brought a suit to determine as to who was entitled to delivery of goods. The High Court (Original Side) decided that the appellant had a right to stop the goods *in transitu* by virtue of section 102 of the Indian Contract Act and was not liable to pay the advance, as a railway receipt was not an instrument of title, as required by section 103 of the Indian Contract Act. These findings were reversed by the High Court on its Appellate Side. An appeal was then preferred to the Judicial Committee of the Privy Council.

Mr. *De Gruyther*, *K C.*, and Mr. *Raikes*, for the Appellant—Section 103 of the Contract Act was relied upon, but the instrument of title must be delivered by the consignee or his agent, who must sign and endorse it. The section did not contemplate assignment and nobody receiving it could pass the title created by endorsement. The receipt was not, in form, negotiable. Custom to the contrary was never proved. The English Law and the Contract Act of 1872 were the same. By sections 77, 78, 148, 172, 103 and 108 there was no pledge of goods without delivery and by sections 100, 102, 109 actual or constructive delivery as by a bill of lading was necessary [section 130 of Act II of 1900 (Transfer of Property Act), and sections 131, 132, 136, 137] exclude the operation of preceding sections relating to actionable claims. It is a saving clause and was not intended to make negotiable what was not so before. It did not alter the nature or character of the document or mode of transfer provided by law. Actionable claims did not become part of the Contract Act by what was laid down by the Transfer of Property Act.

[LORD PARKER: Assign "it" and not goods. It is not an exception to section 101.]

"Assign" then must mean legally or validly assign. Delivery is essential to bar the exercise of the right of stoppage. Delivery of the paper is a good delivery of goods. Section 103 only relates to an instrument of title, *e.g.*, a bill of lading, which was negotiable. If it were held that section 137 was to be read with sections 102 and 103 there is the end of the case.

[LORD PARKER: Section 108 expressly names a good many of those mentioned in section 137, Transfer of Property Act.]

The English Factors' Act of 1842 was extended to India by section 4 of Act XX of

1844 and a new Act was passed in 1877. For sales that Act was not applied to India. There was no assignment of goods by endorsement. Title must pass to the second buyer. If title did not pass by endorsement the instrument was not negotiable. Pledge of a document might create a charge on the document but not on goods.

[LORD PARKER: By section 103 pledge of documents was created and then by section 103 stoppage has put an end to it.]

Section 108 reproduced section 4 of the Factors' Act of 1844 which applied to agents only. There could be no transfer except in the manner which the law provided.

[Lord Parker: Yes, you have no right to assume that the Indian Contract Act was intended to reproduce the English Law.]

Railway receipts were not instruments of title, *Great Indian Peninsula Railway Co.* v. *Hanmandas Ramkison*(1) and *Merchant Banking Co. of London* v. *Phoenix Bessemer Steel Co.* (2).

Sir *E. Richards, K. C.*, and Sir *W. Garth*, for the Respondents.—In other enactments and sections of the Indian Contract Act "document" of title covered such documents as railway receipts and meant rights giving title. (See Act XXIV of 1854.) There was no reason for limiting the meaning of "instrument of title." It must mean documents which pass property. There is no definition as to the documents which would be covered by it. The principles of the English Law of contract should not be applied to Indian conditions.

Reference was made to Benjamin on Sale, 5th Edition, Book I, part 5, clause 3; Carver, on Carriage by Sea, page 67; Sale of Goods Act of 1877, section 55; Sale of Goods Act of 1893, section 47.

Sir *De Gruyther, K. C.*, in reply.

JUDGMENT.

LORD PARKER OF WADDINGTON.—The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form appearing on pages 70 and 71 of the record is "an instrument of title" within the meaning of section 103 of the Indian Contract Act.

Section 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer. Section 99 defines the right. Section 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer. Section 101 lays it down that the right does not, except in the cases thereinafter mentioned, cease on the buyer's re-selling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf. Section 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other "document showing title" to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

The expression "document showing title" is used again in section 108, which refers to a "bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods." The same enumeration is found in section 178, except that in this section the expression "document of title" is substituted for "document showing title." Sections 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844, which with certain modifications, not material for the purposes of this appeal made the provisions of the English Factors' Act, 1842, applicable to British India. Both the last mentioned Acts use the expression document of title to goods, and define it as including any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods

(1) 14 B. 57.
(2) (1877) 5 Ch. D. 205; 46 L. J. Ch. 418; 36 L. T. 595; 24 W. R. 457.

for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot, be disputed before this Board that the railway receipts in question satisfy this test. It is, therefore, unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act, II of 1900, would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are documents showing title to goods within sections 102 and 108 and documents of title to goods within section 178 of the Indian Contract Act.

Returning to section 102, its effect may be stated as follows: *First*, so far as bills of lading are concerned, it enacts the rule of the Common Law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. *Secondly*, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellant's right of stoppage would have been displaced.

Passing now to section 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had used the expression 'document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a re-sale.

Great stress was naturally laid by the appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. They supported this argument by the following considerations: *First*, they contended that the Indian Contract Act was primarily a consolidating Act, and, therefore, ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. *Secondly*, they urged the improbability of the Indian Legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factors' Act of 1877. Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is, therefore, an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform. Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.

It remains to consider the appellant's argument, so far as it is based on the use of the expression "instrument" instead of

"document" of title. In the first place, it is to be observed that "title" in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot, therefore, be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a re-sale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's Counsel was unable to mention, and their Lordships are not aware of, any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded. Further, no reason can be suggested why, if (as is clearly the case) the Legislature intended by section 102 to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by section 103 intended to do the same in favour of a *bona fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, document showing title and document of title, in the same sense shows that the draughtsman was not very careful in his use of language.

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Hughs* and *Sons*.

Solicitors for the Respondents: Messrs. *T. L. Wilson* and *Co.*

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

June 22, 1916.

Present:—Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

CHANDRIKA BAKHSH SINGH—

APPELLANT

versus

Raja INDAR BIKRAM SINGH—

RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Declaration, suit for, by person in possession—Nature of proof—Hindu Law—Claim for declaration based on grant from Hindu widow—Defendant's plea of adverse occupation under alleged Will of last male owner—Finding against defendant—Appeal—Waiver of objection to lower Court's finding at hearing, effect of—Decision by Appellate Court as to widow's power to transfer—Jurisdiction.

In a suit for ejectment of a defendant who is in possession, the plaintiff must prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, in a suit for a declaration of title by a plaintiff in possession, plaintiff must first establish his right to the declaration and is entitled to a decree when the defendant fails to prove the title set up by him. [p. 960, col. 2.]

The plaintiff sued for a declaration that he had proprietary title to a *taluka* by virtue of a transfer from a Hindu widow with the consent of her next reversioners. The defendant pleaded possession in himself under a Will of the last male owner whose widow had no right to make the transfer. The Subordinate Judge found the gift to plaintiff proved and the alleged Will set up by defendant fictitious and accordingly granted plaintiff the declaration prayed for. The defendant appealed to the Court of the Judicial Commissioner and at the hearing of the appeal informed the Court through his Counsel that he would not contest the said findings but confine himself to the question of the widow's power to confer any valid title on plaintiff. The Appellate Court went into a lengthy discussion of the powers of a Hindu widow to dispose of property and eventually dismissed the suit:

Held, (1) that when plaintiff proved the grant in his favour, it was obligatory on the defendant who had no concern in the title to the *taluka* and was not connected with the proprietor's family, to prove the Will set up by him; [p. 960, col. 2.]

(2) that it was the duty of the Appellate Court when the appellant waived objections to the correctness of the findings against him, to dismiss the appeals and that it acted without jurisdiction in discussing the right of a widow to alienate property. [p. 960, col. 2.]

Appeal from a judgment and decree of the Court of the Judicial Commissioner, Oudh, dated May 25, 1911, reported as 11 Ind. Cas. 676, reversing a judgment and decree of the Subordinate Judge of Barabanki, dated January 3, 1910.

FACTS of the case are sufficiently set forth in their Lordships' judgment.

Messrs. *De Gruyther*, *K. C.*, and *O'Gorman*, for the Appellant.—The estate was impartible and could only be controlled and managed by one heir at a time. This point was settled in *Bhai Narindar Bahadur Singh* v. *Achal Ram* (1); section 22 of the Oudh Estates Act, I of 1869. The lady had absolute power of disposition which was voidable only at the instance of reversioners as settled in *Modhu Sudan Singh* v. *E. G. Rooke* (2). The respondent having given up the question of his own title to the *taluka*, he had no *locus standi* to maintain the appeal.

Messrs. *Dunne* and *Dube*, for the Respondent.—The appellant had no cause of action against the respondent and his claim to the property was not maintainable, as the widow had only a limited estate and, therefore, could not convey absolute property therein.

JUDGMENT.

Sir John Edge.—This is an appeal from a decree, dated the 25th May 1911, of the Court of the Judicial Commissioner of Oudh, which reversed a decree, dated the 3rd January 1910, of the Subordinate Judge of Barabanki and dismissed the suit with costs.

The facts necessary for the decision of this appeal may be briefly stated. The dispute relates to the appellant's title to an Oudh *taluka*, known as Mahgawan, which was an impartible estate. The parties are Hindus, subject to the Law of the Mitakshara. On the 13th December 1904, Babuain Maharaj Rani, who held Mahgawan for a Hindu widow's interest, made, by a deed of gift, an absolute transfer of Mahgawan to the appellant, and he obtained possession. To that transfer Mahabir Singh and his younger brother, Bechu Singh, were consenting parties. At the time of the transfer Mahabir Singh was the heir to Mahgawan expectant on the death of Babuain Maharaj Rani, and the appellant is his only son. Upon the transfer to him the appellant applied to the Revenue Authorities for mutation of names in his favour. On the 9th January 1905, the respondent, who was not a member of the family which had held Mahgawan, filed objections to mutation of names being made in the appellant's favour, alleging that Babuain Maharaj Rani had no power to transfer the estate, and claiming title to it in himself under an alleged Will of 1866 of Babu Prithipal Singh, who had been the husband of Babuain Maharaj Rani. In consequence of the respondent's objections, the Revenue Authorities on appeal rejected the appellant's application for mutation of names, and the appellant, in order to clear his title and obtain mutation of names, was compelled to bring this suit. He brought this suit on the 11th December 1908 in the Court of the Subordinate Judge of Barabanki for a declaration of his title as proprietor of Mahgawan.

To the suit the respondent, Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh were made defendants. By their written statements Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh admitted the appellant's title, and Mahabir Singh and Bechu Singh expressly alleged that it was with their consent that Babuain Maharaj Rani had executed the deed of gift of the 13th December 1904, and that they had on the 9th November 1908 executed deeds of relinquishment in favour of the appellant, who was in proprietary possession of the *taluka*.

The respondent, in his written statement, denied the appellant's title; did not admit that Babuain Maharaj Rani had executed the deed of gift of 1904; denied that she had any power to transfer the estate to the appellant; did not admit that the appellant was in proprietary possession; alleged that Mahabir Singh and Bechu Singh were not legitimate; alleged that the nearest reversioners were persons whom he described as Girdhara Singh and Kalka Singh; and asserted title in himself through the alleged Will of 1866 of Babu Pirthipal Singh.

The Subordinate Judge of Barabanki found that Babuain Maharaj Rani had executed the deed of gift of 1904 in favour of the appellant with the consent of Mahabir Singh and Bechu Singh, who

(1) 20 I. A. 77 (P. C.); 20 C. 649.
(2) 24 I. A. 164; 25 C. 1 (P. C.); 1 C. W. N. 433; 7 M. L. J. 27; 7 Sar. P. C. J. 222.

were, he found, legitimate; that the *taluka* passed under that deed of gift to the appellant; that the appellant was then and had been since the date of the deed of gift in proprietary possession of the *taluka*; that Girdhara Singh and Kalka Singh were fictitious persons; and that Babu Pirthipal Singh had not made the alleged Will of 1866; and gave to the appellant a declaration that he was the absolute proprietor of the properties detailed in Schedules A, B and C to the plaint, and would continue to be such proprietor after the death of Babuain Maharaj Rani.

From that decree the respondent on the 31st March 1910 appealed to the Court of the Judicial Commissioner of Oudh, making the appellant and Babuain Maharaj Rani respondents to his appeal. In June 1910, Babuain Maharaj Rani died. On the 9th February 1911, Mahabir Singh and Bechu Singh respectively filed petitions and affidavits in the appeal in the Court of the Judicial Commissioner in which they asserted that the deed of gift of the 13th December 1904 had been executed by Babuain Maharaj Rani by their advice and with their consent; that the deed was valid, and that Babu Chandrika Bakhsh Singh had been put in proprietary possession of the *taluka* at the time of the execution of the deed, and they prayed to be added as respondents to the appeal. On the 24th March 1911, Mahabir Singh and Bechu Singh were by order of the Court of the Judicial Commissioner added as respondents to that appeal.

When the appeal came on for hearing in the Court of the Judicial Commissioner, Raja Indar Bikram Singh, through his Counsel, informed the Court that he did not contest the decision of the Subordinate Judge as to the alleged Will of 1866, or as to the non-existence of the alleged reversioners Girdhara Singh and Kalka Singh, or as to the execution of the deed of gift of the 13th December 1904, and his Counsel confined his contention in opposition to the decree of the Subordinate Judge to an argument that the deed of gift did not represent any genuine transaction, and that Babuain Maharaj Rani had remained in possession, and had no power to confer any valid title upon Babu Chandrika Bakhsh Singh.

The suit was not a suit for the ejectment of a defendant who was in possession, in which the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, it is a suit for a declaration of title by a plaintiff who was and is in possession. The Subordinate Judge had found that Raja Indar Bikram Singh had no title, and when the correctness of that finding was not disputed in the Court of the Judicial Commissioner of Oudh, it should have been apparent to the Judges of that Court, who were hearing the appeal, that as Raja Indar Bikram Singh had failed to prove that he was, even remotely, concerned in the title to Mahgawan and in the right to the proprietary possession of that *taluka*, he had no title to protect and no interest which could give him a right to contest the declaration of title which Babu Chankrika Bakhsh Singh had obtained, and that the appeal to that Court should be dismissed. Raja Indar Bikram Singh was a mere impertinent intervener in another person's affair. The Judges who heard the appeal, however, instead of dismissing it, went into a long and, under the circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property, and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Barabanki restored.

The respondent was ordered to pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*,

Solicitors for the Respondents: Messrs. *Barrow, Rogers & Nevill.*

BARACHI *v.* EMPEROR.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 387 OF 1916.

June 27, 1916.

Present:—Mr. Saunders, A. J. C.

BARACHI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 350 (1)—Transfer of part-heard case—Right of accused to have prosecution witnesses re-summoned.

The provisions of section 350, Criminal Procedure Code, are applicable to a case which, after being part-heard, comes upon the file of another Magistrate who exercises jurisdiction by transfer under section 528, and it is necessary that the proviso to section 350 should be given effect to and the accused made acquainted with the fact that he is entitled to have the prosecution witnesses re-called. [p. 961, col. 2.]

Queen-Empress v. Nga Po Min, U. B. R. (1897-01), I, 87, dissented from.

Mohesh Chandra Saha v. *Emperor*, 35 C. 457; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488; *Palaniandy Gounden* v. *Emperor*, 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146; *Kudrutulah* v. *Emperor*, 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218, referred to.

Mr. *D. Dutt*, for the Applicant.

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—The applicant has been convicted and sentenced to pay a fine of Rs. 30 or suffer one month's rigorous imprisonment under section 24 of the Cattle Trespass Act.

The grounds of this application are that the evidence did not satisfactorily establish the charge. On examining the proceedings, it appears that the case was first taken up by the Township Magistrate but was withdrawn from him and transferred to the Sub-Divisional Magistrate by the District Magistrate acting, presumably, under section 528 of the Code of Criminal Procedure. Before the transfer was made, the whole of the evidence for the prosecution had been recorded and the accused examined by the Township Magistrate. The Sub-Divisional Magistrate on receipt of the proceedings did not re call and examine the witnesses for the prosecution himself and after hearing the defence witnesses, convicted the applicant and sentenced him as stated above.

It was held by this Court in *Queen Empress* v. *Nga Po Min* (1) that section 350 of the Code of Criminal Procedure does not apply to cases withdrawn under section 528 of the Code of Criminal Procedure and that the trial should have been begun afresh. This view has, however, been dissented from in *Mohesh Chandra Saha* v. *Emperor* (2), which was followed by the Madras High Court in the case of *Palaniandy Gounden* v. *Emperor* (3) and has been re-affirmed in *Kudrutullah* v. *Emperor* (4).

I think that the interpretation put upon section 350 of the Code of Criminal Procedure in these latter cases is correct, and that the words, "ceases to exercise jurisdiction and is succeeded by another Magistrate," should not be confined to the case of a Magistrate who is transferred and whose place is taken by another Magistrate.

But while the view may be accepted that section 350 of the Code of Criminal Procedure is applicable to a case which, after being part-heard, comes upon the file of another Magistrate who exercises jurisdiction, it is necessary that the proviso to section 350 should also be given effect to and the accused should have been made acquainted with the fact that he was entitled to have the prosecu witnesses re-called. This does not appear to have been done. The case appears to have been clearly one in which it was desirable that the Magistrate who passed judgment should have had an opportunity of seeing the witnesses.

The defence was that the prosecution case was entirely false, and that the charge was brought four days after the occurrence in answer to a charge of theft, which had been made at once by a friend of the accused in respect of the same circumstances.

The delay in lodging the complaint was certainly an important matter which called for consideration, and I do not think the explanation given by the Magistrate can be accepted. The amount of resistance offered by the accused applicant to the carrying off of the cow to the cattle-pound appears to have

(1) U. B. R. (1897-01), I, 87.

(2) 35 C. 457; 12 C. W. N. 416; 7 Cr. L. J. 220; 7 C. L. J. 488.

(3) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 214; 9 Cr. L. J. 146.

(4) 14 Ind. Cas. 314; 39 C. 781; 13 C. L. J. 218.

been slight and the complainant would seem at once to have yielded up the cow. It is quite possible that the charge of rescue was an invention made in order to meet the charge of theft and that the time which elapsed until the complaint was lodged was occupied in obtaining witnesses.

It does appear to me that there are grounds for holding that there has been a miscarriage of justice.

The conviction and sentence are, therefore, set aside and the fine must be refunded. In the circumstances, I do not think it necessary to order a re-trial.

Revision accepted; Conviction quashed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 54 TO 58 OF 1916.

June 27, 1916.

Present:—Mr. Saunders, A. J. C.

NGA KYAW ZAN HLA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Confession—Punishment, lenient, award of, to confessing accused.

An accused person should not be encouraged to confess by the knowledge that if he does so he will receive lenient punishment. A confession may be an indication that the accused is not an entirely irreclaimable and hardened criminal and where this is so, it may and very properly should be taken into consideration in awarding punishment.

Mr. *H. M. Lutter*, Government Prosecutor, for the Crown.

JUDGMENT.—The District Magistrate has said in his judgment: "It appears to me for the ends of justice that it is very desirable that confessions should be made and the Magistrate should in such cases pass more lenient sentences to encourage them." This is a remark which appears to be open to very grave exception. It appears to mean that the Magistrate thinks that accused persons should be encouraged to make confessions in order to secure the convictions of persons other than the confessing accused, and that this should be encouraged by the passing of lenient sentences. If this view is really held by the District Magistrate and becomes generally known, there can, I think, be little doubt that it will be held out as an inducement for persons accused of serious crimes to confess, that if they do so they will be leniently punished. That an accused person confesses may be taken as an indication that he is not an entirely irreclaimable and hardened criminal. It may be an indication that the accused regrets the comission of the crime which he confesses to have committed, and an indication that he desires to make reparation. If that is so, no doubt, the confession may and very properly should be taken into consideration in awarding punishment. The suggestion that accused persons should for the ends of justice be encouraged to confess by the knowledge that if they do so they will receive lenient punishment, appears to be one which is likely to convey an entirely wrong impression and to be extremely mischievous.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 69 OF 1916.

June 29, 1916.

Present:—Mr Saunders, A. J. C.

EMPEROR—PROSECUTOR—APPLICANT

versus

NGA AUNG BA—ACCUSED—RESPONDENT.

Evidence Act (I of 1872), ss. 8, 24, 27—Confession of accused, relevancy of.

Statements made by an accused person, which are inadmissible under section 24 of the Evidence Act, cannot be made admissible by section 27, unless the person giving the information was accused of an offence and was in the custody of a Police Officer. [p. 964, col. 1.]

Nga San Ya v. *Emperor*, U. B. R. (1907-09), Evidence, 3; 11 Cr. L. J. 41; 4 Ind. Cas 759; *King-Emperor* v. *Nga Po Min*, 2 L. B. R. 186; *Nga San Bwin* v. *Queen-Empress*, U. B. R. (1892-96), I, 83; *Emperor* v. *Misri*, 3 Ind Cas. 26; 31 A. 592; 6 A. L. J. 839, referred to.

Where an accused person accompanies a Police Officer and points out the spot where the stolen property is hidden, it amounts to conduct, proof of which is admissible under section 8 of the Evidence Act. [p. 964, col. 1.]

Mr. *H. M. Lutter*, for the Crown.

JUDGMENT.—Three persons, Nga Aung Ba, Nga Tun Tin and Nga E, were sent

EMPEROR v. NGA AUNG BA.

for trial before the District Magistrate, Meiktila, on a charge of robbery; the 1st accused, Nga Aung Ba, has been acquitted and the 2nd and 3rd accused have been discharged. The Local Government have now appealed against the order of acquittal in the case of the 1st accused, Nga Aung Ba, and apply in revision against the order of discharge in the case of the 2nd and 3rd accused, Nga Tun Tin and Nga E.

It appears that suspicion fell upon the accused Nga E; he was offered a pardon by the Police and thereupon made a statement in the nature of a confession. In consequence of this statement he was taken to a certain place where a balaclava cap, part of the property taken in the robbery, was recovered, and subsequently an earring case taken in the robbery was recovered within two or three furlongs of the place where the balaclava cap was found. Acting upon information given by this accused, a ten-rupee note was recovered from a person who said he had obtained it from Nga E. Four ten-rupee notes had also been taken in the robbery. The District Magistrate recorded the following order:—"After examining the twelve prosecution witnesses and excluding the alleged confession of Maung E, which is irrelevant in this proceeding (section 24, Evidence Act), I find no evidence on which to charge Maung E, and I consider it improper to ask him any question in view of the fact that an illegal inducement to confess has been made to him. Maung E is discharged." Nga Tun Tin was also discharged as there was no evidence against him except the identification by the complainant, and Nga Aung Ba was acquitted because he produced two witnesses to prove that he obtained the *nagats*, found in his possession and identified as property taken in the robbery, from Maung E. The Magistrate said, "They are quite credible witnesses and I cannot reject their evidence".

Nga Aung Ba had been identified by one of the prosecution witnesses, and this identification was not discussed. The District Magistrate was evidently influenced by the fact that the Police had given an improper inducement to the accused, Nga E, to cause him to confess.

The grounds of the appeal are that there was sufficient evidence to justify the conviction of the accused, that the Magistrate overlooked the provisions of section 27 of the Indian Evidence Act and erred in ruling out important evidence which was admissible, and that the Magistrate should have held that the evidence adduced by the defence did not prove the innocence of the accused.

The grounds of the application for revision are much the same, and the application and the appeal may be dealt with together.

The District Magistrate does not appear to have considered the question whether so much of the statement of Nga E as led to the finding of the property taken in the robbery was admissible or not. It is clear that if the statement of Nga E amounted to a confession, it was induced by a promise of pardon and was not admissible under section 24 of the Evidence Act. The contention that section 27 of the Evidence Act is to be read as governing section 24 was held to be untenable in the case of *Nga San Ya* v. *Emperor* (1), following the Lower Burma case of *King Emperor* v. *Nga Po Min* (2) and the Upper Burma case of *Nga San Bwin* v. *Queen-Empress* (3). I am bound to say that I am not very greatly impressed by the arguments in favour of restricting the application of the proviso in section 27 of the Evidence Act to section 26, or sections 25 and 26. The opposite view was taken in the Full Bench case of *Emperor* v. *Misri* (4) and the argument for restricting the application of section 27 appears to lose sight of the principles underlying the restrictions placed by the Evidence Act upon the admissibility of confessions generally. The *reductio ad absurdum* relied upon by Sir Herbert White, C. J., as an argument for the view taken in *King-Emperor* v. *Nga Po Min* (2) appears to be applicable at least to some extent to whatever interpretation is placed upon section

(1) 4 L.dn Cas. 759; U. B. R. (1907-09), Evidence, 3; 11 Cr. L. J. 41.
(2) 2 L. B. R. 186.
(3) U. B. R. (1892-96), I, 83.
(4) 3 Ind. Cas. 26; 31 A. 592; 6 A. L. J. 839.

27. It is not, however, necessary to consider this point, since it appears that section 27 does not apply in the present case and that the statements made by Nga E, which were inadmissible under section 24 of the Evidence Act, cannot be made admissible by section 27 because the condition prescribed in section 27, that the person giving the information must be accused of an offence and in the custody of a Police Officer, has not here been fulfilled. It is admitted that at the time Nga E made his statement he was not in the custody of a Police Officer. The statement of Nga E must, therefore, be excluded.

But it appears that there is other evidence against Nga E, which is not inadmissible and which was not considered by the District Magistrate. He appears to have accompanied the Police Officers to the place where the balaclava cap was recovered, and it was apparently due to his pointing out this place that the cap was recovered. This is conduct on the part of an accused person proof of which is admissible under the provisions of section 8 of the Evidence Act. So also the evidence that a ten-rupee note had been obtained from Nga E was also admissible, and there appears to have been a case upon which Nga E should have been examined.

The case against all the three accused hung together and had to be considered together. The record shows signs of haste and it appears that the Magistrate was so disturbed by the improper conduct of the Police that he did not in fact consider impartially the evidence for and against the different accused. The evidence of the identification of Nga Aung Ba was not dealt with at all, and the evidence that the earrings were obtained from Nga E was considered without reference to the rest of the evidence. I am of opinion that this is a case in which the Magistrate gave inadequate reasons for acquitting Nga Aung Ba and that he improperly excluded evidence against Nga E, which was also evidence to be taken into consideration against both Nga Tun Tin and Nga Aung Ba.

The order of acquittal is set aside and there will be an order directing the District Magistrate to hold a further enquiry into the cases of Nga Tun Tin and Nga E, and to commit all three accused to take their trial in the Sessions Court.

Revision accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 380 OF 1916.

June 24, 1916.

Present:—Mr. Justice Walsh.

GULAB SINGH—APPLICANT

versus

EMPEROR, THROUGH MUNICIPAL BOARD—OPPOSITE PARTY.

U. P. Municipalities Act (I of 1900), s. 128 (a)—Rules—Charge of digging up road, proof of—Right to dig up road or drain.

The applicant had been allowed to put a stone over a drain in front of his shop for the use of himself and persons visiting his shop. Expecting a visit from the Chairman of the Municipal Board the applicant was getting the soil from underneath the projection removed, when he was charged for having dug up the road:

Held, that under the circumstances of the case the applicant was not guilty of digging the road. [p. 965, col. 1.]

No one has any right to dig up any portion of a roadway or to dig up or alter any portion of a drain. [p. 965, col. 1.]

Mr. *G. W. Dillon*, for the Applicant.

Mr. *Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In my opinion this order cannot stand. The charge against the accused is a charge of digging up the road, which is apparently a method of stating the way in which the accused according to law has injured the property of the Municipal Board. Unfortunately I have not seen the precise statement of the charge nor the rule made by the Municipal Board under section 128 (*a*). I entertain no doubt that the drain is Municipal property and vested in the Municipality. No doubt at one time it formed part of the public road. Whether it did or not, neither the applicant nor anybody else has any right to deepen the drain or to alter its construction or to remove any protion of the structure or the bed. If the defendant has done anything of this kind to the drain, it is still open to the Municipality to take proceedings against him for the penalty in a proper proceeding.

But I have to deal in this case with things as they are and I have to see whether the offence charged is properly made out. The charge is, as I have said, for having dug up the road. Now the photo, which I accept as an honest representation of the locality, shows clearly that this drain now runs under a stone projection which is part of the entrance of the applicant's shop. The applicant has been allowed to put the stone over the drain for the use of himself and persons visiting his shop. I think it very doubtful whether the stone can be said to be part of the road at all and still less is the drain underneath it. The powers and rights of a Municipality as road authority and as drain authority are quite distinct. The facts are not in dispute. The applicant was expecting a visit from the Chairman the next day to see whether the projection prevented the drain from being cleaned. He engaged two men who were seen removing the soil from underneath the projection. Whether that was loose soil which had accumulated since the drain was last cleaned or whether it was part of the structure of the drain, is not found. In my opinion, the description in the judgment is consistent with the removal of accumulated matter. Under these circumstances whatever the applicant has done, it is perfectly clear that he is not guilty of digging the road. It must be understood, of course, that no one has any right to dig up any portion of the roadway or to dig up or alter any portion of the drain. The whole dispute in this case is a paltry one and I do not suppose that the Municipality would have taken these proceedings if they had not had another dispute with the defendant. It remains to be pointed out that there is a total absence of any evidence that what the defendant did amounted to defacing or injuring the drain. In any case there seems no reason for imposing the maximum penalty. At the most it is only a case for a nominal penalty but as I have said, the offence charged is not made out by the evidence. I, therefore, allow the revision, direct the order of the Magistrate to be set aside and the fine, if paid, to be refunded.

Revision allowed ; Order set aside.

PANJAB CHIEF COURT.

CRIMINAL REVISION No.1004 OF 1916.

July 21, 1916.

Present:—Mr. Justice Broadway.

RAJA RAM AND ANOTHER—ACCUSED—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Complaint, filing of, before sanction—Illegality.

A sanction to prosecute obtained after filing a complaint for an offence specified in section 195, Criminal Procedure Code, is bad in law, and a conviction based on such a complaint cannot be maintained. [p. 966, col. 1.]

Case reported by the Sessions Judge, Ambala with his No. 837 G. of 23rd May 1916, for the orders of the Chief Court (section 438 of the Criminal Procedure Code).

FACTS.—In 1911, the Assistant Commissioner, Rupar, ordered Raja Ram, accused, to remove a slight obstruction on a path to a well. This was apparently done on 30th April 1915. Puran Singh filed a complaint against Raja Ram and Chanchel, alleging that they had again obstructed the path. The Tehsildar was asked to make a report and he said there had been an obstruction.

The Magistrate went to the spot and could find no obstruction. But he held that there had been one which was subsequently removed and he fined each of the accused Rs. 20.

The accused, on conviction by Khan Bahadur Sayad Bashir Hussain, Honorary Extra Assistant Commissioner, exercising the powers of a Magistrate of the first class in the Ambala District, were sentenced by order dated 17th April 1916, under section 188 of the Indian Penal Code, to pay Rs. 20 fine or in default to suffer 15 days' simple imprisonment each.

GROUNDS.—If the original order be perused, it will be seen that it was Raja Ram who was ordered to remove the obstruction. So Chanchel could not be guilty of an offence under section 188, Indian Penal Code. But the conviction is manifestly bad, as there was no sanction or complaint from the Assitant Commissioner, Rupar, who passed the original order.

If Puran Singh thinks he is aggrieved, he should bring the matter to the notice of the Assistant Commissioner, Rupar, and ask him to take action or else bring a suit for an injunction restraining the accused from blocking

In re BAKIR ALLI KHAN SAHIB.

the path. Puran Singh, as things stand at present, is utilising the Criminal Courts to rectify a civil tort. For these reasons I recommend that the conviction be set aside.

Mr. *Nehal Chand Mehra*, for the Accused.

Lala *Sangam Lal*, for Puran Singh, Complainant.

ORDER.—(1) The learned Sessions Judge is wrong in thinking that Chanchel was not ordered to remove the obstruction; reference to the order, dated 8th October 1911, passed by Mr. P. J. Rust, shows that the order under section 133, Criminal Procedure Code, was confirmed as against him as well.

(2) The sanction, however, in this case is bad in law, inasmuch as no sanction was accorded under section 195, Criminal Procedure Code, until after the complaint, on which this trial was had, had been filed. Section 195, Criminal Procedure Code, lays down that no Court can take cognizance of an offence under section 188, Criminal Procedure Code, without the *previous sanction, &c.*

(3) In these circumstances the trial was bad for want of sanction and I accordingly set the conviction and sentence aside. Section 476, Criminal Procedure Code, was referred to by Puran Singh's Counsel, but obviously has no application.

Petition allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 240 OF 1916.
(CRIMINAL REVISION PETITION No. 202 OF 1916.)

August 18, 1916.

Present:—Mr. Justice Seshagiri Aiyar.

In re BAKIR ALLI KHAN SAHIB—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 203, 437—Dismissal of complaint—Order for further enquiry by District Magistrate, grounds for—Possibility of conviction on further enquiry—Landlord and tenant—Removal of crops by tenant—Decision by Revenue Court, whether evidence at criminal trial—Questions of civil nature—Penal Code (Act XLV of 1860), s. 379—Madras Estates Land Act (Mad. I of 1908), ss. 90, 212.

An order of dismissal passed under section 203, Criminal Procedure Code, should not be set aside by a District Magistrate on the bare ground that it is possible that, on further enquiry, the accused may be convicted. [p. 966, col. 2.]

Where the accused is tried for removal of crops after the immoveable property had been distrained, under section 379, Indian Penal Code, and section 212 of the Madras Estates Land Act, the finding of a Revenue Officer under section 90 of the latter Act is not evidence for any purpose and cannot be relied on as a ground for further enquiry into the charge that was thrown out by a Magistrate under section 203, Criminal Procedure Code. [p. 966, col. 2.]

Disputes between landlords and tenants should be left to Revenue Courts and not taken up by Criminal Courts. [p. 967, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Chittoor, in Criminal Revision Petition No. 1 of 1916, preferred against the proceedings of the Court of the 2nd class Magistrate, Chittoor, in Calendar Case No. 382 of 1915.

Mr. *A. Venkatarayaliah*, for the Petitioner.

The Public Prosecutor, for the Government.

ORDER.—The charge in this case against the accused was that after the immoveable property had been distrained, he removed the crops and thereby committed an offence under section 379, Indian Penal Code, and section 212 of the Madras Estates Land Act. The Trial Magistrate dismissed the complaint under section 203 of the Criminal Procedure Code. The District Magistrate considered that there were *prima facie* grounds for a further inquiry into the charge and set aside the dismissal. As I had occasion to point out once before, unless the District Magistrate can come to some definite conclusion upon the materials, he ought not to set aside the order of dismissal on the bare ground that it is possible on a further enquiry the accused may be convicted. The District Magistrate says rightly enough that the finding come to in a civil proceeding before the Revenue Divisional Officer under section 90 of the Madras Estates Land Act is not evidence in the case, but he says later on that the result of the enquiry shows that there is ground for a further inquiry into the criminal charge. This latter dictum is not consistent with the first opinion. If the proceeding is not evidence it cannot be used for any purpose. Apart from the conclusion come to at the Revenue enquiry, no other evidence is indicated by the District Magistrate which necessitates

a further enquiry into the case. He himself points out that there has been a delay in the presentation of the petition to him. The question is one of civil rights between a landlord and his tenant, and it would be better to leave such a matter as this to be settled by the Revenue Court than that it should be taken up by the Criminal Court. For these reasons, I am of opinion that the order, setting aside the dismissal, should be set aside.

Petition allowed; Order set aside.

V.R.P.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 536 OF 1916.
August 17, 1916.
Present:—Mr. Justice Walsh.
QASIM ALI—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Assam Labour and Emigration Act (VI of 1901), s. 167—Recruiting coolie without license, whether an offence.

A Criminal Court must in every case before it convicts and, as a general rule, before it goes into the evidence, clear the ground and decide and define the offence which it is sought to establish against the accused. [p. 967, col. 2.]

If an accused is running a recruiting concern for his own benefit, either under the guise of a licensed person or independently, without having secured the necessary protection of a license, he ought to be prosecuted and if convicted, punished according to law but if all that the accused is doing is, for some remuneration, giving genuine assistance to a person authorised to carry on a depôt and to recruit, he is not guilty of an offence under the Act. [p. 969, cols. 1 & 2.]

Criminal appeal from an order of the Additional Sessions Judge, Gorakhpur.

Dr. *S. M. Sulaiman*, for the Applicant.

Mr. *R. Malcomson*, (Assistant Government Advocate), for the Crown.

JUDGMENT.—It is to be regretted that I have no alternative but to quash this conviction, on the purely technical ground that neither in the charge nor in the conviction has the Court laid down the crime for which the accused has been punished. The section provides punishment for any person who, in contravention of the provisions of this Act, in this particular case that must mean without a license, either recruits or engages or induces such person to emigrate or further assists any person to emigrate. Now the definition of emigration is "the departure of a native of India from any part of India to which this Act applies, for the purpose of labouring for hire in a labouring district otherwise than as a domestic servant." So that the section requires, before punishment can be inflicted under it, proof that the accused person without a license recruited, engaged, induced or assisted a labourer to depart from any part of the territory for the purpose of labouring for hire. Now there are at least four if not eight different offences contemplated by that section, and as one has had to say over and over again and it cannot be said too often, a Criminal Court must, in every case before it convicts and, as a general rule, before it goes into the evidence, clear the ground and decide and define the offence which it is sought to establish against the accused. In this case there is clearly evidence of guilty knowledge in the fact that the book which the accused person used for entering the names of certain coolies was kept behind a locked door, and also in the fact that the licensed person Nageshar, who could have given an honest explanation of the relationship between himself and the accused, told a story which the Court rejected as false. On the other hand guilty conduct of that kind must not be pressed too far, particularly in this case, because behind the locked door was also a concubine whom, according to her own account, the accused was keeping there against her will, and that makes plain the condition of the premises and also that persons carrying on quite honestly a business which can only be conducted under Government supervision and is hedged round with a quantity of Regulations which they have probably never read and if they did, would certainly not understand, are not unlikely, when they are raided, to say and do things which suggest a guilty mind, although in fact an honest explanation would have saved them from any criminal charge.

In this particular case the first Court came to three conclusions of fact, every one of which may be true but neither of which agrees with one another or fits into the alleged offence

for which this man has been sentenced to six months' simple imprisonment. *First*, it held that he undoubtedly took a prominent part in running these depôts. Now taking a prominent part in running depots is not necessarily an offence under the Act. This much, I think, is quite clear that it is almost impossible for a garden *sardar* to comply with certain provisions of the Act which require him for example to house, feed and properly accommodate the labourers collected by him without the assistance of a person placed in charge of the labourers. To provide such assistance and keep them in order in feeding them and so forth, is undoubtedly taking a prominent part and section 167 clearly contemplates a recruiter lawfully deputing some person who is not a recruiter to accompany labourers to a depôt, and *prima facie* for my own part, I cannot see why if you can employ a person not licensed to accompany labourers to a depôt, you cannot employ a person not licensed to enter the names of coolies in a book, interview them at the depôt or even accompany you when you are going round actually recruiting in the streets. For example in this case the register, about which so much has been made, contains entries not only by the accused but also by a Babu, one Dass, a Bengali, and apparently by Nageshar himself, and I feel some doubt as to whether the Babu, if he had kept the register regularly and done nothing else, could have been convicted. It would have been quite true to say that he was taking a prominent part, because the register is a very important document. The Magistrate further uses the expression "these depôts". Whether he means by that that Nageshar was running both and the accused was taking a prominent part in assisting him, or that Nageshar was running one and the accused running the other, or that they were both running both in partnership, nobody can possibly say, and it is impossible to convict a man of an offence of this kind without deciding what he has done. The *second* alternative is based upon a decision, of Sir George Knox's, that if you run a business yourself without a license, for your own profit, it is no answer to say that you have put up a licensee wholly to run it in his own name. Everything depends upon the real question, whose the business is, the licensed party's or the unlicensed party's. If it is the licensed person, he is undoubtedly recruiting, but there is no evidence and no clear finding that that was the real state of affairs, and it is difficult to say why if Nageshar, who clearly was doing some business on his own account, had obtained a license, and the present appellant wanted to carry on another business of his own, he himself should not have applied for a license which, I have no doubt, he could perfectly well do. The *third* conclusion arrived at by the Magistrate is that Qasim Ali used to get coolies brought by employers and send them off. If he had sent coolies off within the meaning of the definition in sub-section (2) in the sense of recruiting them actually to the depôt, it would have been a very different matter. But as at present advised there is no evidence that he did that. Turning to the Appellate Court's judgment, it is sufficient to say that the only statement of the offence for which the applicant has been, in the view of the Sessions Judge, rightly convicted, is put in the following language: "Knowingly recruiting or assisting in recruiting persons to emigrate to Assam, without having any license permitting him to do so." That statement as a statement of a conviction is clearly bad for duplicity. It is uncertain. It leaves it quite doubtful whether the accused was carrying on the business himself or was assisting somebody else and although if he was doing either, in the moral point of view it makes very little difference, the law has always required, for excellent reasons, that the conviction shall be certain and not doubtful or in the alternative otherwise no man would be safe. The result is that this conviction and sentence must be quashed without prejudice to any further proceedings.

It is not advisable to say much with regard to future proceedings, but it is a little difficult to say why, upon grounds of public policy, if all that the accused is doing is, for some remuneration, giving genuine assistance to a person authorised to carry on a depôt and to recruit, it should be thought worth while to interfere, because it is difficult to see how such work can be properly done, unless the authorised recruiter has the assistance of some agents or servants

for whose conduct he is responsible to the authorities. On the other hand, if the accused is really running a concern for his own benefit, either as suggested under the guise of a licensed person or independently, without having secured the necessary protection of the license, then undoubtedly he ought to be prosecuted and if convicted, punished according to law; but the lower Court ought to guard itself against being led off the track to convict a man for something which he really has not done merely because the Court thinks, upon the evidence, that he has done something else which he ought not to have done. These things are really matters of evidence and no better illustration can be given than in the way in which Mr. Cooke's statement has been used in the judgment of the Court below. Now if at the time when the applicant was meeting these women in the street, taking them off to the southern house kept by him, entering their names in his register as though recruited by him, with a statement against their names of the persons who had introduced them to him, if at that time, he had said to a responsible person like Mr. Cooke that he was recruiting coolies, that would be practically an admission to the hilt of the charge made against him. The evidence of Mr. Cooke is vague in the highest degree. All that it comes to is that at some time or another he told Mr. Cooke that he was recruiting. There is not a particle of evidence that on the day when he made that statement he was not a licensed person or that he was not giving merely clerical assistance in the management of the depôt to Nageshar or some other person.

The order, therefore, is that I quash the conviction and order Qasim Ali to be forthwith released. The fine, if paid, will be refunded.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No 81 OF 1916.

June 7, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Sheepshanks.

RAIMOHAN KARMOKAR AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 135 (b), 137 (1)—Conditional order, what should state—Opponent, right of, to reasonable opportunity to show cause—Evidence—Information to Magistrate, admissibility of, against opposite party—Order based on local enquiry, legality of.

An order under section 133, Criminal Procedure Code, cannot, even by consent of parties, be based upon information gathered at a local inquiry. [p. 970, col. 2]

Upendra Nath Mandal v. *Rampal*, 4 Ind. Cas. 436; 10 C. L. J. 482; 11 Cr. L. J. 1, referred to.

In a proceeding under section 133, Criminal Procedure Code, the report or the other information whereon the Magistrate takes action before making the conditional order is no evidence against the opposite party. [p. 970, col. 2.]

Srinath Roy v *Ainaddi Halder*, 24 C. 395; 1 C. W. N. 217, referred to.

Reasonable opportunity should be given to the opposite party to show cause as contemplated by section 135, clause (*b*) and to adduce evidence as prescribed by section 137 (1) before making the order absolute. [p. 970, col. 2.]

An order issued under section 133, Criminal Procedure Code, should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it. [p. 971, col. 1.]

Kali Mohan Kar v. *Nakari Chandra Das*, 5 Ind. Cas. 722; 11 C. L. J. 114; 11 Cr. L. J. 213, referred to.

When in a proceeding under section 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. [p. 970, col. 2.]

Reference under section 438, Criminal Procedure Code, by the Sessions Judge, Dacca, dated 25th May 1916, against an order of the Sub-Divisional Officer, Munshigunge, dated the 24th March 1910.

JUDGMENT.—This is a reference by the Sessions Judge of Dacca, under section 438, Criminal Procedure Code, in the matter of a proceeding under section 133.

On the 21st February 1916 the President, *Panchayet* of the Hashara Union, reported to the Sub-Divisional Magistrate of Munshigunge that the *halat* from the Hashara Bazar to Teghoria had been destroyed by several persons (six of whom were mentioned in his list), "who had either dug earth therefrom, or excavated a pond, or had ploughed up the land and included it in their holding." On the 4th March the Magistrate directed proceedings to be drawn up against all the persons to show cause why they should not remove the obstructions mentioned; by the same order he fixed the 24th March for the hearing of the case. A proceeding was then drawn up against the six persons jointly requiring them to remove the obstructions mentioned within seven days or to show cause on the 24th March why the order should not be confirmed. The order, however, in the form No. 16, Schedule V of the Criminal Procedure Code, was not drawn up and signed till the 14th March and was not made over to the peon till the 18th March. His return shows that the order was not served till the 21st March. On the date fixed, one of the six persons mentioned in the notice appeared and stated that he had no objection to remove the obstruction, and the order was made absolute against him; three of the others were absent and the order was made absolute against them under section 136. The remaining two persons appeared and prayed for an adjournment to enable them to file a written statement. The Magistrate refused the application and made the order absolute against them also. Pursuant to this order, a notice was issued upon them that they do remove the obstruction immediately on receipt of the notice. The Sessions Judge has, upon the application of these two persons, who had appeared to show cause under section 135, recommended that the order be set aside on two grounds, namely, *first*, that the petitioners had not sufficient opportunity to show cause against the order, and *secondly*, that the proceedings were defective, because the initial as well as the final order was not sufficiently precise. We are of opinion that these objections are well founded.

The initial order under section 133, though made on the 4th March, was not served till the 21st March. The reason for the delay has not been explained, but the result has been that the petitioners had only two days to enable them to show cause. Their application for an adjournment was thus not unreasonable. It cannot be overlooked that a proceeding under section 133 is, in the first instance, entirely *ex parte*, and, as pointed out in *Srinath Roy* v. *Ainaddi Halder* (1), the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by section 135, clause (*b*), and to adduce evidence as prescribed by section 137 (1). In the case before us, we agree with the Sessions Judge that the petitioners had not such opportunity given to them. We may add that the Magistrate in his explanation relies upon the result of an inspection he had made of the locality in the course of a tour long previous to the institution of the proceedings. It may be pointed out, as explained in *Upendra Nath Mandal* v. *Rampal* (2), that an order under section 133 cannot, even by consent of parties, be based upon information gathered at a local enquiry.

It is further plain that the initial order is not sufficiently specific when in a proceeding under section 133 instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. No person can be called upon under section 133 to remove an obstruction not caused by himself. In the case before us, there is no allegation that the unlawful obstructions imputed to the opposite party had been caused by all of them jointly; on the other hand, from the report of the President, *Panchayet*, it seems that different persons had caused different obstructions. In these circumstances, a joint initial order, which does not specify what obstruction each person called upon to show cause has made, followed by a joint order

(1) 24 C. 395; 1 C. W. N. 217.
(2) 4 Ind. Cas. 436; 10 C. L. J. 482; 11 Cr. L. J. 1.

absolute, which does not specify what each member of the opposite party is required thereby to do, cannot be supported. As was pointed out by Jenkins, C. J., in *Kali Mohan Kar* v. *Nakari Chandra Das* (3), an order issued under section 131 should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it. This is no trivial matter, for, under section 140, disobedience to the order renders the defaulter liable to serious penal consequences, namely, to a prosecution under section 188, Indian Penal Code.

We accordingly accept the recommendation of the Sessions Judge and set aside the order of the Magistrate dated the 24th March 1916.

Order set aside.

(3) 5 Ind. Cas. 722; 11 C. L. J. 114; 11 Cr. L. J. 213.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 213 OF 1916.

May 12, 1916.

Present:—Mr. Justice Walsh.

RAM CHANDAR SAHAI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 384—Extortion—Charge, accurate statement of, necessity of—Criminal Procedure Code (Act V of 1898), ss. 221, 222, 223.

Where an offence charged involves consequences which may be stated in a general form, such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of several persons, no particular is required, the nature of the offence being sufficiently stated by the date, time and place of the setting of fire; but extortion or obtaining money from persons by unlawful means involves stating with some approach to accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person. It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. Such an irregularity is fatal to the trial.

Mr. *Hamilton*, for the Applicant.

Mr. *Malcomson*, for the Crown.

JUDGMENT. In this case the applicant in revision has been convicted on two charges one under section 170, Indian Penal Code, for which he received three months' imprisonment, and that charge is not before the Court, and the other under section 384, Indian Penal Code, on which he has also received three months' imprisonment, and in respect of that he raises the question as to whether the charge complied with the law. In my opinion it did not, and it failed to comply with the law, not in any formal technical or subsidiary statement, but in a failure to state in any substantial form the nature and particulars of the offence alleged against the accused. Where, of course, an offence charged involves consequences which may be stated in a general form, such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of several persons, no particular is required, the nature of the offence being sufficiently stated by the date, time and place of the setting of fire; but extortion or obtaining money from persons by unlawful means to my mind involves stating with some approach to accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person. It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. The object of sections 221, 222 and 223, Criminal Procedure Code, is clearly to enable him to know the substantive charges which he will have to meet and to be ready for them before the evidence is given. In my opinion, the conviction must be quashed. The irregularity was not such a one as is cured by appearance even without objection. I have declined to consider the merits. I know nothing whatever about them. The result of this decision is that the accused has not been lawfully tried for the extortion alleged against him in the evidence which was called on behalf of the prosecution. There is nothing in the law which, by reason of this unlawful conviction having been set aside, prevents him from being lawfully tried on any charge which the prosecution may hereafter be advised to bring against him in proper form. The result, therefore, is that the conviction for extortion and the sentence of three months' imprisonment passed in respect thereof will be set aside.

Sentence set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 268 OF 1915.

November 18, 1915.

Present:—Mr. Justice Parlett.

MAUNG THA U—APPLICANT

versus

MA MYA KHIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance, order of, whether determined by refusal of wife to comply with decree of restitution of conjugal rights obtained by husband.

A Magistrate ought to treat an order of maintenance made by him as determined, if the wife fails to comply with a decree for restitution of conjugal rights obtained by the husband and refuses to live with him.

In re Bulakidas, 23 B. 484, referred to.

Mr. *Wiltshire*, for the Applicant.

Mr. *Agabeg*, for the Respondent.

JUDGMENT.—On 25th April 1913 Ma Mya Kin got an order from the Township Magistrate of Taungup for Rs. 25 a month as maintenance for herself and after enforcing the order received Rs. 108-14-0 on 16th October 1915 as maintenance for four months and six days. On 4th October 1913 her husband, who was living in Minbu, filed a suit against her there for restitution of conjugal rights and on 25th November obtained a decree, his wife being allowed two months within which to comply with it. She did not do so. The decree was confirmed on appeal on 28th February 1914. On 7th April 1914 she again applied to enforce the order of maintenance and though her husband pleaded that it was superseded by the decree, the Magistrate ordered payment of arrears of maintenance for eight months holding the maintenance order to continue in force as execution of the decree had not been taken out, and on 7th December 1914 Rs. 203 were paid to Ma Mya Kin. Matters then rested till 16th March 1915, when she applied to the Magistrate to recover Rs. 275, arrears for eleven months, from the husband now in Nyaunglebin. He raised the same plea as before, but process was issued against him and he now moves this Court to stop further enforcement of the maintenance order against him. There is clear authority that a Magistrate ought to treat an order of maintenance made by him as determined if the wife, failing to comply with the decree for restitution of conjugal rights, refuses to live with her husband. See *In re Bulakidas* (1) and the cases there cited. It is perfectly clear that she never made any attempt to comply with the decree, either within the two months or afterwards. If her husband took out execution it is clear that he has little or no property to attach, and all he could do would be to commit her to jail for a short time at considerable expense to himself and with scant chance of inducing her to return to him.

* * * * * *

In my opinion the order for maintenance passed on 25th April 1913 is spent and I set it aside.

Order set aside.

(1) 23 B. 484.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 514 OF 1916.

June 30, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

MOHAMMAD KAZI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878)—Possession of substance containing only traces of opium—Illegal possession of opium, conviction for, whether legal.

Possession of a black substance containing only traces of opium and hardly more than one per cent. of it and which is unfit to be used as opium, is not an offence for which the person possessing it is liable to conviction under the Opium Act as for illegal possession of opium. [p. 973, col. 1.]

Mr. *S. R. Das* and Babu *Chandra Sekhar Sen*, for the Petitioners.

Mr. *Camell* (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.

SANDERSON, C. J.—We think in this case that the conviction ought not to stand by reason of the first ground which was raised by the learned Counsel for the petitioners. The charge against the three accused was that they illegally possessed and sold opium, contrary to the provisions of the Opium Act of 1878. It appears that there were three pieces of black substance which weighed something like 2½ seers, and the

prosecution was lodged upon the assumption that the whole of this substance was opium. The case apparently proceeded upon that assumption, and the taking of the evidence was concluded; and my learned brother has drawn my attention to the fact that it was at the end of the case that the accused persons asked that this black substance should be analysed; and, upon analysis being made, the analyst reported that in the lumps, traces of opium were detected but the substance was unfit for use as opium. Then a telegram was received on the following day about which the learned Magistrate had some doubt as to whether it was admissible in evidence or not but, at all events, he did admit it, which telegram said that the lumps contained less than one per cent. of opium. Assuming that the learned Magistrate had the right to accept that telegram as evidence, the matter stands thus: the lumps contained traces of opium and those traces amounted to less than one per cent. Now, can it be said—I lay emphasis upon this part of my judgment—that that evidence supported the charge which the prosecution had made against the accused? The case was based upon evidence to the effect that these accused persons were in possession of something like $2\frac{1}{2}$ seers of opium. In our judgment, such evidence is not sufficient to sustain the charge against the accused. Further than that, supposing we are to look at it from a narrower point of view, can it be said that an accused person is in possession of opium or selling opium when he is presenting a mass which is obviously not opium and which only contains, upon analysis, less than one per cent. or in other words traces of it, and especially when the question whether those traces of opium can be separated from the larger mass is entirely left in doubt. The prosecution have not given any evidence as to whether the traces of opium could be extracted from the mass and used as opium. Inasmuch as in a criminal prosecution the prosecution have to prove their case, which was that the accused was in possession of $2\frac{1}{2}$ seers opium, and it turns out that the $2\frac{1}{2}$ seers were not opium, but simply contained traces of opium and there is no evidence that such traces can be extracted from the larger mass, I think under the circumstances the prosecution fails and the conviction should be set aside. In this view, it is not necessary for us to express any opinion upon the question of law which Mr. Das has raised.

The fines in respect of this conviction, if they have been paid, will be refunded.

WALMSLEY, J.—I agree.

Conviction quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 336 OF 1916.

May 26, 1916.

Present:—Mr. Justice Sundar Lal.

AIJAZ HUSAIN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 225B—Resistance to lawful authority—Offence—Warrant—Arresting officer, duty of—Procedure.

An officer armed with a warrant of arrest should produce the warrant before the person sought to be arrested and make an attempt to arrest him and if he is in fact resisted, then the person sought to be arrested would be guilty of an offence under section 225B of the Indian Penal Code, inasmuch as to constitute an offence under the section something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest, is required. [p. 974, cols. 1 & 2.]

In a serious case like this if the facts mentioned are true, a charge should be framed against the accused and the accused should be tried in the ordinary way and not summarily. [p. 974, col. 2.]

Criminal Reference made by the Sessions Judge, Moradabad, as per his letter No. 463/II, dated the 12th May 1916.

Dr. *S. M. Sulaiman*, for the Applicant.

Party.

JUDGMENT.—This is a reference made by the Sessions Judge of Moradabad. The facts of the case are as follows:—One Barkat Hasan was the *lambardar* of a village. He made default in payment of the Government revenue. He had transferred his own share to a near relative. The accusad Aijaz Husain was one of the biggest co-sharers in the village. The Tahsildar called upon him to pay the Government revenue but he objected. Thereupon the matter was reported to the Collector. The Collector passed

an order directing realization of the revenue by the arrest of the applicant. A warrant of arrest was issued signed by the Naib Tahsildar on the 24th of February 1916 returnable by the 29th. The peons were unable to execute this warrant. Time for execution was extended up to the 6th of March. In the meantime one of the other co-sharers who had been arrested for non-payment of Government revenue was released and he was asked to trace out Aijaz Husain, for whose arrest the warrant was issued. This co-sharer took the *chaprasis* to the place where the accused was. According to the report of the *chaprasi* endorsed on the warrant the accused declined to be arrested, was ready to quarrel and said:—"Take me if you can to the Tahsil, I won't go." The *chaprasi's* report is no evidence. But I understand that the report of the Naib Tahsildar was admitted in evidence though the Naib Tahsildar was not examined, nor did he personally know what had actually happened when the *chaprasis* went to arrest the accused. Four *chaprasis* had been entrusted with the execution of the warrant. Upon these facts the accused has been convicted of an offence under section 225B of the Indian Penal Code. The case was tried summarily. No evidence has been recorded. The learned Magistrate sets out in detail the case for the prosecution and concludes by saying:—"I find the charge against him proved." He has not found what exactly was the evidence in this particular case. The accused appears to be an influential *zemindar*. For some reason or other the *chaprasis* were unable to find him out before the 29th of November and another co-sharer who had already been under arrest was asked to trace him out. It was in his company that the *chaprasis* went to arrest the accused. I think an officer armed with a warrant of arrest should have produced the warrant before the person sought to be arrested and made an attempt to arrest him, and if he had in fact been resisted then he certainly would have been guilty of an offence under section 225B of the Indian Penal Code. I suspect that the *chaprasis* were more or less friendly with the accused. They did not perform their duty by proceeding to arrest him. I do not understand what the expressions *amadah foujdari hue* or "arrest me if you can, I won't go" were actually meant to convey. To constitute an offence under section 225B, something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest, is required. The learned Magistrate in his explanation says that the accused bears the reputation of a pugnacious man. That may be so. There is apparently no evidence on the point. I think the four *chaprasis* entrusted with the execution of the warrant, for some reason best known to themselves, failed to arrest the accused formally and reported what is endorsed on the warrant. I think in a serious case like this, if the facts mentioned were true, a charge ought to have been framed against the accused and the accused tried in the ordinary way and not sammarily. I am not satisfied (and I agree with the learned Sessions Judge in this matter) that there was any resistance or obstruction offered in fact to the arrest of the accused. The fact is that the *chaprasis* did not attempt to arrest him. I, therefore, accept the reference, set aside the conviction and sentence of the accused and direct his immediate release.

Conviction set aside.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 774 OF 1916.

July 17, 1916.

Present:—Mr. Justice Broadway.

MALA SINGH—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 87, 88, 89, 537—Attachment and sale of property of absconding offender—Proclamation, publication of—Application for return of property made more than two years after attachment, whether barred—Proceedings under ss. 87, 88, validity of—Remedy, when proceedings illegal.

The most important part of the publication of a proclamation under section 87, Criminal Procedure Code, is the publishing of it in the accused's place of residence and the thirty days allowed by the section should be reckoned from the date of such publication. [p. 976, col. 2.]

Queen-Empress v. *Subbarayar*, 19 M. 3; 2 Weir 40; 1 Weir 86, referred to.

Magistrates when acting under section 87 should always make an endorsement or statement in writing validating the proclamation, as contemplated by clause (3) of the section. [p. 976, col. 1.]

MALA SINGH *v.* EMPEROR.

An application under section 89 for return of the property attached, made more than two years after the attachment, is barred [p. 977, col. 2.]

Abdullah v. *Jitu*, 22 A. 216, referred to

Section 89 does not apply to a case where the attachment is irregular and invalid. [p. 977, cols. 1 & 2.]

Kanwar Singh v. *Queen-Empress*, 15 P. R. 1893 Cr., distinguished.

Petition, under section 439 of the Code of Criminal Procedure, for revision of the order of the Sessions Judge, Jullundur, dated the 1st February 1916, affirming that of the Magistrate, 1st class, Jullundur, dated the 22nd October 1915.

Mr. *Mukand Lal Puri*, for the Petitioner.

The Government Advocate, for the Respondent.

JUDGMENT.—This case has arisen out of certain proceedings taken in connection with a dacoity which was committed on the 17th February 1910 at *Mauza* Kharkowal in the Jullundur District.

The petitioner Mala Singh was one of those who were charged with the commission of the dacoity, but he (as well as some others) was not found, and it was reported that he had absconded.

I have gone with great care through the record as well as the *zimnies* of the dacoity case. It appears from the *zimnies* in that case that the Police had reason to believe that the petitioner was leaving the country for Africa and on the 12th March 1910, dockets were issued by the Police Superintendent to the Calcutta and Bombay Police for the arrest of the petitioner if he should be found in either of those seaports.

He was not arrested and on the 26th April 1910, the Magistrate at Jullundur issued a *robkar* addressed to the Hoshiarpur authorities (in which District the petitioner resides) ordering the issue of a proclamation under section 87, Criminal Procedure Code. It was directed that the proclamation should issue on the 1st May 1910, requiring the petitioner to appear in Court on the 31st May 1910.

On the 12th May 1910, a Constable in the Hoshiarpur District reported that he had that day affixed the said proclamation in a conspicuous spot in the petitioner's village.

On the 21st May 1910, an order of attachment was issued under section 88, Criminal Procedure Code. In accordance with this order the property moveable and immoveable belonging to the petitioner was duly attached and in due course sold for a total sum of Rs. 2,377-3-0, the purchaser being a brother of the petitioner. The money was paid into the treasury at Hoshiarpur in June 1911.

Subsequently it appears that the other persons who had also absconded in connection with the dacoity case, from time to time gave themselves up and were all released for various reasons which need not be considered here.

Finally on the 5th February 1915, Mala Singh petitioner surrendered himself and was similarly released on the 22nd March 1915.

He then on the 7th August 1915 applied under section 89, Criminal Procedure Code, for the return of his property or in the alternative for the payment to him of the money its sale had realized.

His allegation is that he had left for Africa some months before the dacoity was committed, and that as he was away he never heard of the proclamation or attachment and sale of his property.

The Magistrate held that as more than two years had elapsed since the proclamation and attachment, the application could not be entertained, and he dismissed it accordingly.

On appeal to the Sessions Judge, the petitioner again urged his innocence as far as the dacoity case was concerned, and it was further argued on his behalf that the sale proceedings were irregular and that no proper enquiry had been made before he was declared to have absconded. Further that no warrant for his arrest had been issued prior to the proceedings under section 87, Criminal Procedure Code, which were, therefore, bad in law.

The learned Sessions Judge held that the application was barred having been made more than two years after the attachment, and that "the regularity or otherwise of the sale proceedings" was "not open to argument at this distance of time."

With reference to the issue of the warrant it was held that the *zimnies* showed

that the Police had used every endeavour to find the petitioner and that as "*Nathi Be*" had been destroyed it should be assumed that the proceedings were in order. The appeal was accordingly dismissed. Mala Singh has now preferred this revision under section 439, Criminal Procedure Code, and I have heard Mr. Mukand Lal Puri in support of the revision, while the learned Government Advocate has addressed me on behalf of the Crown.

Neither Counsel has been able to show me any reported decision on the point now in issue, nor have I been able to discover one after a careful search. It must, I think, be conceded that there are indications on the record that the proceedings under section 87, Criminal Procedure Code, were not strictly in conformity with the prescribed procedure.

It was urged that before a proclamation can be published under section 87, Criminal Procedure Code, it is essential that the Magistrate should have issued a warrant the execution of which had been rendered impossible.

No such warrant is forthcoming nor is there any trace of any order directing its issue. The warrant would, however, ordinarily be placed on "*Nathi Be*," and as this has now been destroyed, it cannot be said it was not issued and it seems to me that it would be justifiable to presume that it was as a matter of fact issued [section 114, Evidence Act, Illustration (*e*)].

There is no endorsement or statement in writing made by the Court validating the proclamation as is contemplated by section 87 (3), Criminal Procedure Code. In my opinion this important provision of law should invariably be made use of by Magistrates when acting under section 87, Criminal Procedure Code, but unfortunately it seems to be wholly ignored in the majority of cases.

The order directing the issue of the proclamation was passed on the 26th April 1910, and the Court in Hoshiarpur was requested to publish it on the 1st May 1910, the time for appearance being fixed as the 31st May 1910. If the Hoshiarpur Court complied with this request the matter would end, but there can be no doubt that the proclamation was not published in the village of the petitioner till the 12th May 1910. Such a publication is imperatively laid down in section 87 (2) (*a*) and (*b*), Criminal Procedure Code.

Mr. Petman urged that the Code merely uses the words "from the date of publishing such proclamation" and that as a copy of the proclamation must have been affixed to the Court house as is required by section 87 (2) (*c*), the 30 days would count from the date of such posting. I am inclined to think that this contention is not sound. It seems to me that the most important parts of the publication are the publishing of the proclamation in the village. I am fortified in the view by *Queen-Empress* v. *Subbarayar*(1), in which case the proclamation was issued on the 6th November 1893, the date specified being the 11th December 1893. The proclamation was not published in the village till the 15th December 1893, and the learned Judges say at page 5: "The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation in the village".

Mr. Petman also urged that in any event the provisions of section 537, Criminal Procedure Code, would apply and cover any defects in these proceedings. It was held in the same case, *Queen-Empress* v. *Subbarayar* (1), that such defects could not be cured by section 537, Criminal Procedure Code, although with all deference to the learned Judges who decided that case I am not convinced that this decision is sound.

Mr. Mukand Lal then urged that as far as section 89, Criminal Procedure Code, is concerned, the limitation of two years refers to a *valid* attachment, and that as the proceedings under section 87, Criminal Procedure Code, were irregular the attachment made under section 88, Criminal Procedure Code, must be regarded as bad, and that, therefore, the present application is not barred as having been made beyond the two years laid down in section 89, Criminal Procedure Code.

He referred me to *Kanwar Singh* v. *Queen-Empress* (2), (which, however, has no

(1) 19 M. 3; 2 Weir 40; 1 Weir 86.
(2) 15 P. R. 1893 Cr.

bearing on this point and need not be discussed), *Queen-Emperss* v. *Subbarayar* (1) and *Abdullah* v. *Jitu* (3). I have already referred to the Madras case, the point now under consideration was not before the Court and so it can give no assistance in the present case.

In the Allahabad case the application was apparently made within the two years, so that it is not precisely in point. It has, however, a bearing on the question, but it seems to me to be against Mr. Mukand Lal's contention. Assuming that there were irregularities in the proceedings under section 87, Criminal Procedure Code, and assuming also that the said irregularities are not curable by section 537, Criminal Procedure Code, and finally assuming that in these circumstances the attachment was not a valid attachment, what is the remedy? Can an application be made under section 89, Criminal Procedure Code, asking for a return of the property wrongfully attached and sold? The answer seems to me to be in the negative. As was held in the Allahabad case referred to, section 89, Criminal Procedure Code, prescribes "a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation" (page 218).

If the attachment is *valid*, then the person aggrieved can move the Court under section 89, Criminal Procedure Code, and he must not only apply but prove that he had not absconded within the period laid down in that section [see *In re Nilkanth Ramchandra Kulkarni* (4) cited by Mr. Petman].

If the attachment was not a valid one then obviously section 89, Criminal Procedure Code, cannot apply and the Court can take no action under it. This may result in hardship at times but with that the Courts are not concerned. Whether or not in this particular case the petitioner can induce the executive authorities to return the sale-proceeds to him, or whether he can, in the circumstances, recover the money in the Civil Courts is a matter with which I am not concerned.

If the attachment was valid then the application was out of time, if the attachment was invalid no application under section 89, Criminal Procedure Code, is competent. In either event the application fails.

I accordingly dismiss the revision.

Revision dismissed.

(3) 22 A. 216.

(4) 19 Ind. Cas. 333; 15 Bom. L. R. 175; 14 Cr. L. J. 237.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 942 OF 1916.

July 21, 1916.

Present:—Mr. Justice Scott-Smith.

DHANPAT—PETITIONER

versus

KESHO RAM—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 439 Sanction to prosecute, application for, whether can be dismissed in default—Revision.

An application under section 195, Criminal Procedure Code, for sanction to prosecute must be proceeded with on the merits and cannot be dismissed in default if the applicant is absent on any of the dates fixed for the hearing. [p. 978, col. 1.]

Case reported by the Sessions Judge, Hissar, with his No. 363 of 24th May 1916, for the orders of the Chief Court (section 438 of the Civil Procedure Code).

FACTS.—"The petitioner's petition for sanction to prosecute the respondent, Kesho Ram, under sections 211 and 193, Indian Penal Code, was made under section 195, Criminal Procedure Code. Notice was issued by the (Sub-Divisional Officer, Sirsa) Magistrate, 1st class, Sirsa, to the respondent for the 2nd May 1916. On the date fixed, *i.e.*, 2nd May 1916, none appeared in Court.

"The petition was dismissed in default by Sheikh Din Muhammad, Sub-Divisional Officer, Sirsa, exercising the powers of a Magistrate of the 1st class, by order, dated 12th May 1916."

GROUNDS.—"According to *Rup Narain* v. *Maha Dyal* (1), the lower Court could not dismiss the petition in default; even if the petitioner did not attend; it should have either granted or refused sanction on the merits. Hence I submit the record to the Chief Court with a recommendation, that order of the lower Court be set aside and the said Court be directed to pass orders according to law."

(1) 28 Ind. Cas. 336; 4 P. R. 1915 Cr.; 22 P. L. R. 1916; 16 Cr. L. J. 288.

DHARAMDEO SINGH *v.* EMPEROR.

Mr. *Nihal Chand Mehra*, for the Petitioner.

Mr. *Chaman Lal Gulate*, for the Respondent.

ORDER.—The order dismissing the application for sanction was illegal, *Rup Narain* v. *Maha Dyal* (1). It is, therefore, set aside and the case is remanded to the Magistrate in order that he may proceed with the application of Dhanpat according to law.

Case remanded.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 244 OF 1916.

May 31, 1916.

Present:—Mr. Justice Walsh.

DHARAMDEO SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Practice—Sentence—Offence under different sections—Penal Code (Act XLV of 1860), ss. 71, 147, 149, 325.

Where there are different definitions of the same offence or where the same offence is provided for in different sections or by separate and different provisions in the Code, under no circumstances should the accused be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. [p. 979, col. 1.]

Criminal revision from an order of the Sessions Judge, Ghazipur.

Mr. *A. P. Dube*, for the Appellants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case I see no ground for interference. It is another of those unfortunate agricultural disputes which are only too frequent. The applicants were cutting either properly or improperly, probably improperly, a sugar-cane crop, and the men who apparently had the right to interfere, or at any rate claimed the right to interfere, called upon them to stop. They might have stopped or they might have remonstrated, but they did a great deal more. They attacked them with *lathis* and inflicted in one case grievous hurt and in another case simple hurt. There was a considerable volume of evidence of eye-witnesses which the Magistrate has accepted. It is a clear case of unlawful assembly attended by force and violence amounting to riot under section 147 of the Indian Penal Code. If all the parties had been sentenced to six months' rigorous imprisonment, nobody could have said that they were too severely punished. They were, however, sentenced to four months' rigorous imprisonment under section 147 of the Indian Penal Code. They were further convicted of the offence of inflicting grievous hurt and sentenced to two months' rigorous imprisonment under section 325 of the Indian Penal Code. There was no direct evidence against any of them for this act. They merely became liable for the grievous hurt under section 149 of the Indian Penal Code, which makes all the participants in an assembly of this kind responsible for what is done. An ingenious argument supported by authority, deserving of all respect, has been addressed to me, by Mr. Dube on behalf of the applicants, that these separate convictions ought to be set aside on the ground that separate convictions and sentences for additional matters like grievous hurt resulting from the riot cannot stand as there has been conviction for riot. It must be conceded, however, that if there is direct evidence against any member of the assembly of his having committed grievous hurt, he may be convicted upon such evidence and punished. The argument is based upon the fact that in the absence of direct evidence such a person can only be convicted through the medium of section 149 of the Indian Penal Code, that is to say, his mere membership of the assembly, and it is argued from that, that section 149 is part of the offence of grievous hurt under section 325. Reliance is placed upon Mr. Justice Straight's decision in *Queen-Empress* v. *Ram Partab* (1). In the first place, I do not think that section 149 is rightly described as part of the offence under section 325. It is a definition of the offence itself. A man becomes guilty of the offence, according to a well-recognised principle of common law, because he is a member of the party that commits the offence. In the second place, I think that the reasoning of Mr. Justice Straight in *Queen-Empress* v. *Ram Partab* (1), although sound as far as it went, did not go far enough and failed to give effect to the

(1) 6 A. 121.

whole meaning of section 71 of the Indian Penal Code. The latest decision of this Court in *(Queen-Empress* v. *Bisheshar* (2), in which the judgment was delivered by Sir John Edge, must, I think, be taken as having settled this matter, so far as this Court is concerned, beyond controversy. The real solution of the question is that whether there are different definitions of the same offence or whether the same offence is provided for in different sections or by separate and different provisions in the Code, care should be taken that under no circumstance should the accused be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. He may be convicted of rioting and also of causing grievous hurt by mere membership of an unlawful assembly, provided the sentence ultimately passed on him does not exceed that provided in section 325 of the Indian Penal Code. This view of the law must be taken to be now clearly established by the authority of this Court. The convictions are, therefore, lawful. I do not think the applicants have any ground for complaint that the sentences are too severe. The sentences of four and two months' rigorous imprisonment to run consecutively must be upheld. The applicants must surrender themselves to bail in order to serve the remaining term of imprisonment.

Sentences upheld.

(2) 9 A. 645.

must be made within sixty days from the date of the order complained of and to this period an addition of the time which is necessary for obtaining copies is allowed. This is not an inflexible rule, and in exceptional circumstances it might be departed from.

Babu *Sarada Charan Maiti*, for the Petitioner.

JUDGMENT.

SANDERSON, C. J.—Since yesterday I have caused enquiries to be made with regard to the practice affecting this matter, and I find that the well-known practice is that an application for revision must be made within sixty days from the date of the order complained of. The Court has allowed an addition, to the sixty days, of the time which is necessary for obtaining copies. This is not a question of limitation, but a rule of the practice of the Court to the effect that an application for revision must be made within a reasonable time. It is not an inflexible rule, and in exceptional circumstances the rule might be departed from. In this case the date of making over the copy to the applicant was the 1st day of June, so that there was ample time to make this motion on one of the usual motion days, namely, Monday the 5th of June, or Monday the 12th of June; yet this motion was not made until the 19th of June when it was out of time. In these circumstances, we are of opinion that this application should not be entertained.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 643 OF 1916.

June 21, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

KHETRA MOHAN GIRI AND OTHERS—PETITIONERS

versus

DARPA NARAIN GIRI AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), *s.* 439—*Revision, limitation for—Practice of Calcutta High Court.*

The well-known practice in the High Court of Calcutta is that an application for criminal revision

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 326 OF 1916.

May 26, 1916.

Present:—Mr. Justice Sundar Lal.

GAYA BHAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 456—*Lurking house-trespass—Intention—Offence—Illicit intercourse with widow, if offence.*

Where the accused entered the complainant's house with a view to carry on an intrigue with his widowed sister who was of age, and was discovered:

Held, that his entering the house could not be said to have caused such annoyance or insult as is contemplated by section 456 of the Indian Penal Code and that the accused committed no offence,

GAYA BHAR *v.* EMPEROR.

inasmuch as to have criminal intimacy with a widow of age is no offence. [p. 981, col. 1.]

Criminal reference made by the Sessions Judge, Gorakhpur, as per his letter No. 347/III, dated the 9th May 1916.

JUDGMENT.- This is a reference made by the Sessions Judge of Gorakhpur. It appears that the accused went to the place of one Sarju to have illicit connection with Sarju's sister. He was arrested and on prosecution was convicted by Pandit Gursaran Newas Misra, a Magistrate of the first class, of an offence under section 456, Indian Penal Code, and sentenced to undergo rigorous imprisonment for one month. The learned Magistrate found that there had been criminal intimacy between the woman and the accused and that the woman was a widow. The question is whether the accused is guilty of an offence under section 456, Indian Penal Code. Section 456 refers to an offence of lurking house-trespass and section 441 defines the offence of criminal trespass. Under section 441, Indian Penal Code, whoever enters into or upon property in the possession of another (*a*) with intent to commit an offence or (*b*) to intimidate, insult or annoy any person in possession of such property shall be held to be guilty of an offence of criminal trespass. It has been found by the Magistrate that there was criminal intimacy between Sarju's sister and the accused. As she is a widow and of age, to have criminal intimacy with her is no offence under the criminal law, and it cannot be said that the accused went to Sarju's house with the intent of committing any offence, so far as this part of the case is concerned. It has been said that at any rate the accused must have known that Sarju would be much annoyed and would feel greatly insulted by the visit of the accused for the purpose of having sexual intercourse with his widowed sister and, therefore, the accused's conduct fell under section 453, Indian Penal Code. The learned Sessions Judge is of opinion that offence under section 456 has not been made out. The Punjab Chief Court in a recent case of *Jiwan Singh* v. *Emperor* (1) has held that under these circumstances the accused was guilty of criminal trespass. In that case Mr. Justice Chatterji came to this conclusion after finding that "*Musammat* Mehro denies the intrigue, and the first Court has not found it to have existed and the view of the learned Judge in regard to its existence is not well supported." Upon these findings it was unnecessary to decide the point. Mr. Justice Chatterji, however, held that the house in question did not belong to *Musammat* Mehro but to her brother and that illicit intercourse was bound to cause annoyance to the brother and he, therefore, upheld the conviction. I am unable to accept that view. In the case of *Queen-Empress* v. *Rayapadayachi* (2), Mr. Justice Shephard and Mr. Justice Davies in a case like this observed as follows: "In our opinion the accused, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of the house, cannot be said to have intended either actually or constructively to cause such annoyance. It is one thing to entertain a certain intention and another to have the knowledge that one's act may possibly lead to certain result. The section (441) defining criminal trespass is so worded as to show that the act must be done with intent and does not, as other sections do (*e.g.*, section 425), embrace the case of an act done with knowledge of the likelihood of a given consequence." The view taken by the Madras High Court seems to me to be the correct view applicable to a case like the one before me. The learned Magistrate in his explanation has relied upon the case of *Emperor* v. *Mulla* (3). In that case the accused was found inside the complainant's house at 2 A. M. He could not give any explanation of his presence. Mr. Justice Knox held that in the absence of any particular intention the accused must be held under the circumstances to have entered the house with the object of committing an offence. In the present case, however, the intention with which the accused entered the house has been clearly proved. Similarly in the cases of *Koilash Chandra Chakrabarty* v. *Queen-Empress* (4) and of *Premanundo Shaha* v.

(1) 17 P. R. 1908 Cr.; 8 Cr. L. J. 488; 32 P. W. R. 1908 Cr.

(2) 19 M. 240; 1 Weir 537.

(3) 29 Ind. Cas. 67; 37 A. 395; 13 A. L. J. 625; 16 Cr. L. J. 435.

(4) 16 C. 657.

Brindabun Chung (5) the accused was found in the middle of the night in a room occupied by respectable ladies. There was no evidence that he had an intrigue with any one of them and on an alarm being raised the accused attempted to escape. It was held that the accused must be deemed to have entered the house with the object of committing an offence. I agree with the view taken by the learned Sessions Judge and following the Madras ruling above referred to, I hold that it has not been proved that the accused entered the house with the intention of committing an offence and that the intention with which he went to Sarju's house, namely to carry on, an intrigue with his sister, even when discovered, cannot be said to have caused such annoyance or insult as is contemplated by the section. I set aside the conviction and the sentence and direct that the accused be forthwith released.

Conviction set aside.

(5) 22 C. 994.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 361 OF 1916.

June 30, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

TODAN MIR *alias* ABDUL KADIR—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code Act XLV of 1860), *s.* 436—*Arson—Previous fires in the locality, evidence of—Conviction on evidence partly inadmissible.*

Where the Sessions Judge convicted the accused of arson and in summing up his conclusion observed: "On these facts I believe the evidence of the Sub-Registrar (that is the complainant) and his servant Asdu, supported as it is by the previous chain of events" and the previous chain of events consisted of fires which had occurred in the village with which, however, the accused was not shown to have been connected in any shape or form:

Held, that it would not be safe to allow the conviction to stand, as the Judge had laid a very considerable stress upon the previous chain of events, which was not admissible in evidence, and it was doubtful whether he would have come to the conclusion at which he arrived but for the chain of events to which he referred. [p. 981, col. 2.]

The High Court, doubting the evidence of identification, set aside the conviction and sentence and directed the accused to be set at liberty without ordering a re-trial. [p 982, col. 2.]

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharjee* for Mr. *Mohammad A. F. K. Huq*, for the Appellant.

Mr. *Camell*, for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case we think that this appeal should be allowed. This is a case which has given us much cause for consideration. It is a serious case, one in which the accused was charged with the offence of arson, for which he has received a very considerable sentence, one which, in my opinion, is not too severe for an offence of this kind, if it were clearly proved that he was guilty of it.

Now, the learned Judge has given a very careful and elaborate judgment in this case: and unwilling as I am ever to interfere with the decision of a learned Judge who has had the opportunity of seeing and hearing the witnesses in the Trial Court, in this case I think there are certain matters which lead us to think that it would not be safe to allow that judgment to stand. First of all, the learned Judge in summing up his conclusion says: "On these facts I believe the evidence of the Sub-Registrar" (that is the complainant) "and his servant Asdu, supported as it is by the previous chain of events and the last link in that chain at Rahim Ali's house." Now, we have come to the conclusion that even assuming that the learned Judge was entitled to admit evidence of those events to which he has referred, as to which I will say a word in a minute, it is clear that he has laid a very considerable stress upon that chain, and it is doubtful whether he would have come to the conclusion at which he arrived, but for the chain of events to which he has referred. Now what is that chain of events? Stating it quite shortly, it is this: apparently this boy wanted the post of the second Pundit in a school but he did not obtain it—I am not going into details—and consequently the learned Judge comes to the conclusion that the boy and perhaps more particularly the boy's father had got a grudge against those who were connected with the school. The school itself was burnt down and

the first Pundit's house had been set on fire and the evidence was that the Pundit had great difficulty in getting accommodation, because the people were afraid that if they gave him accommodation, their property might suffer from fire in the same manner. Then the learned Judge refers to two cases: He refers first to the case of *Makin* v. *Attorney General* (1) in which some people were charged with the murder of a baby and on a part of their premises the bodies of their dead babies were found. Then he refers to the case of *King* v. *Smith* where a man was charged with the murder of his wife by drowning her in her bath, and the evidence relating to the deaths of two of his previous wives had been admitted. And, upon the strength of those two cases, he admitted the evidence relating to the dispute about the school and the previous fires. With great deference to the learned Judge, I do not think that those two cases to which he referred had any bearing upon this case. In both the cases, it is obvious that the previous facts of which the prosecution wanted to give evidence related in a direct manner to the actions of the accused persons, but in this case although there is some evidence that the accused boy had mixed himself up in some way with regard to the theft of some articles from the school, by saying he could give a clue and would secure the return of the missing articles if he were appointed to the post of the second Pundit, there is nothing whatever to connect that boy in any shape or form with the previous fires which occurred in the village. Therefore, I do not see what the evidence of the previous fires in the village has got to do with the present case at all: and that being so, it seems to me that it would not be safe to leave the case as it stands, because we are unable to say that the evidence as to what the learned Judge calls "the previous chain of events" may not have had an important effect on his mind.

Further than that, there are one or two facts with regard to the other part of the case, namely the question of identification and also the question of the evidence of the complainant and his servant. These are the points that I mentioned in the course of Mr. Sanyal's argument, which struck me as important.

Now, the evidence of the complainant was that he did not ascertain that there was any fire at all until he was close to it. He says that he was at the south-east corner of his compound when he saw the fire. Now, to reach that point he had to walk a considerable distance from the entrance of his compound carrying a lighted lantern in his hand and it is almost impossible to believe that the two people, who were alleged to have set fire to his *bari* at the south-east corner of the compound, should have remained close to it and not have noticed the man walking down to the point with a lighted lantern in his hand and with nothing to interrupt the view of him and allowed him to come within a couple of yards without their attention being attracted to his presence.

Further than that, there is the fact that his servant was also carrying a lighted lantern and he had to come from the other side of the tank which was close to the spot, and it is highly probable that his lighted lantern at 2 o'clock on a dark morning would have thrown light on the atmosphere in such a way that anybody, especially those who were about such a nefarious scheme as setting fire to a house, would have seen. This leads me to doubt whether the evidence of the complainant and his servant can be accepted *in toto*, when the complainant says that he came right upon the two accused within a couple of yards before they discovered his presence.

Now, the other point which has appealed to us is the evidence of the servant, and that is this: according to his evidence, he said that he was at the north-western corner of the tank when he first heard the shout of his master, and his master must then have been at the south-eastern corner of the compound. The men who are supposed to have set fire to the *bari* were then running away in a southerly direction, yet the servant was able to run back and come up to meet one of these men almost face to face. We have some doubts whether that story when looked at from a physical point of view can be accepted in its entirety.

For these reasons I think that it would not be safe to allow this conviction to stand. We, therefore, allow this appeal, set aside the con-

(1) (1894) A. C. 57; 63 L. J. P. C. 4; 6 R. 373; 69 L. T. 778; 17 Cox. C. C. 704; 58 J. P. 148.

viction and sentence and direct that the appellant be set at liberty.

WALMSLEY, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

ORIGINAL CRIMINAL.

March 8, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice.

EMPEROR—PROSECUTOR

versus

SREENATH MAHAPATRA AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 289, 292—Right of reply, when accused merely tenders as evidence documents identified by prosecution witnesses in cross-examination.

Section 292, Criminal Procedure Code, must be read in connection with section 289 and must be construed accordingly. When so read, the right to reply which is given by section 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded. [p 984, col. 21.]

The prosecution has not a right of reply when the accused do not adduce evidence in the sense above mentioned but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution. [p. 984, col. 1.]

Mr. *Eardley Norton*, (with him Mr. *McNair* instructed by Mr. *J. T. Hume*), Public Prosecutor, for the Crown.

Mr. *L Thornton*, for the Accused.

JUDGMENT.—In this case the three prisoners (Sreenath Mahapatra, Anil Prokash Shome and Sunil Prokash Shome) were charged with criminial conspiracy to commit the offences of forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document and cheating, and certain other offences, which it is not necessary to specify in detail.

During the cross-examination of certain of the witnesses for the prosecution, the learned Counsel appearing for one of the prisoners put to the witnesses certain letters as having been written by them or their employers.

The witnesses identified the letters which were then tendered as evidence and admitted.

At the end of the case for the prosecution, the learned Counsel for all the three prisoners declared that they did not mean to call witnesses or adduce evidence.

The learned Counsel for the prosecution thereupon claimed the right to reply under section 292 of the Code of Criminal Procedure of 1898, alleging that one of the accused had adduced evidence, by reason of the letters which the learned Counsel appearing for him had put in during the cross-examination of the witnesses for the prosecution, and, therefore, that the terms of section 292 gave him a right of reply. I held that the learned Counsel for the prosecution had not, under the circumstances above mentioned, the right to reply, and at the request of the learned Counsel engaged in the case, who urged that it was desirable to have a definite ruling on the point, I undertook to put my reasons for so holding into writing.

In my judgment the question depends upon whether section 292 is to be construed independently of the preceding sections of the Act, or whether it must be read in connection with them and in particular with reference to section 289.

If section 292 is to be construed independently of section 289, then the putting in evidence of the letters by the learned Counsel for one of the accused during the cross-examination of the witnesses for the prosecution would, in my opinion, bring the case within the section and give the prosecution the right of reply: for I do not think that the correct test for deciding this matter is whether the prosecution is taken by surprise, as has been suggested in some of the decisions. There is nothing to this effect in section 292, and to hold that this was the test would mean the implied addition to the section of some such words as "provided that the Judge who tries the case thinks the prosecution has been taken by surprise by the evidence adduced by any of the accused."

Such an implication, in my judgment is not permissible or necessary.

In my judgment, however, section 292 must be read in connection with section 289 and must be construed accordingly. When so read, the intention of the Legislature to my mind is clear. The scheme of the Act is that at a certain stage of the proceedings, *viz.*, "when the examination of the witnesses for the prosecution and the examination of any of the accused are concluded," the question is to be put to the accused whether he means to adduce evidence. If the accused does not then adduce evidence, provisions as to the course to be adopted are made by the Act: if he does, then certain other provisions as to the course to be adopted are made, one of which is the provision contained in section 292 as to the right of reply. Reading, therefore, the two sections together the right to reply which is given by section 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded.

The object of the Legislature, in my opinion, being to give each side an opportunity of commenting on the evidence of the other, this is accomplished by giving the prosecution the right to sum up at the conclusion of the case for the prosecution, when the accused does not adduce evidence in the sense above mentioned, but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution, and in giving a right of reply to the prosecution when the accused does adduce evidence in the manner specified by the Act. It is to be noted that this should not give rise to any inconvenience, for, in the cases where documents are put in by means of legitimate cross-examination of the witnesses for the prosecution, it must be obvious to those conducting the case for the prosecution for what purpose, or with what object they are put in, and the prosecution will have an opportunity of commenting upon them in the summing up which is expressly provided by the Act at the conclusion of the case for the prosecution. For these reasons, I held that the learned Counsel for the prosecution in this case had not the right to reply.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 90 OF 1915.

June 14, 1916.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Sheepshanks.

KARALI PRASAD GURU—

APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 456, 457, 380—Charge under ss. 457, 380—Conviction under s. 456—Criminal Procedure Code (Act V of 1898), s. 238—Intention, whether should be specified in charge under s. 456, Penal Code.

An inflexible rule of universal application cannot be laid down that under no circumstances can a conviction be made under section 456, Penal Code, when the accused has been charged with the commission of an offence under section 457, Penal Code. [p. 986, col. 1.]

Where the specific intent, namely, an intent to commit theft, imputed to the accused to sustain a conviction under section 457, Penal Code, has not been established, the accused may be convicted of an offence under section 456, Penal Code, in conformity with section 238, Criminal Procedure Code, if he is not prejudiced at the trial by such conviction for the minor offence. [p. 986, col. 2.]

To sustain a conviction under section 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention, such as is contemplated by section 441, is proved either from direct evidence or from conduct and other circumstances. [p. 986, col. 2.]

An accused was found at midnight in the house of the complainant, a respectable widow, while she was asleep on the same bed with her mother. He was caught but ran away leaving his wearing cloth behind. He was charged with and tried of offences under sections 457 and 380, the case for the prosecution being that the entry in the house was made with intent to commit theft of the complainant's ornaments. The explanation of the accused was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation. The trying Magistrate found that the accused had entered the house that night, not to commit theft as the prosecution alleged, nor to carry on an intrigue at the complainant's invitation as the accused asserted, but really with a view to make immoral proposals to her:

Held, that the accused could be convicted under section 456, Penal Code. [p. 987, col. 2.]

KARALI PRASAD GURU *v.* EMPEROR.

Jharu Sheik v. *Emperor*, 14 Ind. Cas. 320; 16 C. W. N. 696; 13 Cr. L. J. 224, *Queen-Empress* v. *Baba Rantanlal*, Bom Cr. Cas. 293; *Emperor* v. *Ishri*, 29 A. 46; 3 A. L. J. 652; 4 Cr. L. J. 291; A. W. N. (1906) 279; *Sher Singh* v. *Empress*, 14 P. R. 1883 Cr., referred to.

Reference under section 438, Criminal Procedure Code, by the Sessions Judge, Bankura, dated the 6th June 1916, against an order of the Deputy Magistrate, Bankura, dated the 25th May 1916.

JUDGMENT.—This is a reference under section 438, Criminal Procedure Code, by the Sessions Judge of Bankura.

The facts material for the determination of the questions raised on this reference may be briefly stated. On the morning of the 29th April 1916, one Golap Goalini lodged an information in the Police Station at Nejhia that, at midnight, Karali Prasad Guru had entered into her house while she and her mother were asleep on the same bed and that the entry was made with intent to commit a theft of her ornaments. She woke up as soon as her body was touched, and noticed the accused, who took away her ear ring from her right ear. She caught his clothes and raised a cry. Her mother awoke, lighted a match and caught the man. He pushed her down, tried to free himself from the hold of the complainant but failed and ran away naked, leaving his wearing cloth behind. On this information, the Police took action, arrested the accused and sent him up for trial. He was then summarily tried of offences under sections 457 and 380, Indian Penal Code, that is, lurking house-trespass by night and theft from a dwelling house. He pleaded not guilty and filed a written statement. The substance of his defence was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation, he denied the theft of the ear-ring and asserted that the cloth produced in Court had never been worn by him. His story was in effect that as soon as he discovered that the mother of the complainant was awoke he stealthily withdrew from the place in fear. Evidence was adduced on behalf of the prosecution not only to prove the incident as alleged by the complainant, but also to show that she was a respectable woman and had led a blameless life since the death of her husband 6 or 7 years ago. The accused, on the other hand, brought forward witnesses to depose that he had, for some time past, carried on an intrigue with the complainant. The Deputy Magistrate came to the conclusion that the incident had happened as narrated by the complainant and her witnesses. He also held that the story of an intrigue between the complainant and the accused, as told by the defence witnesses, was untrue, and that the accused had entered that night into the house of the complainant, not to commit theft as she alleged nor to carry on an intrigue at her invitation as he asserted, but really with a view to make immoral proposals to her and thus to annoy her. In this view, the Deputy Magistrate convicted the accused under section 456, Indian Penal Code, and sentenced him to six weeks' rigorous imprisonment. The accused thereupon moved the Sessions Judge on the ground that the conviction under section 456 was illegal, on the authority of the decision of this Court in *Jharu Sheik* v. *Emperor* (1). The Sessions Judge has accepted this contention and has recommended that the conviction may be set aside and the accused re-tried. We have carefully examined the record and have arrived at the conclusion that the conviction should be sustained.

The decision in *Jharu Sheik* v. *Emperor* (1), by reason whereof the Sessions Judge felt constrained to make this reference, is, we think, distinguishable. There the accused was charged with offences under sections 457 and 340. As regards the charge under section 457, the intent imputed to him was the commission of theft. The defence was a complete denial of the incident and the prosecution was said to be due to malice and ill-feeling. In these circumstances, this Court held that no conviction could properly be made under section 456, till the charge under section 457 had been amended. The reason assigned for this opinion was that the accused must have been seriously prejudiced by not knowing what really was the charge against him. It is not necessary for us to express an opinion upon the question, whether this view was correct, even in the circumstances of that case. But it is plain that if the Court intended

(1) 14 Ind. Cas. 320; 16 C. W. N. 696; 13 Cr. L. J. 224.

to formulate an inflexible rule of universal application that under no circumstances can a conviction be made under section 456, when the accused has been charged with the commission of an offence under section 457, the view cannot possibly be sustained. Section 238, Criminal Procedure Code, which provides that when a person is charged with an offence, and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it, could clearly be applicable to a case of this character. This view was adopted by West and Nanabhai, JJ., in *Queen-Empress* v. *Baba Rantanlal* (2). There the accused had been convicted by the Trial Court under section 457; on appeal the conviction was altered to one under section 414. The High Court held that section 457 applied to what might be called a composite offence and consequently under section 238, Criminal Procedure Code, an accused might be convicted of any element of the composite offence which constituted a minor offence. A similar course was followed in *Emperor* v. *Ishri* (3); there the accused was charged under section 457, but convicted under section 456, as the intent imputed to him was not established; the conviction was sustained by the High Court [see also *Sher Singh* v. *Empress* (4)]. We are of opinion that the decision in *Jharu Sheikh* v. *Emperor* (1) must be limited to its special circumstances, and in this connection the warning given by Lord Halsbury, L. C., in *Quinn* v. *Leatham* (5), may be usefully borne in mind, namely, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. We cannot, consequently, hold that merely because the intent imputed to the accused to sustain a conviction under section 457 has failed, no conviction can be made under section 456. We are not now concerned with the question whether a conviction under section 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved. We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under section 147 cannot be supported, unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge [*Silajit Mahoto* v. *Emperor* (6); *Poresh Nath Sircar* v. *Emperor* (7); *Rahimuddi* v. *Asgar Ali* (8)]. In that class of cases, the weighty observations in *Behari Mahton* v. *Queen-Empress* (9) may be borne in mind: "An accused person is entitled to know with certainty and accuracy the exact value of the charge brought against him. Unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases but it is more specially true in cases where (as in the case under section 147) it is sought to implicate an accused person for acts not committed by himself but by others with whom he was in company." We hold consequently that although the specific intent, namely, the intent to commit theft, was not established, yet it was competent to the Court to convict the accused under section 456 and the only consideration is, whether the accused has been prejudiced at the trial by the conviction for a minor offence, in conformity with section 238, Criminal Procedure Code. In the determination of this question, as pointed out by Couch, C. J., in *Reg.* v. *Govindas Haridas* (10), the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration.

Now it is well settled that to sustain a conviction under section 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved, such as is contemplated by section 441 [*Kailash Chandra Chakrabarty* v. *Queen-*

(2) Bom. Cr. Cas. 293.
(3) 29 A. 46; 3 A. L. J. 652; 4 Cr. L. J. 291; A. W. N. (1906) 279.
(4) 14 P. R. 1883 Cr.
(5) (1901) A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289 50 W. R. 139; 65 J. P. 708.
(6) 4 Ind. Cas. 19; 36 C. 865; 13 C. W. N. 801; 10 Cr. L. J. 471.
(7) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.
(8) 27 C. 990; 5 C. W. N. 31.
(9) 11 C. 106.
(10) 6 B. H. C. R. Cr. Cas. 76;

Empress (11); *Balmakand Ram* v. *Ghansamram* (12); *Premanundo Shaha* v. *Bindabun Chung* (13); *Emperor* v. *Ishri* (3); *Sher Singh* v. *Empress* (4); *Lalje Ram* v. *Queen-Empress* (14); *Ram Rang* v. *Emperor* (15)]. In the case before us, the accused admitted his presence at midnight in the house of the complainant. He alleged that he went there by invitation of the complainant with whom he had an intrigue. Evidence was directed at the trial to this point by both the prosecution and the accused, and the question in controversy has been decided. The Trial Court has disbelieved the defence witnesses and has accepted the prosecution testimony. The Sessions Judge has examined the evidence and has confirmed the view of the Deputy Magistrate. We see no reason to differ from these conclusions. The position then is that the accused is found at midnight in the house of the complainant, a respectable widow, while she is asleep on the same bed with her mother. He is caught, struggles to get off, and ultimately runs away leaving his wearing cloth behind. The explanation he offers for his presence in the house at dead of night and for this singular incident has been rejected. What, then, could have been his intention? The answer is best given in the words of Hill, J., in *Koilash Chandra Chakrabarty* v. *Queen-Empress* (11): "What we have then to deal with is the case of a man, a stranger, who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances, we think the Court ought to presume that the entry was effected with an intent such as is provided for by section 441, Indian Penal Code." In the language of Pigot, J., in *Permanundo Shaha* v. *Bindabun Chung* (13) "the position of the accused and all the facts preclude any notion of his going there to steal or for any purpose save his own pleasure; the facts are good evidence of an intent and of an intrusion on privacy within the meaning of section 509, Indian Penal Code, and, therefore, the intent to commit an offence within the meaning of section 441 is made out" To the same effect are the observations of Banerjee, J., in *Balmakand Ram* v. *Ghansam ram* (12) and of Turner, C. J., in *Samban* v. *Queen* (16). As was pointed out by Banerjee, J., the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances, for as Lord Ellenbrough, C. J., said in *R.* v. *Dixon* (17): "it is an universal principle that when a man is charged with doing an act,..... the intention is an inference of law resulting from doing the act."

We are further clearly of opinion that the accused has been in no way prejudiced and will gain nothing by a re-trial. If a re-trial is directed, if he is charged under section 456, if it is alleged that the trespass was committed with intent to commit an offence under section 509, and if he urges in defence that he entered into the premises at the invitation of the complainant with whom he was on terms of intimacy, what will be the question for investigation?—the very question which has now been determined on evidence adduced on behalf of the complainant and the accused. We feel no doubt whatever that, in these circumstances, it would not be right to direct a re-trial and afford a possible opportunity for the manufacture of perjured evidence.

As regards the sentence, we are of opinion that it does not err, by any means, in the direction of severity. The offence committed was very serious. The complainant is a respectable woman and though she occupies a humble station in life she is entitled to the full protection of the law. The accused, on the other hand, is said to be well-connected and is a person of means and some position, but that is not a good reason why he should be treated with misplaced leniency. Unless exemplary sentences were passed in these cases, persons

(11) 16 C. 657.
(12) 22 C. 391.
(13) 22 C. 994.
(14) 12 P. R. 1898 Cr.
(15) 18 P. R. 1905 Cr.; 127 P. L. R. 1905; 2 Cr. L. J. 279.
(16) 1 Weir 533.
(17) 3 M. & S. 11 at p. 15; 4 Camp. 12; 15 R. R. 381; 105 E. R. 516.

who are inclined to run the risk of detection in the commission of such offences, are not likely to be deterred. We accordingly decline to interfere in the exercise of our revisional jurisdiction, and direct that the accused be called upon to surrender so that he may serve out the remainder of the term of imprisonment.

Conviction affirmed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 552 OF 1916.

June 23, 1916.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

EMPEROR—PROSECUTOR

versus

NANDA GOPAL ROY—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 439, 423—Discharge, order of, by Presidency Magistrate—High Court's power of revision.

The High Court has power, under section 439 read with section 423, Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case. [p. 989, col. 1.]

Malik Pratap Singh v. Khan Mahomed, 3 Ind. Cas. 861; 36 C. 994; 13 C. W. N. 1221; 10 Cr. L. J. 385, followed.

When one of four accused persons jointly charged with an offence was discharged by a Presidency Magistrate and on appeal by the others who were convicted, the High Court directed his evidence to be taken, and on such evidence being taken and considered the appeal was dismissed and a Rule was issued upon that person to show cause why the order of discharge should not be set aside and the case against him inquired into again:

Held, that although the High Court was not deprived of its jurisdiction to revise the order of discharge by the mere fact of calling upon the accused to give his evidence in the case, yet under the circumstances of the case the order of discharge should not be set aside and the case against him should not again be inquired into. [p. 989, col. 1; p. 990, cols. 1 & 2.]

Babu *Atulya Charan Bose*, for the Crown.

Mr. *Chuckerbutty* and Babus *Monmatha Nath Mukherjee* and *Satindra Nath Mukherjee*, for the Accused.

PRELIMINARY ORDER.

SANDERSON, C. J.—The facts which are necessary to be stated in order to deal with the point that the learned Counsel has raised are these: This is a Rule which was granted calling upon Mr. N. G. Roy to show cause why the order of the Magistrate discharging him should not be set aside and a further inquiry held with regard to his alleged guilt. It appears that the charge originally made was against Mr. N. G. Roy and three others—as I understand, the charge was, amongst others, a conspiracy to cheat. After hearing the evidence the Magistrate, under section 253, Criminal Procedure Code, discharged Mr. N. G. Roy. That section runs in this way: "If, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

"Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

The proceedings went on with regard to the other three accused and in due course they were convicted. They then appealed to the High Court against their conviction, and during the course of the appeal apparently the learned Judges who heard it thought that it was desirable that the evidence of Mr. N. G. Roy should be taken; and, therefore, they remanded the case in order that his evidence should be taken. That evidence was taken and then the hearing of the appeal was continued in the High Court. And, amongst the materials which were considered by the High Court, was the evidence of Mr. N. G. Roy; and, upon considering the materials and the evidence, the High Court dismissed the appeal of the three accused. Then exercising the jurisdiction which had been exercised on previous occasions under section 439, the learned Judges directed that a Rule should issue calling upon Mr. N. G. Roy to show cause why the order of discharge should not be set aside and the case against him should not be enquired into again.

Now, those being the facts, it is urged by the learned Counsel, Mr. Chuckerbutty, that this Court has no jurisdiction to make the Rule absolute, which means that the Court has no jurisdiction under the circumstances of this case to direct that the order of discharge should be set aside and that the case against Mr. N. G. Roy should be enquired into again.

In our judgment the Court has jurisdiction. We think that as soon as the Magistrate discharged Mr. N. G. Roy, he ceased to be an accused person, and he never would have been an accused person again until proceedings in some form or other had been taken against him. If this Rule were to be made absolute and we were to direct that the order of discharge should be set aside and the case should be enquired into again, then he would become an accused person again. It was admitted, and it could not be denied in view of the decisions, that an order of *discharge* does not operate as an *acquittal*, and I do not understand how the mere fact of Mr. N. G. Roy being called upon to give his evidence in this case can convert the order of discharge into one of acquittal: and for these reasons I am of opinion that the Court has not been deprived of the jurisdiction which it has under section 439 as interpreted by the decision in the case of *Malik Protap Singh* v. *Khan Mahomed* (1). That case decides that "the High Court has power, under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further enquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case."

Therefore, in my opinion, the preliminary point which Mr. Chuckerbutty has taken is not a good one. I desire to add that this argument really amounted to one contention which was well summarised in the course of his argument, *viz.*, that the calling of Mr. N. G. Roy as a witness amounted to giving him an assurance that further proceedings should not be taken against him in respect of the same charge. We shall have to consider when we hear the case upon the merits whether that is the correct interpretation of what was done in this case, and I am of opinion that the fact to which Mr. Chuckerbutty has drawn our attention will be one of the materials which we shall have to consider upon the question whether we should in the exercise of our discretion make the Rule absolute.

(1) 3 Ind. Cas. 861; 36 C. 994; 13 C. W. N. 1221; 10 Cr. L. J. 385.

WALMSLEY, J.—I agree.

JUDGMENT.

SANDERSON, C. J.—In this case in my judgment the Rule should not be made absolute.

I think this is a case of considerable importance, although it is not likely that many similar cases will arise in the future. We have already expressed our judgment that this Court would have jurisdiction to make the Rule absolute, if we thought right in our discretion to make it absolute. We have given our reasons for that judgment. But under the circumstances of this case, in my judgment, it will not be right in the exercise of our discretion to make the Rule absolute, and the reasons for that conclusion may be shortly stated as follows: I do not think that Mr. Chuckerbutty put it much too high, when he summarized the position by saying that in directing this evidence of Mr. N G. Roy to be taken in this case, the Court was to a certain extent impliedly informing him that he would not be prosecuted in respect of the charge any further. It must be remembered that the object of the remand was as follows: Mr. N. G. Roy had made a statement before he was discharged by the Magistrate, giving a long account of these somewhat complicated circumstances. Apparently, though I have not read his judgment, the learned Magistrate had relied to a large extent upon that statement in coming to the conclusion that the other three accused were guilty of conspiracy. The learned Judges of the High Court thought he was not entitled to use that statement made by one who was an accused person at that time against the other three accused, and, therefore, they directed the case to be re-heard and the evidence of Mr. N. G. Roy to be taken on oath: and, if I remember rightly what was read by Mr Bose as to the directions with regard to the remand, it was expressly stated that Mr. N. G. Roy should be called as a witness

and then he could be cross-examined by the accused or those representing them upon his statement in the witness-box in order that the Court might be in full possession of the evidence to enable it to do justice in the case. It was not remanded in any sense whatever in order to enable Mr. N. G. Roy to try to exculpate himself, because he had already been discharged by the Magistrate, and at that time there was no charge hanging over his head at all. Now, under those circumstances, would it be right for this Court to make this Rule absolute? First of all, I have this fact in my mind that when the hearing of the appeal was continued the High Court was in possession of the evidence which had been given by Mr. N. G. Roy. I cannot disguise from myself the fact that in the judgment of the learned Judges reference is made to the evidence of Mr. N. G. Roy and the conclusion is arrived at that the evidence which he had given could not in some respects be accepted. Further at the time of granting the Rule it was stated that Mr. Roy had been examined on oath and had had an opportunity of stating his version of the case in the witness-box, but much of his evidence could not possibly be accepted. I think it would be hard for any learned Judge to say whether the evidence given under those circumstances and with such a view expressed about it had or had not any influence upon his mind when he directed the Rule to issue. At all events, in view of the fact that the evidence was before the learned Judges when the Rule was issued, can I say that it is clear that the Rule would have been issused just the same if that evidence of Mr. N. G. Roy had not been before them? I am not satisfied that I can say so. Then there is what seems to me a more important view of this case and that is this: although the evidence of Mr. N. G. Roy, given under the direction of the Court, could not be used against him if he were to be re-tried, there is no doubt whatever that the prosecution are in possession of the evidence which he gave. They know exactly what he said and it may well be that the evidence which he has given may be of considerable assistance to them in framing a case of complicity in the conspiracy against him. —I do not say it would; I do not say it would not; it is sufficient for me to say that it may be of considerable assistance in framing their case against him. There is also the other point that his evidence was used by the Division Bench of the High Court for the purpose of coming to the conclusion that a conspiracy had in fact taken place between the three accused who were convicted. The learned Counsel for Mr. N. G. Roy has argued that if further proceedings are directed against Mr. N. G. Roy, the prosecution would start with this important fact in their favour that a conspiracy between the three convicted men had been established and, when that fact has been established apparently to some extent by the evidence which Mr. N. G. Roy has himself given under the direction of the Court, I do not think that it would be right under those circumstances to make this Rule absolute.

One further point which I desire to mention is that it is admitted that the statement which Mr. N. G. Roy made before he was discharged could be put in evidence against him, if he were to be tried again and it is possible, though again I do not say that it would follow as a necessary consequence, that some of the answers which he has given in examination by the prosecution or cross-examination by the accused may have afforded material for the prosecution to show that some part or parts of his statement made before he was discharged were unreliable; that is one instance I had in my mind when I said that the evidence may have afforded material for the prosecution for supporting or framing the charge against Mr. N. G. Roy. This, in my opinion, would be contrary to the traditions of justice in criminal cases.

For these reasons I think that this Rule should be discharged.

WALMSLEY, J.—As I was one of the Judges who issued the Rule, I should like to add a few remarks. After thinking over the case I have come to the conclusion that I ought to agree with the learned Chief Justice in holding that the Rule should be discharged. Mr. Chuckerbutty's main argument on behalf of Nanda Gopal Roy, broadly stated, is that under the circumstances it would not be fair to Nanda Gopal Roy for this Court, after having directed him to be examined as a witness, to order him to be prosecuted in the same matter, and it is not possible for me

to hold that there are not grounds for taking the view that it would be unfair to the accused, for the reasons which have been given by the learned Chief Justice; I do not wish to repeat them. One other remark I wish to add and that is that in issuing the Rule we had no intention of suggesting that the evidence given by Nanda Gopal, when he was examined as a witness, was to be used in the proceedings that might be taken against him; and I very much regret that the learned Vakil who appeared in support of the Rule should have argued as though he was under the impression that that was our intention. I agree that the Rule should be discharged.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 813 OF 1915.

May 9, 1916.

Present:—Justice Sir George Knox, KT., and Mr. Justice Lindsay.

Thakur GULAB SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal conspiracy—Conspiracy, when not indictable—Penal Code (Act XLV of 1860), ss. 120B, 195, 511—False evidence, attempt to fabricate, charge of, when sufficient—Photographing under-trial prisoners against Police rules—Intention—Offence.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two or more agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, becomes capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. A conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." [p. 996, col. 2.]

Three Police Officers joined in taking a couple of photographs, one taking the photographs, the second arranging the camera and the third arranging the prisoners. They were charged with conspiracy to bring about the conviction of the prisoners for dacoity:

Held, that it was not a case where several men were proved to have taken several steps tending to one obvious purpose and through a continued portion of time, taking steps that led to an end. [p. 997, col. 1.]

There cannot be a conspiracy of one. When two people are indicted for conspiracy and are tried together, either both must be convicted or both must be acquitted. In a prosecution for conspiracy it is very necessary to prove that there were two or more persons agreeing for the purpose of the conspiracy. [p. 997, col. 2.]

Where a Police Officer took photographs of under-trial prisoners contrary to the Police Department rules:

Held, that in the absence of evidence it could not be said that his intention was necessarily to use the photographs for the purpose of fabricating false evidence. [p. 995, col. 2.]

A mere surmise and thought of probability on the part of a Judge as to the object of a certain act is not enough to justify a conviction for attempt to commit an offence. [p. 995, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge, Bareilly.

JUDGMENT.

LINDSAY, J.—These two appeals are connected and may be disposed of by one judgment. They have arisen out of a trial held in the Court of the Additional Sessions Judge of Bareilly in which three persons were concerned, namely, Abdul Hamid Khan, Azadar Husain and Gulab Singh. Of these the first named was, in the month of August 1914, Sub-Inspector of the Jahanabad Police Circle in the Pilibhit District: the second accused, Azadar Husain, was at that time the *Kotwal* of Pilibhit, while Gulab Singh, the third accused, was the Prosecuting Inspector of the Pilibhit District. The case in which these three accused were implicated had its origin in certain events which took place in the Pilibhit District in the month of August 1914, of which a short narrative may be given by way of introduction.

It appears that on the night of the 15th and 16th August 1914 a dacoity was committed in the house of one Tika Ram, the Station Master of Shahi, one of the stations on the Rohilkhand and Kumaun Railway, situated a few miles away from Pilibhit. A report of this affair was made at the Jahanabad Police Station and an investigation was made by the *Thanadar* Abdul Hamid Khan and one of his assistant officers. No names of any of the offenders concerned were given to the Police and no clue was obtained till the night of the 25th August. On the evening of that day the *Kotwal* of Pilibhit, the accused Azadar Husain, made a capture of five persons in a grove some little distance away from the town of Pilibhit. It is stated that this capture was made in con-

sequence of some information previously received, to the effect that a number of criminals intended to meet together outside Pilibhit for the purpose of committing a dacoity. The Police took action accordingly and lay in wait close to the scene. The five men who were arrested at the grove were Jahangir Khan, Gobre Singh, Tika, Chhote Singh and Mohan Lal, all of whom (except Mohan Lal) are residents of villages in the Shahjahanpur District which lie close to the railway station of Kuraya. At the time of the capture of these men two swords and a wooden fencing sword were found in their possession. It is stated that besides the five men mentioned several others were present in the grove, who managed to escape when the Police surrounded the spot: three of these were arrested late the same night, namely, Bandhu Singh, Puttu Singh and Shib Singh. Of these three Bandhu is the brother of Chhote Singh who had been caught in the *bagh*, and he was captured in the waiting room of the Pilibhit Railway Station. It is said that Bandhu Singh gave information to the Police which led to the arrest of the other two, Puttu Singh and Shib Singh, who were taken into custody just as they had taken their seats in a train which arrived at the Pilibhit Station about 11 P. M. The eight prisoners were taken to the *Kotwali* Police Station where a charge under section 402, Indian Penal Code, was entered against them. Further information alleged to have been given by Bandhu Singh led to the arrest of three other men on the following day. These were Kanhaya Lal, Bania of Pilibhit, Kanhaya Brahman and a Goshain named Ramgir, who according to the story told by Bandhu had been concerned with himself and others in the Shahi dacoity. The Bania was arrested in the forenoon of the 26th August and in consequence of a statement made by him a piece of a silver chain was found subsequently in the possession of one Narain Dhimar. The latter's story was to the effect that he had bought the chain from the Bania: this chain was later on identified as his property by the Station Master Tika Ram whose house had been raided on the night of the 15th-16th August.

Kanhaya Brahman is a gate-keeper on the railway at a level crossing a few miles from Pilibhit and he was arrested at his hut on the evening of the 26th August after Ram Gir had been captured at or near the same place. Ram Gir, like Bandhu Singh, also made a statement by way of confession implicating himself and others in the Shahi and other dacoities, and the information given by him resulted in the arrest of five others said to have been engaged in the Shahi case. These were Pitam Singh, Dalli Singh, Bhima, Shah Nur and Ganesha. Following upon these arrests certain identification proceedings were held on various dates in the month of September in the Pilibhit Jail and eventually two cases were instituted, one under section 402, Indian Penal Code, against those who had been captured on the evening of the 25th August, and the other under section 395, Indian Penal Code, against those persons and the others who were arrested later. The charge under section 395, Indian Penal Code, related to the Shahi case. In both cases the accused were committed to the Court of Session, where the charges were withdrawn in consequence of information having been obtained that the Police had been guilty of malpractice for the purpose of obtaining false evidence of identification. It was discovered that photographs had been taken of seven out of the eight men arrested on the 25th August and it was supposed that the photographs had been improperly used in order to bring about the identifications in the Pilibhit Jail. After the charges had been withdrawn in the Sessions Court, steps were taken to obtain sanction for the prosecution of the Police Officers said to have been concerned in the manufacture of this false evidence and, after certain preliminary proceedings to which it is unnecessary to refer, an inquiry was held under the provisions of section 478 of the Code of Criminal Procedure by Mr. Burkitt, Additional Sessions Judge of Bareilly.

Two separate cases were put before Mr. Burkitt. In one he was asked to find that the charge under section 402, Indian Penal Code, which had been laid against the men arrested on the 25th August, was a false charge either wholly or in part; in the other he was invited to hold that

false evidence had been fabricated for the purpose of procuring identification of those who had been charged with complicity in the Shahi dacoity. The learned Judge rejected the application made for sanction in connection with the case under section 402, Indian Penal Code. He held that the bulk of the evidence put before him in order to show that the section 402 case was a bogus case, was obviously false.

With regard to the application in connection with the Shahi case he came to the conclusion that there was strong evidence to show that seven of the men arrested on the 25th August had been photographed in the Pilibhit *Kotwali* on the 26th August: that the *Kotwal* and the Prosecuting Inspector were concerned in the taking of the photographs: and that the photographs had been made in pursuance of a conspiracy entered into between these two officers and Sub-Inspector Abdul Hamid Khan, the object of which was to secure false evidence for the purpose of proving that the seven persons whose photographs had been taken took part in the dacoity committed at Shahi on the night of the 15th-16th August 1914.

Mr. Burkitt accordingly drew up two charges against the three Police Officers Abdul Hamid Khan, Azadar Husain and Gulab Singh. One charge was that they had on or about the 26th August 1914 agreed to do an illegal act, namely, to bring a false charge of dacoity against the seven men photographed. The offence laid in this charge was punishable under section 211 read with section 120B of the Indian Penal Code. The other charge was one of having agreed to fabricate false evidence against the same seven men, amounting to an offence punishable under section 195, Indian Penal Code, read with section 120B.

Both charges, it is to be observed, related exclusively to the Shahi dacoity case, in other words, it was imputed that the accusation of having been engaged in the Shahi dacoity was a false accusation and that false evidence to support this false accusation had been procured by the three Police Officers.

The officers were committed for trial on these two charges framed by Mr. Burkitt and they were tried by Mr. Jenkins, Additional Judge, with the result that Abdul Hamid Khan and Azadar Husain were acquitted on both counts.

Gulab Singh was also acquitted on both the charges framed against him but was convicted under section 195, Indian Penal Code, read with section 511, Indian Penal Code, the learned Judge being of opinion that the photographs of the seven men had been taken by Gulab Singh "for facilitating the identification of the accused in dacoity cases". The learned Judge further held, to quote the words of his judgment, that it is "not proved that Azadar Husain or Abdul Hamid conspired with Gulab Singh either to take or to use the photographs, and that there is no proof that the photos were used for the purpose for which they were prepared."

We are no longer concerned with any case against Abdul Hamid Khan: there is no appeal against the order of acquittal passed in his case. We have an appeal (No. 813 of 1915) on behalf of Gulab Singh challenging the order of conviction, and in the case of Azadar Husain we have an appeal on behalf of the Local Government (No. 942 of 1915), the case for the Government being that Azadar Husain should, upon the evidence recorded, have been convicted under sections 195 and 120B of the Indian Penal Code. It will, we think, be most convenient to deal in the first place with the appeal of Gulab Singh, and the first matter for consideration in this connection is the genuineness of two pieces of material evidence, namely, two photographs Exhibits Y1 and Y2. Gulab Singh's defence in the Court below was that these photographs had not been taken by him. He denied all knowledge of them and suggested the possibility of their having been fabricated, that is to say, he pleaded that although the photographs presented the appearance of having been taken outside the *kotwali* building at Pilibhit, they might in fact have been taken elsewhere in the first instance and might have been afterwards re-printed against a background obtained by taking a genuine photograph of the wall of the *kotwali* building. This part of the defence was rejected by the learned Judge, who came to the conclusion upon certain evidence led in this

respect that the photographs Exhibits Y1 and Y2 were originals and that in fact they had been taken at the spot represented in them, namely, the back wall of the *kotwali* building. When Gulab Singh's appeal came up first for hearing in January last, an application supported by an affidavit was filed by his learned Counsel representing that since the date of his conviction Gulab Singh had obtained certain information to the effect that these photographs were composite productions and had been manufactured by a certain photographer named Parsi Sah, who appears to carry on business at Naini Tal, Bareilly and Lucknow. It was stated that this information had been obtained by Gulab Singh through the medium of advertisement inserted in the "Advocate", a newspaper published at Lucknow, and the Court was asked to adjourn the hearing of the case to allow of the taking of additional evidence. This request was acceded to, the additional evidence was taken before Mr. Burkitt, the Additional Sessions Judge, and includes certain evidence tendered by the Crown by way of rebuttal of the statement of Parsi Sah, the principal additional witness on behalf of accused appellant Gulab Singh. The learned Advocate who has now argued the appeal of Gulab Singh has not pressed this evidence upon our notice, and wisely so, for a perusal of it convinces us that the statement of Parsi Sah, which was intended to lead the Court to believe that the photographs Exhibits Y1 and Y2 were composite photographs and his handiwork, is false from beginning to end. The evidence of Mr. S. P. Sanyal, formerly Editor of the Advocate newspaper, establishes conclusively that the advertisement inserted by Gulab Singh in his paper which was represented to have resulted in the discovery of Parsi Sah as a witness able to give exculpatory evidence on behalf of Gulab Singh was drawn up by Gulab Singh in the office of the newspaper in the presence of Parsi Sah. In short the advertisement was a bogus affair concocted by Gulab Singh and this photographer and there can, we think, be no manner of doubt that Parsi Sah who, it is proved, was well known to Gulab Singh, has been suborned by the latter to give false evidence in order to secure his acquittal.

We may add that the expert evidence of Lieutenant Hort who was examined by the Crown proves to our satisfaction that the Exhibits Y1 and Y2 are original and genuine photographs.

It follows, therefore, that we must take it that the photographs Exhibits Y1 and Y2 were taken in the precincts of the Pilibhit *Kotwali* and that the seven men whose pictures appear in them were ranged for the purpose of being photographed in front of the back wall of the *kotwali* building. One other fact must also be taken to be conclusively established, namely, that both photographs must have been taken at some time before noon on the 26th of August 1914. They could not, for want of light, have been taken on the night of the 25th and it is proved that the seven men were removed from the *kotwali* about noon on the 26th and were taken, after a remand by the Magistrate, to the Pilibhit Jail. There is nothing whatever to show that they were ever again taken back to the *kotwali*.

[His Lordship, after discussing the evidence which was led to connect Gulab Singh with the taking of the photographs, proceeded:—]

We are unable to hold that on this evidence it can be affirmed that Gulab Singh took the photographs Exhibits Y1 and Y2 and this being so, the case against Gulab Singh was not proved.

Before concluding the discussion of the case against Gulab Singh, we have to refer to the argument put forward by his learned Counsel to the effect that even on the facts found by the learned Judge, Gulab Singh was not in law guilty of the offence of which he was convicted. It has been mentioned already that the conviction is in respect of an offence which was not charged. The charge in respect of the photographs was one of conspiracy: it was alleged that Gulab Singh had agreed with the Kotwal and Abdul Hamid Khan to fabricate false evidence for the purpose of obtaining convictions in the Shahi dacoity case. On the findings of the Judge with respect to the Kotwal and Abdul Hamid it was not possible to convict Gulab Singh on the charge as framed. But the learned Judge, being convinced that Gulab Singh had

taken the photographs, held that he was guilty of an attempt to commit the offence of fabricating false evidence, not for the purpose of obtaining a conviction in the Shahi case, but in order to obtain convictions in certain dacoity cases not specified. It is stated definitely in the judgment that the prosecution had failed to show to what use the photographs were put or were intended to be put. It is also stated definitely that there was no evidence from which it could legitimately be inferred that these photographs had been used so as to bring about the identification of any of the accused who were alleged to have been concerned in the Shahi case. The learned Judge surmises that the photographs may have been taken by Gulab Singh and distributed by him to the various Police Officers who were interested in the investigation of the numerous dacoity cases, in connection with which the identification proceedings were held in the jail on various dates in September 1914. And he adds in his judgment that "the existence of these photographs makes one suspect that there may have been a plan to have the photographed men identified by means of these photos". He then proceeds to the conclusion that it was "most probable that the photographs were intended to be used to work out certain cases in which there was otherwise not the slightest hope of obtaining evidence against any one".

It seems, therefore, that the Judge, while satisfied that Gulab Singh was the author of the photographs, was unable to arrive at any definite conclusion regarding the purpose for which they were taken and it is difficult to understand how in this state of affairs it can be predicated that the act of taking the photographs amounted to an attempt to fabricate false evidence.

Turning to the language of section 511 of the Indian Penal Code, we find that the liability to punishment arises out of the doing of an act "towards the commission of the offence", such act being done in the course of an attempt to commit the offence or to cause it to be committed.

The offence which it is said Gulab Singh was attempting to commit was the offence of fabricating false evidence of identification: he had formed the intention of procuring witnesses by means of these photographs to swear falsely that they recognised one or other of the men in the photographs as persons whom they had actually seen committing the offence of dacoity. Can it be said then that the taking of the photographs by Gulab Singh was an act done "towards the commission of the offence". According to the judgment no such definite quality is attributed to the act: the learned Judge can go no further than to say that he surmises or thinks it very probable that the photographs may have been taken with a view to the procuring of false evidence. But that is not enough to justify a conviction for attempt.

The quality of the act can only be estimated in the light of the surrounding circumstances. It cannot, we think, be inferred from any of the events which preceded the taking of the photographs that the intention was to use them for an unlawful purpose, and it is admitted that there is no evidence afforded by subsequent events to justify the conclusion that they were so used or intended to be used. Ordinarily the act of taking a photograph is an innocent act which cannot be deemed to import an intention of using the product of the act for an illegal purpose. It has been pointed out, however, that under the rules of the Police Department the taking of photographs of undertrial prisoners is prohibited and that consequently the act ascribed to Gulab Singh was not an innocent act. But while in these circumstances we may attribute to Gulab Singh the knowledge that he was doing wrong by transgressing a rule of conduct of his department, we cannot in the absence of other evidence go further and hold that his intention necessarily was to use the photographs for the purpose of fabricating false evidence.

We find, therefore, that even if it be assumed to be proved that Gulab Singh took the photographs Exhibits Y1 and Y2, he could not on the evidence before us be convicted of an attempt to fabricate false evidence. We allow his appeal and setting aside the conviction and sentence direct that he be acquitted and released.

GULAB SINGH *v.* EMPEROR.

[His Lordship then dealt with the appeal preferred by the Government against Azadar Hussain and concluded as follows:—]

Our consideration of the evidence in the case leads us to the conclusion that there could be no justification for our interfering with the order acquitting Azadar Husain and we dismiss the appeal against him accordingly.

KNOX, J.—I have had the opportunity of reading and considering what my brother Lindsay has written in his judgment about this case. I only wish to add

(1) that I fully agree with him in his finding about the facts of the case. The evidence given to prove that Azadar Husain joined Gulab Singh in taking the photographs (Y1 and Y2) is so unreliable that it can sustain no finding to that effect.

But even if it were reliable evidence it would fall short of proof of the offences charged. The charges on which he was tried were (1) that he with Gulab Singh and Abdul Hamid did agree to do an illegal act to wit, to bring a false charge of having committed dacoity at Shahi against Jahangir Khan and others, knowing that there was no just and lawful ground for such charge and thereby committed an offence punishable under sections 211/120B of the Indian Penal Code; (2) that he with Gulab Singh and Abdul Hamid did agree to do an illegal act, to wit, to fabricate false evidence of having committed a dacoity at Shahi against Jahangir, intending thereby to cause the said persons to be convicted of the offence of dacoity, and thereby committed an offence punishable under sections 195/120B, Indian Penal Code. The Crown never attempted to prove with reference to the Shahi dacoity that the three accused went one step further than taking the photographs Y1 and Y2 on the 26th of August 1914. No one of the Crown witnesses even suggests that the photographs were shown to any of the witnesses in the Shahi dacoity case and as the evidence shows there was no necessity for the taking of any such step; no witness suggests that they saw or heard of any agreement between the accused with reference to that case.

It was pointed out by Mr. Justice Willes in *Mulcahy* v. *Queen* (1) that: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means." And so far as proof goes, conspiracy, as Grose, J., said in *Rex* v. *Brissac* (2), is generally matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.'" This is in consonance with the language used in section 120A of the Indian Penal Code.

On behalf of the Crown, however, while it was admitted that proof of mental agreement was a necessary ingredient, still it was contended that that ingredient of the offence was generally an inference from the collateral circumstances of the case. In support of this, reference was made to Russell on Crimes, 7th Edition, Vol. I, page 191.

In *Reg.* v. *Murphy* (3) Coleridge, J., did use the expression. But the error in the argument addressed to us lies in divorcing one text of His Lordship's judgment from the context.

The judgment went on to say: "It is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge, it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, for in many cases of the most clearly established conspiracies there are no means of proving any such thing. If, therefore, two persons pursue by their acts the same object, often by the same means, one

(1) 3 English and Irish Appeals 306 at p. 317.
(2) 4 East. 164 at p. 171; 102 E. R. 792.
(3) 8 Car. & P. 297.

performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the common object they were pursuing, the Jury are free to infer that they have been engaged in a conspiracy to effect that object."

Similarly in *Regina* v. *Duffield* (4) Erle, J., in addressing the Jury pointed out that the essence of the offence of conspiracy was the combination to carry out an unlawful purpose and went on to say:—"although that be the essence of the offence, it does not happen once in a thousand times, when the offence of conspiracy is tried, that anybody comes before the Jury to say: 'I was present at the time when these parties did conspire together, and when they agreed to carry out their unlawful purposes;' that species of evidence is hardly ever to be adduced before a Jury, but the unlawful combination and conspiracy is to be inferred from the conduct of the parties, and if you see several men taking several steps, all tending towards one obvious purpose, and you see them through a continued portion of time, taking steps that lead to an end, why, it is for you to say whether those persons had not combined together to bring about that end, which their conduct so obviously appears adapted to effectuate." In the case before us all that has been asserted by the prosecution evidence is that three persons joined in taking a couple of photographs, one taking the photographs, the second arranging the camera and the third arranging the prisoners. It is not a case where several men are proved to have taken several steps tending to one obvious purpose and through a continued portion of time, taking steps that lead to an end. It seems to me much as if the prosecution, getting information by anonymous letters or otherwise that certain persons were concerned in committing arson, ask the Court to infer that there was a conspiracy to commit arson merely because in the pockets of the alleged conspirators certain boxes of matches were found or that they were proved to have purchased matches. Or to take a case more cognate to the present one, if the prosecution were to ask a Court to find persons guilty of a conspiracy to commit an offence under section 122 of the Indian Penal Code and go no further in proof than to show that persons not licensed to carry arms had, one of them a stand of arms in his house, another ammunition and so forth.

It may, however, be contended that where there is no evidence that persons have joined in concerting a plan or that they never met the other conspirators, they may still be found guilty of a conspiracy but in such a case, as pointed out by Coleridge, J., in *Regina* v. *Murphy* (3), there must be a joining afterwards to execute one common object to the injury of a person. There is no such joining in a common purpose proved in the present case.

There is another fact which both sides appear to have overlooked, and that is that when Abdul Hamid and Azadar Husain were acquitted of the offence charged the conviction of Gulab Singh for conspiracy *ipso facto* fell to the ground. There cannot be a conspiracy of one. In the *Queen* v. *Manning* (5), Lord Coleridge held: "in cases of an indictment for conspiracy, when two people are indicted and are tried together, either both must be convicted or both must be acquitted. That seems to me to have been determined, or, if not determined, taken for granted from very early times."

In the *King* v. *Plummer* (6) the learned Judges went so far as to hold "that, where two or more persons are charged in the same indictment with conspiracy with one another, and the indictment contains no charge of their conspiring with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a Jury or upon his own confession." It shows how necessary, in a prosecution for conspiracy, it is to prove that there were two or more persons, agreeing for the purposes of the conspiracy. These last remarks refer particularly to the case of Gulab Singh, but I have inserted them here as it is intended to pass only one judgment in

(4) 5 Cox, C. C. 404 at p. 434.

(5) 12 Q. B. D. 241.

(6) (1902) 2 K. B. 339; 71 L. J. K. B. 805; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647; 20 Cox. C. C. 263; 18 T. L. R. 659.

the two cases. So far as Gulab Singh was concerned there was nothing in the charge setting out conspiracy with others or unknown persons over and above Azadar Husain and Abdul Hamid, and a conviction on the offence charged would have been illegal.

For these reasons, both because no agreement to do or cause to be done an illegal act has been proved either by direct evidence or by a combination of circumstances from which such an inference can be properly drawn and also because the evidence upon the record which has been given to prove a concert between Azadar Husain, Gulab Singh and Abdul Hamid is of such a doubtful character, I agree with my brother in holding that this Government appeal against Azadar Husain must be and is hereby dismissed. For the same reasons I hold that the appeal of Gulab Singh, Criminal Appeal No. 813 of 1915, must be and is allowed. Neither this offence is charged nor the offence of which he was found guilty was proved against him and the sentence is set aside. He is out on bail and the bail-bond is discharged.

BY THE COURT.—The appeal of Gulab Singh is allowed and the conviction and the sentence passed upon him are set aside and it is directed that he being already out on bail, the bail-bond be discharged.

The Government appeal against Azadar Husain is dismissed and the order of acquittal passed by the Additional Sessions Judge of Bareilly upheld.

Conviction set aside.
Government appeal dismissed.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No 922 OF 1915.
April 3, 1916.
Present:—Mr. Justice Shah Din and Mr. Justice Chevis.
EMPEROR—APPELLANT
versus
FAIZ AND OTHERS—CONVICTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (1)—Statement of deceased, admissibility of, as to cause of death—Transaction, one—Penal Code (Act XLV of 1860), s. 330.

Where a person commits suicide as the result of ill-treatment received at the hands of an accused person and that treatment is the cause though not the direct cause of the death, the whole affair, ill-treatment and subsequent suicide, forms one transaction and, therefore, statements made by the deceased as to the cause of his death are admissible in evidence under section 32 (1) of the Evidence Act. [p. 999, col. 1.]

Appeal from the order of the Sessions Judge, Sialkot, dated the 29th May 1915.

The Assistant Legal Remembrancer, for the Appellant.

Mr. *Dhan Raj Shah*, for the Respondents.

JUDGMENT.—Faiz, Muhammad Din and Khuda Bakhsh were tried by the District Magistrate and convicted of an offence under section 330, Indian Penal Code, and sentenced each to three months' simple imprisonment and a fine of Rs. 100 or in default six months' rigorous imprisonment. The learned Sessions Judge on appeal altered the conviction to one under section 323, and reduced the sentence to the fine or imprisonment in default. This being in effect an acquittal of the charge under section 330, Government has preferred an appeal.

The facts are fully given in the judgments of the lower Courts and it is unnecessary to repeat them. Both the lower Courts have held it proved that the convicts ill-treated the deceased Rahmat, but the learned Sessions Judge holds that there is no proof that the object was to extort a confession and that the probabilities are that he was merely beaten as he was suspected of being a thief, and so the Sessions Judge holds that the conviction under section 330 cannot be upheld.

On behalf of the convicts it is urged that the statements made by the deceased are inadmissible in evidence and that there is no good proof that the convicts beat the deceased. For the prosecution it is urged that the statements are admissible under section 32 (1), Evidence Act. Mr. Dhan Raj Shah objects that his clients have not been tried for causing the death of Rahmat, and that the cause of that death is not in question, death being admittedly the result of Rahmat's wounding himself with a razor. Counsel for the convicts quotes *Fakir* v. *Empress* (1) and *Imperatrix* v. *Rudra* (2).

(1) 17 P. R. 1901 Cr.
(2) 25 B. 45.

In the former case the head-note seems to go further than the judgment. The Bombay case is easily distinguishable. There the appellant had been tried for dacoity, the deponent had died of pneumonia, and no connection between the dacoity and pneumonia was proved. In the present case there can, we think, be no doubt that the suicide was the result of the ill-treatment received at the hands of the convicts, and so that treatment was the cause though not the direct cause of the death, and though the convicts are not legally responsible for the suicide, the cause of death comes into question in this case, the whole affair, ill-treatment and subsequent suicide, being all one transaction. Illustration (*a*) to section 32 seems also in point, as shewing that a statement as to the cause of death referring to the rape is relevant as against a person tried for the rape when rape and death form parts of the same transaction. The difference between English Law and the law in India is pointed out on page 302 of Woodroffe and Ameer Ali's Law of Evidence, 6th edition.

We hold that the statements are admissible. Taking these statements into consideration, we have no hesitation in agreeing with the lower Courts in their finding that the respondents to this appeal ill-treated and caused hurt to Rahmat.

We cannot agree with the learned Sessions Judge that Rahmat was beaten merely out of resentment as being suspected of being a thief. Police aid had been invoked and everything in our opinion points to an attempt on the part of the respondents to make Rahmat confess and give up the stolen property. When a thief is caught *in flagrante delicto* he is often given a good beating in the passion of the moment, but here the circumstances are entirely different, Rahmat was merely a suspect against whom evidence was not forthcoming though wanted.

We accept this appeal and restore the conviction under section 330 and the sentence passed by the District Magistrate. We further direct that the fines, if realized, shall be paid to the nearest representative of the deceased.

We note that the sentence passed by the District Magistrate is certainly not excessive, but errs, if at all, on the side of leniency. The respondents should surrender to the District Magistrate or to the Superintendent of the Jail within one week to undergo the sentence; failing this the District Magistrate should cause them to be arrested.

Appeal accepted.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 4 AND 5 OF 1915.

December 14, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—APPELLANT

versus

MON MOHAN ROY AND OTHERS—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 120B, 109—Abetment by conspiracy—Evidence Act (I of 1872), s. 10—Appeals, criminal, in connected cases—Cross-references to evidence and judgments in cases by Appellate Court—Irregularity.

It is irregular for a Judge, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases. [p. 1000, cols. 1 & 2.]

A conviction under section 120B, Indian Penal Code, cannot stand if the offence was committed before that section came into force but the accused can be convicted of abetment under section 109, Indian Penal Code, as abetment includes abetment by conspiracy. [p. 1000, col. 2.]

The accused, a loading officer of a Railway Company, fraudulently endorsed shorter weights on the back of consignment notes, whereby the Railway Company were defrauded and the consignees were benefited. It was proved that the firm of the consignees was in negotiation with the accused about something and that the firm had, through its dealings with some loading officer of the Railway Company, been able to defraud the company of considerable sums and the name of the accused signed by himself appeared in one of the note books of the firm and there was positive evidence that it was the duty of the accused to make out the weights on the consignment notes:

Held, that under section 10 of the Evidence Act the note books and *jama kharach* of the firm could be used as evidence of abetment by conspiracy against the accused. [p. 1000, col. 2.]

Mr. *Norton* and Babu *Manindra Nath Banerjee*, for the Appellants.

Babus *Dasarathi Sanyal*, *Monmotha Nath Mukerjee*, *Jogendra Nath Mazumdar* and *Jitendra Lall Banerjee*, for the Respondents.

JUDGMENT.

CRIMINAL APPEAL NO. 4 OF 1915.

These are two Government appeals arising out of an alleged series of conspiracies to

defraud the East Indian and connected Railways by endorsing a false weight on the back of the consignment notes, whereby the railway receipts were made out for sums much less than what was really due to the Railway Companies and the consignees benefited by the fraud to the extent of the freight wrongly calculated, so that in one year the Railway Companies concerned have lost Rs. 12,500.

The procedure was very simple if sufficiently ingenious. The clerk, whose duty it was on any given day to convert the true weights in tons into the Indian weights, in maunds from the weighment slip sent from Howrah after the wagons had been weighed, entered a weight several tons less than that on the slip and made the corresponding shortage in the calculation of the weight in maunds. The clerk whose duty it was to calculate the freight to be charged, it is said, was thereby deceived, though it is quite possible he may have been an accomplice, and charged a large sum less than the railway was entitled to for carrying the goods. The consignees who took delivery profited by the fraud and in the cases now before us are said to have paid the accused Mon Mohan Roy, a loader of the East Indian Railway Company, various sums as an illegal gratification for helping to carry out the fraud by making false endorsements on the consignment notes. The trial of the cases was held before Babu R. N. Chatterjee, an experienced Deputy Magistrate, at Howrah and in both the cases he dealt with the evidence as a whole in exhaustive and careful judgments and eventually convicted in case No. 4 Mon Mohan Roy, the loader, East Indian Railway, Dinonath Pal, the head of the firm of Molasses Merchants at Kooshtea, and Janaki Nath Pal his son, also a member of the firm, under section 120B, Indian Penal Code, of conspiracy to defraud, and sentenced Mon Mohan Roy to one year's rigorous imprisonment, Janaki Nath to 9 months' and Dinonath to 4 months' under three counts, the sentences to run concurrently. He also gave various terms under sections 420, and 420 read with 109, 161 and 161 read with 109, apparently all to run concurrently. So that the sentences under 120B were really the substantive sentences in the case. In appeal the learned Sessions Judge has dealt with the cases in a somewhat perfunctory manner and has made cross-references to the evidence and judgments in the two cases, which is irregular and confusing. He has rightly found that the convictions under section 120B cannot stand by reason of the fact that the offences were committed before that section came into force, but he has entirely omitted to notice that this is immaterial as the law of abetment includes abetment by conspiracy, which was distinctly charged before the Magistrate under section 420/109. This has led him to consider nothing but the direct evidence against Mon Mohan of making the endorsement of false weights on the consignment notes, and finding this evidence to be insufficient on grounds which we shall presently have to deal with, he has thrown out the whole case holding that unless and until the alleged act of cheating is proved against Mon Mohan no question of taking an illegal gratification or of abetment can arise.

It is hardly necessary to point out that there is such a thing as circumstantial evidence and as was remarked by Sir Lawrence Peel, C. J., in the case of *R.* v. *Hadger* (1): "It is perfectly true that the dark covertness of crime cannot often be laid open, that conspiracies like other crimes must be generally supported by circumstantial proof."

Here the circumstantial proof of a conspiracy to defraud the East Indian Railway is overwhelming, though at the outset we can only say that certain firms conspired with certain officers of the railway to that end. In this particular case we have the specific firm of Dinonath Pal in negotiation with the accused Mon Mohan about something and as this firm has through its dealings with one of the loading officers of the Howrah Goods Station been able to defraud the companies of considerable sums and as Mon Mohan's own name signed by himself appears in one of the note books of the firm and there is positive evidence which, if believed, proves that it was Mon Mohan's duty to make out the weights on the consignment notes, we think that there can be no doubt that under section 10 of the Evidence Act the note books and *jama kharach* of the firm of Dinonath can be used, as they were used by the learned Deputy Magistrate, as evidence of abetment of conspiracy against Mon Mohan

(1) Starkie on Evidence p. 132 (1852).

Roy. As regards the Judge's finding that the evidence as to the figures being in Mon Mohan's hand has broken down by reason of the inability of the witnesses to stand the test of a partially concealed attendance register, we can only say that the test imposed was not a fair test and the greatest expert in handwriting in the world could not have succeeded in it. But we may point out that the witness Madhub, Superintendent of the Goods Office, who has 23 years of unblemished service in the Railway came so extraordinarily near to complying with the test that we are convinced that he is intimately acquainted with Mon Mohan's handwriting and can recognise it. He was tested with the first page of the attendance register where the names of Upendra Nath Das and Mon Mohan Roy immediately follow one another and he picked out the figures against the name of Upendra Nath Das as being in Mon Mohan's handwriting. Now an examination of the book clearly discloses that the entries of the names and the figures of these two loaders are in the same hand, as frequently happens, throughout the book and would naturally be the case when two men arrive together and one sits down to write their names and the hour of their arrival. From admitted writing of Mon Mohan's we can have no doubt that the names are written by Mon Mohan and not by Upendra and, therefore, presumably the figures which are bold and characteristic are also Mon Mohan's. The same bold and characteristic figures appear on the back of the consignment notes, Exhibits 8, 9 and 12 which are the subject of the charges, and we can see no reason to doubt the genuineness of Madhab's identification of his figures.

We do not rely so much upon Kali Charan Sarkar's evidence, because he is said by the defence to be the person who must have entered the figures and it is quite possible that he may have been an accomplice. At any rate he like the other subordinate clerks in the Goods Office shows a tendency in cross-examination to give the facts a turn favourable to Mon Mohan. Dealing next with the considerations which have been urged by the defence to show that Mon Mohan could not have entered the figures and that it was not his duty to do so, we can only say that we believe the positive evidence of Superintendent Madhub that it was his duty and we do not accede to the contention that Mr. Pemmell, the Senior Inspector of Accounts, East Indian Railway, who derives his knowledge primarily from Madhub, is personally ignorant of what he deposes to. The delegation of authority may be in the hands of Madhub, but a superior who has had charge of the enquiry must be assumed to have satisfied himself that what he himself vouches for is a fact. It is also obvious from the details of the procedure that the officer who loads and seals the wagon and marks the consignor's statement would naturally be the proper person to enter the actual weight found by the weighing clerks at the coal yard.

The contentions against this are that Mon Mohan goes out to work in the yard at 3 P. M. and, it is assumed, does not return to the office, as the witnesses say that the office closes at 5 P. M., though any one who has work to finish can stay on as long as he chooses. It is pointed out that Mon Mohan loaded the wagon about which the first count of the charge in this case is concerned on the 1st November. The weighment slip was received on the 2nd November and it is in evidence that these slips come in at 4 P. M. and are received by Kali Charan Sarkar or some other clerk and as the Railway receipt was prepared after the weights in maunds had been calculated on that same day, the 2nd November, Mon Mohan cannot have had anything to do with it. This is assuming that Mon Mohan does not return to the office at 5 P. M. or after, of which there is no evidence. On the contrary the attendance register shows that he seldom if ever left office before 6 P. M. So that he had ample time to perform this simple duty in respect of all wagons loaded under his supervision the day before.

It is always easy where there are several men working in the office to try and shift the responsibility to some one else. Of course when a man is absent from illness or any other cause some one else must do his work and the evidence to this effect is sought to be used to throw a doubt on Mon Mohan's complicity in the transactions evidenced by Exhibits 8 and 9. Those exhibits, however, themselves show that Mon Mohan

was in office on those days and filled in the forms.

With regard to Exhibit 12 Mon Mohan's writing does not appear, as the wagon was loaded at Shalimar by one Pasupati Mandal who was acting for Upendra Nath Das. The evidence is, however, clear that even Upendra Nath had nothing to do with working out the weights in maunds and that this was always done by Mon Mohan and it is a remarkable circumstance that the figures by whomsoever made are exactly similar to those on Exhibits 8 and 9. Coming now to the note books and *jama kharach* of the firm of Dinonath Pal, we find it admitted that Janakinath in this particular case, just as we shall see the *gomastha* Narain did in case No. 5, came down to Calcutta to purchase molasses and his expenses are entered in the *jama kharach* books which have been laid before us. There is also mention of sums paid by him to Mon Mohan in the same book on the dates to which these consignment notes refer. A money order sent by Narain in connection with another case shows that it was this Mon Mohan Roy of the Ramkrisnapore Howrah Goods Office that was in communication with the firm of Dinonath and there is no other Mon Mohan Roy in the office according to the evidence. Moreover Mon Mohan Roy's signature, undoubtedly genuine, appears in one of the note books under a sentence the meaning of which has not been discovered. It runs "*Tumi loili pore ami ar jaibo na*" which means "after you have taken I will not go any more."

It was sought to be urged that these note books and *jama kharach* had been obtained under a search warrant and that all the formalities had not been carried out. It appears that a search warrant was issued but it was not used as the books were voluntarily produced by the old man Dinonath, who appears to have had no knowledge of the fraud and to have given every assistance to the Police.

The attack is, therefore, shifted from the alleged irregularities to the delay in producing them in Court and it is also pointed out that the passages which Sadananda Babu, the Auditor of the East Indian Railway, and the Sub-Inspector speak to as being admitted by Janaki were not marked at the time. The search was ordered by a Magistrate who had no seisin of the case, before the investigation was nearly completed and the books appear to have gone at once to the superior Police Officer at Howrah and to have been examined by the Government Pleader. They were produced in Court in their regular sequence when the Sub-Inspector Jaganath Mukherjee and Babu Sadananda Paulit P. W. Nos. 10 and 11 proved them. There is no internal trace of their having been tampered with and we can see no ground whatever for holding that any of the entries in the note books have been fabricated. The *jama kharach* kept in the ordinary course of business are clearly untouched. We think there can be no doubt that Janakinath paid Mon Mohan Roy Rs. 3 on the three occasions shown in the books and that the proved and completed fraud coupled with the evidence of Mon Mohan's duties and his handwriting fully establish Mon Mohan Roy's guilt under section 420, Indian Penal Code, and Janakinath Pal's abetment of the same under section 420/109. The learned Counsel for the Crown does not press the charge against Dinonath Pal.

He is a very old man and has ceased to take any active part in the affairs of the firm. He appears to have suspected of nothing of what his son and servants had been doing and gave the authorities every assistance in his power.

We are, therefore, disposed to dismiss the appeal of Government in his case and confirm his acquittal. As regards Mon Mohan Roy and Janaki Nath Pal we think the sentences originally passed by the Magistrate under section 120B were quite appropriate, especially as in Mon Mohan's case there is another case of a similar nature in which we are delivering judgment after this. We, therefore, set aside the order of acquittal passed by the learned Judge and convicting Mon Mohan Roy under sec. 420, Indian Penal Code, sentence him to be rigorously imprisoned for one year.

We convict Janaki Nath Pal under section 420/109 and sentence him to be rigorously imprisoned for 9 months.

As regards the charges under sections 161 and 161/109 we do not think it necessary to come to any finding. The conduct of the two

accused appears to be covered by the general charge of cheating and the illegal gratification was the consideration for the fraud. In any case no separate sentence would be necessary.

CRIMINAL APPEAL No. 5 OF 1915.

In this appeal the facts are precisely similar to those in Appeal No. 4 except that the *gomastha* of Dinonath Pal, one Narayan Chandra Dutt, was the intermediary in this case and there was only one count charged instead of three.

The evidence as to Mon Mohan's duties, handwriting and the note books and *jama kharach* are of the same nature as in the other case and we find on that evidence that Mon Mohan did make the false endorsement upon Exhibit 6 dated 6th March 1913, that Narayan was in Calcutta purchasing molasses from Dinonath Pal on that date and that he entered in his note book and in the *jama kharach* Rs. 24 in all paid to Mon Mohan Roy on 3 *challans* of molasses of which only one is in issue in this case.

The same objection was taken as to the admissibility of the note books, but whatever may be thought as to the impossibility of the witnesses remembering three months afterwards the unmarked passage said to have been admitted on May 3rd in their presence by the accused Narayan and Janaki Nath Pal, who has already been dealt with there can be no difficulty in finding on the evidence of Babu Sadananda Paulit, a highly respectable officer of the Railway on Rs. 300 a month, that Narayan took the book to Calcutta as he said he did and made entries in it there and the *jama kharach* book kept in the regular course of business clearly shows the date 6th March and onwards during which Narayan was purchasing molasses and paying Mon Mohan Roy for something.

Another curious contention is pressed by the defence in this appeal, that it was Kalicharan who was deceived by the false entry and so made to enter on reduced freight and that as he suffered no wrongful loss no charge of cheating can lie.

It is not at all clear, nor is it material that Kalicharan was deceived, but the intention was by deceiving the Railway Authorities to induce them to deliver goods to Dinonath at Kooshtea for a very much smaller frieght than they were entitled to.

The Railway Authorities were so deceived and did what they would not have done if they had known the truth. The other arguments urged on either side are the same as we have already noticed and we do not think it necessary to comment any further on them.

Finding in this case that Mon Mohan Roy made a false entry of weights on Exhibit 6 with a view to deceive the Railway Company and to cause them wrongful loss and wrongful gain to the firm of Dinonath and that Narayan, the *gomastah* of that firm, abetted the act of cheating by joining a conspiracy to commit fraud in pursuance of which he paid money of his master's firm to Mon Mohan, we set aside the order of acquittal in their cases and convicting them respectively under section 420 and 420/109, Indian Penal Code, sentence Mon Mohan to be rigorously imprisoned for 6 months under section 420 and Narayan to be rigorously imprisoned for 6 months under section 420/109.

We do not think it necessary to pass any orders under any other section.

For the reasons given in Appeal No. 4 we uphold the acquittal of Dinonath Pal.

The District Magistrate will take steps for the arrest and committal of the accused Mon Mohan Roy, Janaki Nath Pal and Narayan Chandra Dutt to jail.

Order of acquittal set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 84 OF 1916.

March 8, 1916.

Present:—Mr. Justice Scott-Smith.

WASAWA SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 401—Associating with gang of thieves, what constitutes.

In order to sustain a conviction on a charge under section 401, Indian Penal Code, it must be proved

(1) that there existed a gang of persons,

(2) that those persons were associated for the purpose of committing theft or robbery,

(3) that theft or robbery was to be committed habitually, and

(4) that the accused was a member of such gang.

[p. 1004, col. 2.]

WASAWA SINGH *v.* EMPEROR.

The rule that once it is established that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in one or more cases of theft come under the purview of section 401, does not mean that any person who joins the members of such a gang in committing theft becomes *ipso facto* a member of that gang. It should be taken to mean that any person who, knowing of the existence of such a gang joins that gang for the purpose of committing even one theft, is guilty under section 401, but an accused person may take part in a theft with one or more members of a gang without himself becoming a member of that gang. [p. 1007, col. 1.]

An association with the members of a gang of thieves at fairs, weddings and liquor shops cannot be presumed against the accused as for the purpose of committing theft or robbery, nor should any inference unfavourable to the accused be drawn from such association. [p. 1007, col. 1.]

Beja v. *Emperor*, 26 Ind Cas. 625; 223 P. L. R. 1915; 13 P. R. 1914 Cr. at p. 39; 16 Cr. L. J. 33, referred to.

Appeal from the order of the Magistrate, 1st class, exercising enhanced powers under section 30, Criminal Procedure Code, Sialkot, dated 18th October 19.5, convicting the appellant.

Mr. *Badar-ud-Din Kureshi*, for Wasawa Singh, Lala *Dharm Das Suri*, for Waryam Singh, and Mr. *N. C. Mehra*, for Rur Singh, Appellants.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The following persons were *challaned* before the lower Court for being members of a gang of persons associated for the purpose of habitually committing cattle theft under section 401, Indian Penal Code:

(1) Wasawa Singh, (2) Waryam Singh, son of Bhag Singh, (3) Waryam Singh, son of Hakim Singh, (4) Sundar Singh, (5) Kanahya, (6) Khera, (7) Rur Singh, (8) Vir Singh, (9) Sohan Singh, (10) Baga Singh and (11) Thakar Singh.

Out of these Baga Singh and Thakar Singh are said to be absconding and Waryam Singh, son of Hakim Singh, and Sundar Singh have been discharged. The other seven persons have been convicted and sentenced to various terms of imprisonment and Wasawa Singh has also been sentenced to a fine of Rs. 1,000.

From the convictions seven separate appeals have been filed and all the appeals are disposed of by this judgment. Wasawa Singh's appeal has been argued by Mr. Kureshi, Waryam Singh's by Mr. Dharm Das Suri and Rur Singh's by Mr. N. C. Mehra. Khera's appeal was filed by an agent and those of Kanahya, Vir Singh and Sohan Singh were sent up through the Jail Authorities.

The principles governing a case of this sort have been fully discussed and set forth in the judgment in Criminal Appeal No. 573 of 1913, reported as *Beja* v. *Emperor* (1). At page 39 of the Record the learned Judge has stated what things are necessary to prove in order to sustain a conviction on a charge under section 401. These are:—

(1) that there existed a gang of persons,

(2) that those persons were associated for the purpose of committing theft or robbery,

(3) that theft or robbery was to be committed habitually, and

(4) that the accused was a member of such gang.

The remarks which follow on pages 39 and 40* have been set forth in the judgment now appealed against and it is not necessary for them to be repeated here. That judgment was followed by me in certain appeals in similar cases of the Karnal District. See judgments in Criminal Appeals Nos. 286 and 409 of 1914.

In the present case Khushal Singh of Dhapai, who is said to have been the leading member of the gang, has been examined as an approver. He has given evidence as to 15 specific cases of cattle theft, but case No. 12 is the subject of a separate *challan* and has not been considered by the Magistrate in arriving at his conclusion. It has not been referred to in argument before me. Wasawa Singh appellant is stated to have been concerned in more of these cases of cattle theft than the other accused and it will be convenient to take his case first.

Case No. 1.—In this case two bullocks are said to have been stolen about the end of May 1914. Khushal Singh approver implicated Baga Singh and Wasawa Singh as well as himself. One of the stolen bullocks has been traced to Baga Singh and there is a good deal of evidence in regard to this. The other is said to have been sold to one Bidh Singh, who could not be found at the time of the trial. As regards the bullock which Baga Singh is said to have taken, the approver's

(1) 26 Ind. Cas. 625; 223 P. L. R. 1915; 13 P. R. 1914 Cr; 16 Cr. L. J. 33.

*Pages of 13 P. R. 1914 Cr.—*Ed.*

statement has been fully corroborated and we also have the evidence of Chanda (P. W. No. 24), who proves that Khushal Singh, Baga Singh and Wasawa Singh were together at his well on the day before the theft. Bur Singh (P. W. No. 114) has deposed that the same three men passed his well where they had food about the time of the theft and in their possession were two bullocks answering the descriptions of those stolen. I consider that this case is sufficiently proved against Wasawa Singh.

Case No. 2.—Two bullocks were stolen about the end of September 1914. Thakar, absconder, Khushal Singh and Wasawa Singh are said to have committed this theft. There is ample evidence to show that one of the bullocks was sold by Wasawa Singh and Thakar and that in regard to the other the same two men demanded *bhunga* after receipt of which the bullock was restored.

Case No. 3.—Two bullocks were stolen about the end of October 1914. Wasawa Singh and Baga Singh are the principal persons implicated. The case against Wasawa Singh depends upon the evidence of Khushal Singh corroborated by that of Labh Singh (P. W. No. 6) and Jamiat Singh (P. W. No. 42). The lower Court thought that these witnesses might give the evidence they did simply in order to save one Daya Singh, who was according to Khushal Singh one of the thieves. The Court, therefore, considered that the case was not so strong against Wasawa Singh and Baga Singh as Nos. 1 and 2 and I am disposed to agree with this.

Case No. 4.—Three bullocks were stolen about the end of October 1914. Wasawa Singh, Baga Singh and Soban Singh are said to be implicated in this case. As against Wasawa Singh and Baga Singh there is the evidence of certain admissions made by them, after which two of the stolen bullocks were recovered from the cattle pound and there is also evidence that one of the bullocks was sold to Suba witness by the same three men. I consider that this case is sufficiently proved against Wasawa Singh.

Case No. 5.—Three bullocks were stolen about the 19th of November 1914. Khushal Singh says that he himself, Wasawa Singh, Baga Singh, Rur Singh and Khera committed the theft. One of them was sold to Fauja Singh (P. W. No. 10) by Khushal Singh, Wasawa Singh and Khera. This one Fauja Singh subsequently exchanged with Hakam Shah (P. W. No. 49), who in his turn sold it to Sher Shah (P. W. No. 48). The third bullock was purchased by Danna (P. W. No. 53) from Khushal Singh and Wasawa Singh. Raja (P. W. No. 54) is a witness to the sale and Diwan Singh (P. W. No. 111) also corroborates the approver's statement. The case is, I consider, clearly proved against Wasawa Singh.

Case No. 6.—This case is not proved against Wasawa Singh though the Magistrate considers it to have been.

Case No. 7.—Four bullocks were stolen about the middle of January 1915. The only evidence against Wasawa Singh in this case is that he joined in demanding *bhunga* in regard to the stolen cattle. Dewan Chand (P. W. No. 14) gives evidence on the point. The case is not a very strong one against him.

Case No. 8.—A roan horse was stolen about the middle of February 1915. Khushal Singh says that in addition to himself Wasawa Singh and Kanahya were the thieves; Phula Singh (P. W. No. 98) deposes to having purchased it from Khushal Singh and Wasawa Singh and his statement is corroborated by the evidence of Sundar Singh and Bhagwan Singh (P. W. Nos. 99 and 100). Devi Ditta (P. W. No. 9) and Jhanda (P. W. No. 12) say that they saw the three accused mentioned above and Khushal Singh showing off the paces of the horse and the mares, the subjects of cases Nos. 9 and 10, outside Kalewala. I think that there can be no doubt that Wasawa Singh took part in this theft.

Cases Nos. 9 *and* 10.—Two mares are said to have been separately stolen from different places about the middle of February 1915 by Wasawa Singh, Waryam Singh and Kanahya. One of these was, admittedly found in the possession of Waryam Singh, who says that he bought it and kept it openly not knowing it to be stolen. The other mare was found with one Khairu (P. W. No. 106), who says that he bought it from Khushal Singh and Wasawa Singh. I think there is sufficient evidence to show that Wasawa Singh was in possession

of both these mares and sold one of them to Khairu.

Case No. 14.—This case I am unable to regard as proved against Wasawa Singh.

Case No. 15.—A mare was stolen in the end of March 1915 and the thieves were said to be Wasawa Singh and Thakar absconder. Bur Singh, Labh Singh and Hakim Singh (P. W. Nos. 114, 120 and 121) prove that Bur Singh bought this mare from Thakar and Wasawa Singh. I see no reason to doubt their evidence and I hold that Wasawa Singh's complicity is established.

There are thus at least nine cases, of which one is rather weak, proved against Wasawa Singh. Khushal Singh, the approver, was with Wasawa Singh in six of these and Baga Singh is said to have been with him in five of them, and in several cases it is stated that the stolen cattle were taken to Baga Singh's *haveli*, which is in an isolated place, and were there disposed of. There is also a good deal of evidence to show that these three persons were constant companions and I have no doubt that they formed a gang of persons associated together for the purpose of habitually committing cattle theft. I, therefore, consider that Wasawa Singh's conviction is fully justified by the evidence.

I come now to the case of Waryam Singh. He has never been convicted before this, nor has he been placed in security under section 110, Criminal Procedure Code.

The only cases which the Magistrate finds he was implicated in are Nos. 8, 9 and 10. Having regard to the first information reports the dates of the three thefts appear to be in Case No. 8 the 15th of February 1915, in Case No. 9 the 13th of February 1915 and in Case No. 10 the 14th of February 1915. From the approver's statement it would appear that the thefts in Cases Nos. 9 and 10 took place subsequently to that in Case No. 8 but the point is not very clear, nor do I consider it to be of much importance. As already stated, the stolen mare in one of these cases was found admittedly in Waryam Singh's possession. Besides this fact there is very little evidence against him in regard to the property stolen in these three thefts. The main evidence is that of Jhanda (P. W. No. 12) and Devi Ditta (P. W. No. 9), who says that Waryam Singh and others were showing off the paces of the roan horse and two mares outside the village of Kalewala. Jhanda admitted that Punjab Singh, uncle of Waryam Singh, had given evidence against him in two cases and it is possible that he may have given evidence against him in the present case on account of enmity. Khushal Singh approver stated that while he and the others were taking the stolen animals along, they put up for a night with Khushal Singh and again for a night with Fateh Singh. The only other Khushal Singh witness who is called besides the approver is P. W. No. 67, and he says nothing about this. Fatteh Singh (P. W. No. 82) does not say anything about these people having passed a night with him. He says that Khushal Singh approver and two Sikhs came to him but he is unable to identify the Sikhs. Beyond the fact that Waryam Singh was admittedly in possession of one of the stolen mares there is very little to connect him with any of the thefts in Cases Nos. 8, 9 and 10. He may have been in dishonest possession of the mare, but if he was, a separate case could be brought against him in regard to it under section 411, Indian Penal Code. I do not think the evidence warrants the conclusion that he was a member of the gang to which the approver and Wasawa Singh undoubtedly belonged. His conviction must, in my opinion, be set aside.

I will now take up the case of Kanahya. He also is said to be implicated in Cases Nos. 8, 9 and 10, but the evidence against him is even less than that against Waryam Singh. No stolen property was found in his possession and the only evidence against him is that of Devi Ditta and Jhanda already referred to which, in my opinion, is quite insufficient to prove that he was a member of the gang.

Khera, Vir Singh and Sohan Singh appellants are said to be implicated in only one case each. I have carefully examined the evidence in these cases. Case No. 5, that in which Khera is implicated, is sufficiently proved in my opinion. So is

Case No. 11 in which Vir Singh is implicated. Case No. 4 in which Sohan Singh is said to be implicated is not a very strong one against him. In *Beja* v. *Emperor* (1) it was laid down that once it was established that a gang was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft come within the purview of section 401. Now this does not mean that any person who joins the members of such a gang in committing theft becomes *ipso facto* a member of that gang, I take it to mean that any person, who knowing of the existence of such a gang joins that gang for the purpose of committing even one theft, is guilty under section 401. Khera, Vir Singh and Sohan Singh may, therefore, each have taken part in one theft with one or more members of a gang without themselves becoming members of that gang. I think it would be unsafe to hold on the evidence on the record that any one of these three men is proved to be a member of such a gang within the meaning of section 401, Indian Penal Code.

There is no doubt that there is some evidence against them that they have been seen associating with Khushal Singh, Wasawa Singh and others at fairs, at a wedding and at liquor shops, but it is not proved that they so associated for the purpose of committing theft. Nor can any inference unfavourable to them be drawn from such association.

I now come to the case of Rur Singh. It is said that there are two cases in which he was implicated, Nos. 5 and 6. This is what the Magistrate says in summing up the cases against each of the accused, but when we turn to that part of his judgment in which he discusses each case of theft particularly we find that in Case No. 5 he says as regards Rur Singh that the corroboration, *i.e.*, of the approver's statement, is wanting. In summing up Case No. 6 he says that the evidence against Baga Singh is quite sufficient but it is weak in regard to others. The evidence against Rur Singh in Case No. 6 in addition to that of the approver is that of Khushal Singh, P. W. No. 67, who says that he saw Rur Singh, Khushal Singh and two others driving two bullocks. His evidence, however, appears to conflict with that of the approver, who says that he by himself took away the bullocks. There is also the evidence of Chanda (P. W. No. 24) at page 197 of the record, who says that he saw the stolen bullocks at Rup Singh's well and that Rup Singh himself was there. I agree with the lower Court that this is a weak case against Rur Singh but even if it be considered to be proved, it is not by itself sufficient to show that he belonged to a gang of cattle thieves.

The result then is that I find the guilt of Wasawa Singh to be clearly established and that I dismiss his appeal. Against none of the other six persons is the case proved. I, therefore, accept the appeals of Waryam Singh, Kanahya, Khera, Rur Singh, Vir Singh and Sohan Singh and setting aside their convictions and sentences acquit them and order that they be released from custody forthwith.

The result of this case exemplifies the difficulty of proving an accused person guilty of an offence under section 401, Indian Penal Code. There may, for instance, be ample proof of the existence of a gang consisting of *A*, *B* and *C*, but if it is sought to show that *D*, *E* and *F* are also members of the gang it is not enough to show that they took part, whether singly or collectively, in one theft with one or more of *A*, *B* and *C*. It must be clearly shown that they joined the gang knowing that it was one within the meaning of section 401, Indian Penal Code.

Wasawa Singh's appeal dismissed;
Other appeals accepted.

KRISHNA LAL *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 399 OF 1916.
July 25, 1916.
Present:—Mr. Justice Lindsay.
KRISHNA LAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), ss. 30, 31, 32—Licence to regulate resort of persons to public places, legality of—Order, if ultra vires*—Licences, nature of.*

The Police have no authority to regulate by licence the resort of any persons or class of persons to any public place or thoroughfare, nor does section 31 of the Police Act, which assigns the duty of "keeping order" at places of public resort and of "preventing obstructions" on certain occasions in such places to the Police, authorize them to give any general order.

The accused was convicted under section 32 of the Police Act of having contravened the order of the Superintendent of Police, Benares, that no one plying the trade of a *jatrawal* is to be allowed to frequent the Moghal Sarai Railway Station, and the thoroughfares and other public places in Moghal Sarai, without having first obtained a pass or licence from the Superintendent of Police or District Magistrate:

Held, setting aside the conviction, that the order of the Superintendent was *ultra vires*, inasmuch as the only licences which could be lawfully issued by him were in connection with the conduct of assemblies and processions and the use of music on the occasion of festivals and ceremonies under section 30 of the Police Act.

Criminal revision from an order of the District Magistrate of Benares, dated the 29th of February 1916.

Mr. *J. Nehru*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application for revision on behalf of one Krishna Lal, who has been convicted of an offence under section 32 of the Police Act (V of 1861). The conviction has been upheld in appeal by the District Magistrate. The above-mentioned section of the Police Act provides for the punishment of persons who oppose or disobey orders issued under the three preceding sections of the Act or who violate the conditions of any licence granted for the use of music or for the conduct of assemblies and processions.

The order which the accused is said in this instance to have disobeyed, purports to have been issued under section 31 of the Act and the principal matter to be considered here is whether this order is valid and one which could lawfully issue under section 31.

A copy of the order is on the record. It is in the form of a printed proclamation issued over the name of the Superintendent of Police, Benares, and contains elaborate directions for the conduct of *jatrawal* whose business takes them to the Railway Station at Moghal Sarai for the purpose of escorting pilgrims to Benares. It is not necessary to refer in detail to all the rules set out in this proclamation: it is sufficient to say that it is ordered that no one plying the trade of a *jatrawal* is to be allowed to frequent the Moghal Sarai Railway Station, and the thoroughfares and other public places in Moghal Sarai, without having first obtained a pass or licence from the Superintendent of Police or District Magistrate.

The accused here, who describes himself as a Gangaputra, is said to have been acting as a *jatrawal* in Moghal Sarai without having obtained a licence.

A reference to the language of section 32 of the Act and of the three preceding sections satisfies me that the Superintendent of Police had no authority under section 31 of the Police Act to issue any general order of this kind. The order is *ultra vires*. The only licences which can lawfully be issued by a Superintendent of Police are those referred to in section 30 of the Act in connection with the conduct of assemblies and processions and the use of music on the occasion of festivals and ceremonies. There is no authority to regulate by licence the resort of any persons or class of persons to any public place or thoroughfare, nor can it be argued that because the Police are, under section 31, assigned the duty of "keeping order" at places of public resort and of "preventing obstructions" on certain occasions in such places, they are authorised to give any general order of the kind now under consideration. I hold, therefore, that the accused was not liable to conviction under section 32 of the Act: the order which he is found to have disobeyed was not a lawful order. I set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Conviction set aside.

END OF VOLUME XXXV.

GENERAL INDEX

VOLUME XXXV—1916.

ABANDONMENT by one co-owner—Exclusive possession by another, effect of 72

ACCEPTANCE. *See* BILL OF EXCHANGE.

ACCOUNTS, claim to enforce production, whether maintainable when suit for declaration time-barred 646

——— in preliminary decree, when adjusted finally. 95

———, rendition of, whether can be asked in defence when claim barred 910

———, suit for, of charitable trusts against non-trustees, maintainability of 593

———, *suit for—Costs of suit pending reference for account.*

In a suit for accounts where the defendant resisted plaintiffs' claim for an account, costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account. C HYAM, J. I. J. *v.* BENGAL STONE CO., LTD., 20 C. W. N. 368 83

———, suit for, re-opening of, when allowable 603

ACT OF BANKRUPTCY—Notice to creditor of intention to suspend payment, what amounts to 942

ACT OF COURT, act of officer of Court, when amounts to 779

ACTS—GENERAL.

ACT 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT.
—— 1860—XLV. *See* PENAL CODE.
—— 1861—V. *See* POLICE ACT.
—— 1863—XX. *See* RELIGIOUS ENDOWMENTS ACT.
—— 1868—I. *See* GENERAL CLAUSES ACT.
—— 1869—IV. *See* DIVORCE ACT.
—— 1870—VII. *See* COURT FEES ACT.
—— 1872—I. *See* EVIDENCE ACT.
—— 1872—IX. *See* CONTRACT ACT.
—— 1877—I. *See* SPECIFIC RELIEF ACT.
—— 1877—XV. *See* LIMITATION ACT.
—— 1878—I. *See* OPIUM ACT.
—— 1878—VII. *See* FOREST ACT.
—— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
—— 1881—V. *See* PROBATE AND ADMINISTRATION ACT.
—— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
—— 1882—II. *See* TRUSTS ACT.
—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—V. *See* EASEMENTS ACT.
—— 1882—VI. *See* COMPANIES ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.

ACTS—GENERAL—concld.

ACT 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
—— 1889—IV. *See* MERCHANDISE MARKS ACT.
—— 1889—VII. *See* SUCCESSION CERTIFICATE ACT.
—— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
—— 1890—IX. *See* RAILWAYS ACT.
—— 1893—IV. *See* PARTITION ACT.
—— 1894—I. *See* LAND ACQUISITION ACT.
—— 1898—V. *See* CRIMINAL PROCEDURE CODE.
—— 1899—II. *See* STAMP ACT.
—— 1899—IX. *See* ARBITRATION ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1911—III. *See* CRIMINAL TRIBES ACT.
—— 1913—VIII. *See* CRIMINAL LAW AMENDMENT ACT.

ACTS—(LOCAL)—ASSAM.

ACT 1901—VI. *See* ASSAM LABOUR AND EMIGRATION ACT.

ACTS—(LOCAL)—BENGAL.

ACT 1884—III. *See* BENGAL MUNICIPAL ACT.
—— 1885—I. *See* BENGAL FERRIES ACT.
—— 1885—III. *See* BENGAL LOCAL SELF-GOVERNMENT ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.

ACTS—(LOCAL)—BURMA.

ACT 1876—II. *See* LOWER BURMA LAND AND REVENUE ACT.
—— 1898—III. *See* BURMA MUNICIPAL ACT.
—— 1900—VI. *See* LOWER BURMA COURTS ACT.

ACTS—(LOCAL)—MADRAS.

ACT 1882—V. *See* MADRAS FOREST ACT.
—— 1904—III. *See* MADRAS CITY MUNICIPAL ACT.
—— 1908—I. *See* MADRAS ESTATES LAND ACT.
—— 1914—I. *See* MADRAS HINDU BEQUESTS VALIDATION ACT.

ACTS—(LOCAL)—PUNJAB.

ACT 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1900—XIII. *See* PUNJAB ALIENATION OF LAND ACT.
—— 1903—II. *See* PUNJAB COURT OF WARDS ACT.
—— 1904—I. *See* PUNJAB LOANS LIMITATION ACT.
—— 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1914—I. *See* PUNJAB EXCISE ACT.
—— 1914—III. *See* PUNJAB COURTS ACT.

ACTS—(LOCAL)—U. P.

ACT 1886—XXII. *See* OUDH RENT ACT.
—— 1899 III. *See* U. P. COURT OF WARDS ACT.
—— 1900—I. *See* U. P. MUNICIPALITIES ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.

ORDINANCES.

ORD. 1882—.... *See* STRAITS SETTLEMENT BANKRUPTCY ORDINANCE.
—— 1896—VI. *See* STRAITS SETTLEMENTS LIMITATION ORDINANCE.
—— 1907—XXXI. *See* STRAITS SETTLEMENTS CIVIL PROCEDURE CODE ORDINANCE.

REGULATION.

REG. 1802—XXV. *See* MADRAS REGULATION.

STATUTES.

8 & 9 Vic. C. 106. *See* REAL PROPERTY ACT.
24 & 25 Vic. C. 104. *See* CHARTER ACT.
5 & 6 Geo. 5 C. 61. *See* GOVERNMENT OF INDIA ACT, 1915.

ADMINISTRATOR. *See* WILL.

ADMIRALTY, *court of—Collision between vessels—Negligent navigation—Trial Judge, finding of, on questions of fact—Appellate Court, duty of.*

In collision cases, a Court of Appeal should be most chary of interfering with the decision of the Trial Judge, who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court, which has not had this advantage, reverse the judgment of the Trial Judge on questions of fact. **P C** RIVERS STEAM NAVIGATION CO., LTD. *v.* HATHOR STEAMSHIP CO., LTD., 20 C. W. N. 1022; (1916) M. W. N. 446; 31 M. L. J. 159; 4 L. W. 176 193

ADMISSION. *See* PLEADER AND CLIENT.

ADOPTION. *See* CUSTOM; HINDU LAW; WILL.

ADVANCEMENT, doctrine of—Law in India 569

ADVERSE POSSESSION. *See* LIMITATION ACT, 1908, SCH. I, ART. 137; SETTLEMENT DECREE.

——, claim by, in increase of land by sea 902

——*Co-owner's possession, when adverse—Ouster.*

Where after the dispossession of the owners of a land by an adverse claimant some of them come into possession under a lease granted by the adverse possessor, their possession must be referred to the title which they acquired under the lease and not to their title as co-owners of the property and consequently, it will be considered adverse to the other co-owners, so as to extinguish the title of the latter under the Limitation Law. **C** BISESWAR GANGOOLY *v.* BHAGABATI CHARAN BANERJEE, 24 C. L. J. 38 26

——, failure to pay rent, whether constitutes 871

—— of one tenant against another tenant of same landlord, when affects landlord 60

——, plea of—Burden of proof—Suit based on title—Entry in revenue map, value of, in proving title 432

—— by tenant against landlord 28

——*Vacant site—Possession follows title—Burden of proof.*

In the case of a vacant site possession follows title and it is for the party alleging to have acquired title to prove that he acquired ownership thereof by adverse possession. **P** CHAIN SUKH *v.* GOPI RAM, 116 P. W. R. 1916; 134 P. L. R. 1916 120

AGENCY—*Recognition of tenant's status by landlord's agent—Deposit of rent in Court—Withdrawal by agent, effect of—Scope of authority—Burden of proof—Liability of tenant.*

When a question arises as to the authority of an agent to bind the landlord, it must be decided on the particular facts as in every other case regarding the scope of the authority of an agent to bind his principal.

The defendants who were transferees of a non-transferable holding deposited certain rents which were withdrawn by the landlord plaintiff's agent who was authorized to withdraw money deposited by tenants and was regularly in the habit of withdrawing money from the Civil Court on behalf of the plaintiff:

Held, that under the circumstances it was for the plaintiff to show that the withdrawal was outside the scope of the agent's authority:

Held, also, that the acceptance of rent by the agent from the defendants amounted to a recognition by plaintiff of the tenancy set up by the defendants inasmuch as the plaintiff was bound by the agent's withdrawal as he failed to show that in withdrawing the deposit the agent acted beyond the scope of his authority. **PAT** MOTIHARI CONCERN, LTD. *v.* LACHMI PROSAD SAH 81

AGRA TENANCY ACT (II OF 1901), S. 4 279

—— S. 58 739

—— S. 167 279

—— Ss. 177 (e), 195—*Ejectment, suit for—Defendant pleading himself to be tenant of third person—Question of proprietary title—Appeal to District Judge, maintainability of—Jurisdiction.*

Where in a suit for ejectment under section 58 of the Agra Tenancy Act the defendant pleads that he is a tenant under a person other than the plaintiff and the Court decrees the claim, an appeal from the decision lies to the District Judge under section 177 (e) of the Act. **A** GANGA PRASAD *v.* HAR NARAIN, 14 A. L. J. 666; 38 A. 465 739

—— S. 180 279

AGRA TENANCY ACT—concld.

——— Ss. 181, 182—*Appeal from order of remand—Practice, uniform, desirability of—Civil Procedure Code (Act V of 1908), O. XLI, r. 23*

Under the provisions of the Agra Tenancy Act no appeal lies from an order of remand passed by a District Judge under the provisions of Order XLI, rule 23, Civil Procedure Code.

The desirability of the Courts of co-ordinate jurisdiction following cognate decisions on matters of practice pointed out. **A** HIRA LAL *v.* MAHARAJ SINGH 105

——— S. 182 105

——— Ss. 182, 193—*Appeal, second, to District Judge—Remand, order of—Appeal to High Court, maintainability of.*

No appeal lies to the High Court from an order of remand passed by a District Judge in a second appeal to him under section 182 of the Agra Tenancy Act. **A** GULZARI LAL *v.* LATIF HUSAIN, 14 A. L. J. 81; 38 A. 181 27

——— S. 193 27

——— S. 195 739

——— S. 202—*Determination of question of tenancy, failure of—Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Remand.*

Where in a suit the defendant meets the plaintiff's suit by a plea of the existence of a still subsisting tenancy, the position described by section 202 of the Agra Tenancy Act arises: and if the first Court overlooks this provision, the Appellate Court is justified in remanding the suit to the first Court to be proceeded with from the point at which that Court went wrong. **A** BHAWAN *v.* MADAN MOHAN LAL, 14 A. L. J. 734; 38 A. 533 41

AGRICULTURIST. *See* CIVIL PROCEDURE CODE, 1908, s. 60 *(c)*.

ALIEN ENEMY, suit against, whether maintainable during continuance of war 951

ALIENATION. *See* CUSTOM; HINDU LAW.

———*—Religious office*—Bungas *attached to Golden Temple at Amritsar—Manager, office of, nature of—Alienation of office, if valid.*

The *bungas* attached to the Golden Temple at Amritsar are partly religious and partly charitable institutions, and the office of manager partakes of the nature of a religious office which cannot be alienated for the manager's personal gain. **P** MEHR SINGH *v.* SOCHET SINGH, 151 P. W. R. 1916. 620

ANCESTRAL PROPERTY. *See* PROPERTY.

APOSTACY. *See* HINDU LAW.

APPEAL (CIVIL). *See* AGRA TENANCY ACT, s. 177 *(e)*; ARBITRATION; BENGAL TENANCY ACT, ss. 109A, 152; CIVIL PROCEDURE CODE, 1908, ss. 47, 92; LOWER BURMA COURTS ACT, s. 27 (2); CRIMINAL PROCEDURE CODE, s. 408.

———Afforestation proceedings—Decision of District Court 902

——— *Disposal on ground not urged, if proper.*

APPEAL—(CIVIL)—contd.

A Judge of the lower Appellate Court is not justified in disposing of an appeal on a ground which was not urged for the defence and in respect of which the plaintiff had no opportunity to give evidence. **A** ABDUR RAZZAQ *v.* PARTAB SINGH 638

———Failure to bring deceased appellant's heirs on record.—Appellate Court, power of 743

———, judgment in, contents of 657

———*New point—Practice.*

Ordinarily a new point which was not taken before a Single Judge of the High Court, will not be allowed to be taken for the first time in an appeal under clause 10 of the Letters Patent. **PAT** DEBI CHARAN LAL *v.* MEHDI HUSAIN, 20 C. W. N. 1303 888

———, new question, whether can be raised for first time in 335

——— by one co-defendant—Common ground—Power of Court to pass decree in favour of all defendants 547

———whether lies against order delivering possession to decree-holder auction-purchaser 468

———, against order granting review, whether lies 15

——— from order of Single Judge of High Court under section 46 of Provincial Insolvency Act, whether lies 610

——— *Partition suit — Preliminary decree, appeal against, whether affected by failure to appeal against final decree subsequently passed.*

There is a right of appeal against the preliminary decree in a partition suit and the appellant is not barred of his right to secure an adjudication therein by his failure to appeal against the final decree subsequently passed.

Per *Sharfuddin, J.*—A preliminary decree in a partition suit has existence independent of the final decree and the final decree is really dependent upon and subordinate to the preliminary decree. A preliminary decree retains its force as such even after the passing of the final decree. The final decree does not extinguish the preliminary decree but instead gives effect to it. **PAT** WAHIDUNNISSA *v.* DIP NARAIN PERSHAD, 20 C. W. N. 1174; 1 P. L. J. 406 873

———, right of, extent of, under provisions of Companies Act 6

——— Waiver of objection to lower Court's finding at hearing, effect of 958

———. (CRIMINAL), in connected cases—Cross-references to evidence and judgments in cases by Appellate Court—Irregularity 999

———, SECOND. *See* PUNJAB MUNICIPAL ACT, s. 189.

———, *as to exercise of discretion, under s. 5 of Limitation Act, 1908, whether lies.*

No second appeal lies as to the exercise of discretion by a lower Court under section 5 of the Limitation Act. **P** ASA RAM *v.* BUDHU MAL, 43 P W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916 67

——— to District Judge—Remand, order of—Appeal to High Court, maintainability of—Agra Tenancy Act, s. 182 27

———Findings of fact unsupported by evidence, whether reversible in 655

———Inference as to status—Question of law 544

———Misreading of evidence by lower Court 892

APPEAL, SECOND—concld.

———*Whether plaintiff's father's consent was* bona fide, *if question of fact—Consent, whether sufficient cause of action—Denial of plaintiff's right in written statement, effect of.*

On the death of one of three brothers holding an estate in equal shares, his widow succeeded to a life-interest in her husband's share. A part of the estate having been acquired by Government, the widow's share of the purchase-money was paid to her with the consent of her brothers-in-law. Their minor sons then sued for declarations that the widow was only entitled to use by way of maintenance the income of the sum which she received as compensation, and that after her death the plaintiffs should be entitled to the capital and for an injunction restraining the defendant from using the capital during her lifetime. Both the lower Courts having decreed the plaintiffs' claim, the defendant preferred a second appeal to the Chief Court:

Held, (1) that the question whether the consent of the plaintiffs' fathers was given *bona fide* was one of fact and could not be argued in second appeal;

(2) that although the mere fact that their fathers consented to allow the widow to receive the compensation in cash, gave the plaintiffs no cause of action, provided that the welfare of the estate was not threatened, yet in view of the plaintiffs' allegation that the defendant set herself up as full owner and her reply that the plaintiffs had no right in the property, it could not be said that the plaintiffs had no cause of action. **P** SARDAR BEGAM *v.* MUHAMMAD SHARIF, 63 P. R. 1916; 160 P. W. R. 1916 **555**

APPELLATE COURT, *duties of.*

When an Appellate Court reverses a finding of fact, it ought to apply its mind to the consideration of the whole of the evidence in the case. **M** LAXMIPATHAYA *v.* RAMACHENDRA, 31 M. L. J. 311; (1916) 2 M. W. N. 133; 20 M. L. T. 228 **421**

———, *duty of—Trial Court, conclusions of fact by—Wrong application of law.*

A Court of Appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is and applies wrong legal principles to the facts of the case so stated by him, then in such cases the Appellate Court will intervene and correct the erroneous principles of law which the Judge has applied and remand the case for a re-hearing with a correct exposition of the law. **PAT** RAM CHARAN MAHATO *v.* HARIHAR MAHATO **392**

———, powers of, to alter finding—Omission to frame charge, on which altered finding to be given, effect of—Revision, whether ground for **816**

———, powers of, to interfere with appointment of Receiver **939**

———, remand by, of case for re-trial with direction to record additional evidence and give decision after consideration of original and fresh-evidence—Illegality—Prejudice to accused—High Court—Revision **508**

APPROVER. [*See* CRIMINAL PROCEDURE CODE, S. 337.

ARBITRATION—*Award—Decree in accordance with award—Appeal—Revision—Material irregularity.*

No appeal lies from a decree passed in accordance with an award of arbitrators, except in so far as the decree is in excess of or not in accordance with the award.

It is discretionary with a Court to grant or refuse time for producing evidence in support of objections to an award, and where it has acted with due care and attention the High Court will not interfere in revision. **PAT** KHARAGNATH MISRA *v.* NAKCHEDDI JHA **914**

———Award, how far bars subsequent suit for same reliefs **710**

———*Award, modification of—Substantial alterations—Jurisdiction—Revision*

In modifying an award a Court has no power to go beyond the provisions of paragraph 12, Schedule II, of the Code of Civil Procedure and it acts without jurisdiction if it makes substantial modifications because it takes a different view from that held by the arbitrator as to what is just and fair in this or that set of circumstances.

Material irregularity on the part of a Court in dealing with objections to an award is a ground for revision, though it is no ground for revision that the arbitrator himself has been guilty of some misconduct and that the Court has wrongly adjudicated upon the objection raised regarding that misconduct.

A Court's refusal to call the arbitrator to answer questions which the petitioner wished to put to him regarding his conduct of the proceedings is a ground for revision. **P** PARMA DAT *v* BIPJU, 78 P. R. 1916; 124 P. W. R. 1916 **887**

———*Award—Civil Procedure Code (Act V of* 1908*) Sch. II, cls.* 10, 14 (b)*—Remission of award, ground for—Expression capable of many interpretations—"Indefinite or incapable of execution."*

The fact that a particular expression used in an award is capable of more than one interpretation, does not show that it is indefinite; much less that it is so indefinite as to be incapable of execution. The expression in such a case has to be interpreted in execution proceedings consequent on the decree following the award. **O** RAGHURAJ BAHADUR SINGH *v.* RAJESHWAR BALI, 3 O. L. J. 258 **761**

———, private—Award, filing of, order of—Appeal, maintainability of—Expression of opinion, effect of—Questions not referred, decision of—Withdrawal of question—Private agreement on referred question—Failure to decide question, effect of **833**

———, reference to—Absence of some of the arbitrators during enquiry—Award, signing of, by absentees after submission to Court—Illegality—Decree in terms of illegal award—Appeal **358**

———, reference to, in pursuance of compromise, whether amounts to sanction of compromise—Application for leave withdrawn **675**

ARBITRATION ACT (IX OF 1899), SS. 4, 5, 19—*"Submission", meaning of—Reference, one of parties to, filing suit regarding same subject-matter—Stay of proceedings under s.* 19*—Civil Procedure Code (Act V of* 1908*), s.* 151*—Court, inherent power of, to stay proceedings—Procedure, where valid reference subsists between parties.*

The definition of "submission" in section 4 of t

ARBITRATION ACT—concld.

Arbitration Act covers both what is ordinarily termed an arbitration clause, and also what is commonly called a reference.

Where one of the parties to a reference files a suit in respect of the same subject-matter, the proceeding in the suit cannot be stayed under section 19 of the Arbitration Act, but the Court has inherent power to stay such proceedings if it be necessary to do so for the ends of justice. The Court should either adjourn the trial of the suit until an award has been published, or insist on the plaintiff obtaining leave of the Court to revoke the reference.

The authority delegated to an arbitrator cannot be revoked except by leave of the Court, and so long as it is not revoked he has power to make an award, and there would be no impropriety of conduct on his part in proceeding with the reference after suit filed, unless he has notice that there has been an application for leave to revoke the authority conferred on him to some Court competent to grant such leave.

Even where it appears desirable to have the matter tried in Court, the proper course would be not to ignore the arbitration and proceed forthwith with the suit, but to direct the defendant to take necessary steps to revoke his submission. **S** DHANPATMAL-DIWANCHAND *v.* KISHINLAL-INDRAJ, 10 S. L. R. 1 **586**

——— Ss. 5, 19 **536**

ASSAM LABOUR AND EMIGRATION ACT (VI OF 1901), S. 167—*Recruiting coolie without license, whether an offence.*

A Criminal Court must in every case before it convicts and, as a general rule, before it goes into the evidence, clear the ground and decide and define the offence which it is sought to establish against the accused.

If an accused is running a recruiting concern for his own benefit, either under the guise of a licensed person or independently, without having secured the necessary protection of a license, he ought to be prosecuted and if convicted, punished according to law but if all that the accused is doing is, for some remuneration, giving genuine assistance to a person authorised to carry on a depôt and to recruit, he is not guilty of an offence under the Act. **A** QASIM ALI *v.* EMPEROR, 17 CR. L. J. 407 **907**

ATTACHMENT. *See* CRIMINAL PROCEDURE CODE, S. 145; EXECUTION.

——— by prohibitory order, whether amounts to injunction within the meaning of Article 42, Limitation Act, 1908 **98**

AUCTION-PURCHASER, subsequent, suit by, against prior auction-purchaser **753**

AWARD. *See* ARBITRATION.

BAIRAGEE MAHANT. *See* HINDU LAW.

BANDHU. *See* HINDU LAW.

BANKRUPT, discharge of, in Singapore, effect of—Liability of bankrupt's properties in British India for his debts in Singapore - 'Jointly bound', meaning of—Son, whether 'jointly bound' with father—Liability of son of bankrupt **918**

BENAMIDAR—Real owner permitting another to hold himself out as owner of estate—Mortgage by latter—Doctrine of *bona fide* purchaser for value, applicability of—Notice, direct or constructive—Burden of proof **893**

BENAMI TRANSACTION—*Purchaser taking conveyance in name of another—Presumption—Burden of proof—Burmese Law—Children, whether have vested interest during lifetime of either parent.*

When a person purchasing property takes the conveyance in the name of a relation, the presumption is that the purchase is *benami* and the burden lies on the person to whom the conveyance has been made of proving that he is entitled to and beneficially interested in the property.

In Burma children have no vested interest in parental property during the lifetime of either parent, and the fact that a child can claim under certain circumstances does not prevent a surviving parent from disposing of the whole of the property or give the child any interest until such claim is made.

Where, therefore, a house in occupation of the judgment-debtor being attached in execution of the decree, his minor son applied for removal of the attachment on the ground that the house belonged to him, and it appeared that the son lived only occasionally with his father in the house which was bought with the father's money and that the father raised money on it:

Held, that the purchase in the name of the son was a *benami* transaction entered into by the judgment-debtor with a view to committing a fraud upon his creditors and that, therefore, the attachment could not be removed. **U B** NGA TIN GYI *v.* NGA TWE AUNG, 9 BUR. L. T. 35 **12**

BENGAL FERRIES ACT (I B. C. OF 1885) **782**

BENGAL LOCAL SELF-GOVERNMENT ACT (III B. C. OF 1885), S. 138 (*d*, RR. 93, 98, 102, 103 **305**

BENGAL MUNICIPAL ACT (III B. C. OF 1884), S. 155—"*Within a distance of two miles above or below the ferry*", *meaning of—Bengal Ferries Act (I B. C. of 1885)—'Ferry' 'right of ferry', 'ferry boat,' meaning of—Municipal right of ferry, invasion of—Statutes, construction of words in sections of.*

The words "within a distance of two miles above or below the ferry" in section 155 of the Bengal Municipal Act mean "within a distance of two miles above or below the ferry along the banks of the river or stream," and not 'within a radius of two miles of the Municipal ferry.'

Section 155 of the Bengal Municipal Act cannot be construed in the light of the provisions of the Bengal Ferries Act, I of 1885, inasmuch as section 4 of the Act lays down that the provisions of the Public Ferries Act shall not apply to a Municipal ferry under the provisions of the Bengal Municipal Act.

The words used in defining the limits of a public ferry under Act I of 1866 and the limits of a Municipal ferry under Act III of 1884 are not used in the same sense as those in section 16 of Act I of 1885.

Per *N. R. Chatterjea, J.*—When the words used in a section of an Act are plain, and construed in their ordinary sense mean one thing, the Court cannot construe the section in a different way merely because the construction of the words in their

BENGAL MUNICIPAL ACT—concld.

ordinary sense may, in some cases, lead to results which might seem anomalous.

The banks referred to in the last clause of section 155 of Act III of 1884 are banks of the same river, and the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality.

Per *Richardson, J.*—The word ferry in the expression "Municipal ferry" must denote a place where passengers are conveyed by boat from one side of the river to the other; and the "right of ferry" is the right so to carry passengers at such a place.

A "ferry boat" must mean any boat used for the purpose of carrying passengers across the river, whether at that place or at some other place.

It is not an invasion of a Municipal right of ferry created by the Bengal Municipal Act for an unlicensed ferry boat to pick up passengers at some place outside the prescribed area of two miles above or below the ferry and without touching at the nearer bank to take them across the river to a point on the further bank within that area or to do the converse. **C** KASIM ALI *v.* CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG **782**

BENGAL TENANCY ACT (VIII B. C. OF 1885),

S. 20 (7)—*Occupancy rights—Lease as* thekadar, *whether confers such rights*—Raiyat, *meaning of.*

A *raiyat* within the meaning of the Bengal Tenancy Act is a person who acquires land for the purpose of cultivating it.

Possession under a lease as a *thekadar* and not as a cultivating tenant does not confer occupancy rights under the Act. **PAT** STONEWIGG *v.* SHEO RACHHAYA SINGH **622**

——— Ss. 29, 179—*Landlord and tenant—Enhancement of rent*—Mukarrari patta—*Notice by tenant to landlord to perform certain acts in terms of* patta—*Ratification—Undue influence*

By a *kabuliyat* a tenant agreed to pay an enhanced rate of rent and in consideration thereof the landlord passed a *mukarrari* interest in his land within the meaning of section 179 of the Bengal Tenancy Act. Subsequent to the execution of the *kabuliyat* the tenant served a notice upon the landlord to sink a *pakka* well in accordance with the terms of the *kabuliyat*:

Held, that section 29 of the Bengal Tenancy Act did not apply to the case, inasmuch as the *kabuliyat* created a permanent *mukurrari* interest within the meaning of section 179 of the Act.

Held, also, that the notice amounted to a ratification of the *kabuliyat* and it was not subsequently open to the tenant to plead that the *kabuliyat* was executed under undue influence. **PAT** GUR SAHAI MAHTO *v.* KESHWAR SAHU, 1 P. L. J. 76 **437**

——— S. 30—*"Held at a money-rent," meaning of.*

Section 30 of the Bengal Tenancy Act refers to a tenancy where the rent is solely payable in money, and it does not apply to a tenancy of which rent is paid partly in cash and partly in kind.

The Bengal Tenancy Act is an Act which was passed in the interests of tenants and under it

BENGAL TENANCY ACT—contd.

rents are payable sometimes in money, sometimes in kind and sometimes partly in money and partly in kind. **C** PRIYANATH PAL *v.* TARINI CHARAN ROY, 24 C. L. J. 373 **618**

——— Ss. 30, 105, 109A—*Enhancement of rent, basis of assessment of—Appeal—Batwara papers, whether evidence against tenants.*

A decision, so far as it determines the amount of enhancement, is "a decision settling the rents", within the meaning of section 109A of the Bengal Tenancy Act, and, therefore, no appeal lies against it.

In a suit for enhancement of rent Batwara papers are not evidence against the tenants.

In settling the rate of enhancement under section 30 (*b*) of the Act, the Court must have regard to the nature of the land on which rent is to be assessed. If it is up-land the prices of the up-land staple crop must be considered, while if it is low land the prices of the low-land staple crop must be considered. **PAT** SAJIWAN MAHTO *v.* GULAB CHAND LAL, 1 P. L. J. 409 **678**

——— Ss. 50, 115, *application of—Suit for declaration that Record of Rights is incorrect—Fixed-rate tenant—Evidence of long payment anterior to preparation of Record of Rights, admissibility of—Presumption.*

A suit for a mere declaration that the Record of Rights is incorrect is not one governed by the Bengal Tenancy Act. But even in a suit not governed by the Act, the fact of long payment of rent at an unchanged rate is evidence as showing that the holding is a fixed rate holding.

The evidence of payment, anterior to the publication of the Record of Rights, is admissible. **PAT** PIRTHI CHAND LAL *v.* MOHAMED TAHIR, 1 P. L. J. 67 **427**

——— S. 71 (4) **491**

——— S. 85 (1) **754**

——— S. 103—*Record of Rights, value of—Presumption.*

A Record of Rights should be presumed to be accurate until it is proved to be incorrect.

A Record of Rights is evidence not only between landlord and tenant, but in all cases where the subject-matter with which it deals is in dispute. **PAT** MUHAMMAD FARID *v.* HAKIM SHAH ABDUL WAHAB **424**

——— S. 105 **678**

——— Ss. 105, 105A, 109, 111A—*Applicability and scope of ss.* 109 *and* 111*A—Assessment of fair rent under s.* 105—*Subsequent declaratory suit by tenant, when barred*—Res judicata, *constructive.*

The proviso to section 111A of the Bengal Tenancy Act applies only to a case where the Record of Rights was framed in pursuance of an order made under section 101, sub-section (2), clause (*d*), that is, to a case where a settlement of land revenue is being or is about to be made, but not to a case where the Record of Rights was prepared at the instance of the landlord under section 101, sub-section (2), clause (4).

After the assessment of fair rent under section 105, Bengal Tenancy Act, a subsequent suit by the tenants for a declaration that the proceedings under Chapter X,

of the Bengal Tenancy Act were vitiated by fraud, and that they are *maurusi mokarari raiyats* and not tenure-holders and that the lands held by them constitute not one tenure but distinct *raiyati* holdings, is not barred by the operation of section 109, but in respect of the plaintiffs' prayer for a declaration that the landlord is not entitled to realise the rent assessed under section 105, the suit is barred by section 109.

The introduction of section 105A into the Bengal Tenancy Act has not altered the law that to attract the operation of section 109 it is essential to establish that the Civil Court has for its subject a matter which has already formed the subject of an application under section 105.

The jurisdiction of a Civil Court is not constructively excluded by the operation of section 109 in regard to a point which, though it might and should have been raised in a proceeding under section 105 read with section 105A, has neither been raised nor decided in the proceeding under that section. **C** NAWAB BAHADUR OF MORSHIDABAD *v.* AHMAD HUSSAIN 695

——— S. 109 695

——— S. 109A 678

——— Ss. 111, 111B— *Suit instituted within prohibited period, how to be dealt with—Dismissal of suit—Rejection or return of plaint—Civil Procedure Code (Act V of* 1908), *O. VII, rr.* 10, 11.

A suit involving issues mentioned in clauses (*b*) and (*c*) of section 111B of the Bengal Tenancy Act instituted, in contravention of the provisions of that section, within the period of three months following the date of the certificate of final publication of a Record of Rights, ought not to be dismissed but may be treated, subject always to any question arising under section 109, as though the plaint had been received and the suit instituted on the day following the expiration of such period.

But the plaint in such a suit should be at once returned or rejected under Order VII, rule 10 or 11, Civil Procedure Code.

Per *Richardson, J.*—Sections 111 and 111B of the Bengal Tenancy Act prohibit for the periods therein stated the entertainment by, or the institution in, the Civil Courts of suits of certain classes. But the jurisdiction of the Civil Courts in regard to such suits is not necessarily taken away for good and all. The Civil Courts are finally deprived of jurisdiction only in the case of suits concerning matters which have come before a Revenue Officer for decision under sections 105 to 108.

The provisions of sections 111 and 111B have the effect that in respect of certain suits the Civil Courts are closed to the plaintiff for the period specified in the sections. But the filing of a plaint within a prohibited period shall not entail the dismissal of the suit. **C** PRAN KRISHNA SAHA *v.* KRIPA NATH 76

——— S. 111A 695

——— S. 111A—*Suit for declaration—Limitation.*

In a Record of Rights finally published in 1905, the plaintiff was shown as defendant's tenant liable to pay rent to him. In 1908 the landlord obtained an *ex parte* decree for arrears of rent which the plaintiff paid off. In 1912 the landlord again brought a suit

for rent, which the plaintiff contested but his contention failed. On 7th of October 1912 the plaintiff brought a suit for a declaration that he was a *lakheraj raiyat* and that he was not liable to pay rent:

Held, that the suit was in effect to correct the Record of Rights and as such was barred by limitation, having been filed after more than 6 years from the date of the final publication of the Record of Rights when the cause of action arose. **PAT** AMIRUDDIN *v.* SAIDUR RAHMAN, 1 P. L. J. 73 433

———S. 111B 76

——— S. 115 427

——— S. 147A—*Compromise in contravention of the section—Illegality.*

A compromise decree passed in contravention of the provisions of section 147 A of the Bengal Tenancy Act is a nullity. **PAT** CHAND GORAIN *v.* KHUB LAL MAHTON 445

——— S. 153—*Decree passed without jurisdiction, if appealable.*

In a suit for rent, the amount claimed not exceeding Rs. 502, a question relating to title to the land in suit as between the parties having conflicting claims thereto was raised before the Munsif (empowered by the Local Government to exercise final jurisdiction under section 153, Bengal Tenancy Act) but was not decided by him, and in appeal from his decision, the Appellate Court decided that question, although it was contended before it that the appeal was incompetent:

Held, that no appeal lay from the decision of the Munsif but an appeal lay to the High Court, from the decision of the first Appellate Court as that Court had decided a question of title between the parties.

Per *Mookerjee, J.*—A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto and if there is a statutory appeal from decrees made in suits of that character, the decree does not become unassailable because it has been made without jurisdiction.

Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. **C** GANGADHAR KARMAKAR *v.* SHEKHARBASINI DASYA, 20 C. W. N. 967; 24 C. L. J. 235 348

——— S. 171—*Unregistered co-sharer in occupancy holding, if entitled to benefit of s.* 171.

An unregistered co-sharer in an occupancy holding cannot obtain the benefit of section 171, Bengal Tenancy Act, against the registered holder of which the decree for rent was obtained, by reason of his paying into Court the amount requisite to prevent the sale of the holding in execution of a decree. **C** HARISH CHANDRA BOSE *v.* RAM GOBIND NANDY 584

——— S. 174—*Application to set aside sale—Jurisdiction—Officers of Court, whether bound to give information to parties—Wrong information supplied, effect of—Act of officer of Court, when act of Court—*

BENGAL TENANCY ACT—concld.

Deposit of decretal amount, etc., period within which to be made—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

A Court has no jurisdiction to entertain an application to set aside a sale under section 174 of the Bengal Tenancy Act until it is satisfied that the statutory conditions provided by the section have been fulfilled.

The High Court has jurisdiction to set aside an order made under section 174 without jurisdiction.

No duty is cast upon the officers of a Court to give any information to the parties for the purposes of section 174.

No relief can be given to a party who has been misled by wrong information supplied by an officer of a Court. Relief can only be granted in cases where a party has been misled by an "act of the Court", that is an act of a prescribed officer acting in accordance with the prescribed rules of the Court.

A deposit of the decretal amount together with the statutory 5 per cent. on the purchase-money, under section 174, in order to be valid and to give the Court jurisdiction must be made within 30 days of the sale, and not later. **PAT** SARJOO PRASAD *v.* NANOO RAI, 1 P. L. J. 459 779

——— S. 179 437

——— SCH. III, ART. 3—*Dispossession by person holding dual capacity of landlord and auction-purchaser of holding—Limitation.*

The dispossession of a tenant by a person who holds the dual capacity of the landlord and also of the auction-purchaser of the holding when he dispossesses, comes within Article 3 of Schedule III of the Bengal Tenancy Act.

The dispossession referred to in Article 3 of Schedule III need not be a dispossession by the landlord as such. **C** FANI BHUSAN SARKAR *v.* PULIN CHANDRA MANDAL 838

——— SCH. III, ART. 3—*Limitation, special, applicability of—Dispossession, necessity of.*

In applying the law of limitation prescribed by Article 3, Schedule III, of the Bengal Tenancy Act the purpose and scope of the Act must not be lost sight of.

To deprive a tenant of his right of suit as being barred by the special limitation of Article 3 of Schedule III of the Act, there must be a plain dispossession within the meaning of the Article. **C** KRISHNA CHANDRA BAGDI *v.* SATISH CHANDRA BANERJEE, 20 C. W. N. 872 365

BILL OF EXCHANGE—Acceptance—Set-off, right to, by acceptor on due date as against payee—Tender of balance after due date—Discharge of drawer after tender—Notice of dishonour—Drawer, nature of, liability of 628

BONA FIDE purchaser for value, doctrine of—Notice, direct or constructive—Burden of proof 893

BUDDHIST LAW, BURMESE, *applicability of, to Rajbansis—Custom.*

Burmese Buddhist Law is not applicable to Rajbansis, even if they are Buddhists. The law applicable to them is the customary law prevailing among them in their habitat. **L B** FOESON *v.* ADI CHANDRO BORWA, 8 L. B. R. 301 431

——— INHERITANCE—*Partition on remarriage of mother—Shares of children by first marriage and second husband in unpartitioned property—Court-fees.*

Under Burmese Buddhist Law when children partition with their mother upon her re-marriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion. Of the property that is left unpartitioned the children of the first marriage take three-fourths, and the second husband takes one-fourth.

The plaint must be stamped according to the plaintiff's valuation of his share which he seeks to recover. **L B** MAUNG SHWE BON *v.* MAUNG PU, 9 BUR. L. T. 97 731

——— PARTITION *between children of two marriages and step-mother—Mode of division.*

Division, whether between children of two marriages, or between children of the first marriage and their step-mother, is always *per stirpes*, not *per capita*. Children are not entitled to a share during the lifetime of their mother, but only succeed as representing their mother. **L B** MI CHIT LU MA *v.* WI WIN MA U 425

BURDEN OF PROOF—*See* ADVERSE POSSESSION; *Benami* TRANSACTION; FRAUD; LIMITATION ACT, 1908, SCH. I, ART. 142; MORTGAGE.

BURMA MUNICIPAL ACT (III OF 1898), S. 142 (r), *bye-law under—'Keep', meaning of.*

The word 'keep' in the bye-law made by the Rangoon Municipal Committee under section 142 (*r*) of the Burma Municipal Act means the keeping for some lengthened time.

Where, therefore, the accused took a goat to a Hindu temple to be sacrificed and tied it up in the temple awaiting the sacrifice ceremony for about two hours and was thereupon convicted for breach of the bye-law:

Held, that the conviction was bad and should be set aside. **L B** BOYHENJ CHANDRA *v.* RANGOON MUNICIPALITY, 8 L. B. R. 328; 17 CR. L. J. 342 518

BURMESE LAW. *See Benami* TRANSACTION.

CALCUTTA HIGH COURT RULES, APPELLATE SIDE, CH. XI, R. 4, *applicability of—Deputy Registrar's certificate on a review application.*

Rule 4 in Chapter XI of the Calcutta High Court Rules, Appellate Side, is intended to apply to a case where the Deputy Registrar gives a certificate that all the proceedings on an application for review of judgment are in order, and not to a case where the certificate of the Deputy Registrar is to the effect that the proceedings are not in order. Until the Deputy Registrar certifies that the review proceedings are in order, no application for review of judgment can be moved in Court. **C** GANGADHAR KARMAKAR *v.* SHEKHARBASINI DASYA, 20 C. W. N. 967; 24 C. L. J. 235 348

CAVEAT EMPTOR, doctrine of, extent of 92

CERTIFICATE, grant of, on point of custom—Evidence, conflicting 884

——— of value by High Court for appeal to Privy Council, whether conclusive as to value when based on wrong principle 939

CHARGE, accurate statement of, necessity of 971

———, framing of—Revision by High Court 826

CHARITY. *See* MUHAMMADAN LAW.

CHARTER ACT (24 & 25 Vic. C 104), s. 15 821

CHIEF JUSTICE, *power of, to hear application for review of judgment pronounced by other Judges.*

The Chief Justice can only hear an application for review if it is impossible for the Court which passed the judgment to hear it, or at all events, if there is not one of the Judges who decided the appeal available for the purpose. C GANGADHAR KARMAKAR *v.* SHEKHAR BASINI DASYA, 20 C. W. N. 967; 24 C. L. J. 235 348

CHOTA NAGPUR ESTATE—*Primogeniture and impartibility, existence of.*

In the estate of Maharaja of Chota Nagpur and in his family the custom of impartibility and primogeniture exists. PAT RAM CHARAN MAHATO *v.* HARIHAR MAHATO 392

CIVIL PROCEDURE CODE (ACT XIV OF 1882), Ss. 13, 108, 311—Res judicata - *Suit to set aside ex parte decree on ground of fraud, if barred, when application under s.* 108, *Civil Procedure Code, on same ground rejected.*

Where a question of fraud has been properly raised and determined in an application under section 108 of the Civil Procedure Code, 1882, to set aside an *ex parte* decree, the same question cannot be re-opened by the applicant in a suit subsequently brought by him to set aside the *ex parte* decree on precisely the same ground. C KHIRODE CHANDRA ROY *v.* ASHTULLA BEE, 20 C. W. N. 845 557

——— S. 108 339, 557

——— S. 311 557

——— Ss. 456, 578—*Guardian* ad litem *of minor defendants, appointment of—Consent of person appointed not obtained—Interest adverse to minors—Fit and proper person—Irregularity—Mortgage by Hindu father—Suit by mortgagee against father and minor sons—Father appointed guardian* ad litem—*Minors, whether properly represented.*

In a suit on a mortgage executed by a father, his minor sons were also impleaded as defendants, and the father was, without his consent being taken, appointed guardian *ad litem* of the minors. He entered no appearance and an *ex parte* decree was passed, in execution of which the mortgaged property was sold. On attaining majority, the minors brought a suit for possession of their share of the property, on the allegations, among others, that the consideration for the mortgage was an immoral debt, that their father was a man of bad character, that having an interest adverse to his minor sons he was not a proper person to be appointed their guardian *ad litem*, and that they had not been properly represented in the previous suit:

Held, that there was a serious irregularity about the appointment of the father to act as guardian for his minor sons, and *quæ* the question sought to be put in issue in the suit, he was not a fit and proper person to be appointed as guardian. A BAIJ NATH RAI *v.* DHARAM DEO TEWARI, 14 A. L. J. 353; 31 A. 315 707

CIVIL PROCEDURE CODE—(1882)—contd.

——— S. 539.

In giving effect to the provisions of section 539 of the Code of Civil Procedure, 1882, and in appointing new trustees and settling a scheme for a public trust, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

The Board deprecated the giving of the power of appointing or electing trustees of a mosque in the hands of an indeterminate and necessarily fluctuating body of people, whether they called themselves *panchayet* or *jamaet*, and directed that the appointment of future trustees should be entrusted to a committee of worshippers, the composition of which was to be in the discretion of the Court, with due regard to local needs and conditions. P C MUMAMMAD ISMAIL ARIFF *v.* AHMED MOOLA DAWOOD, 14 A. L. J. 741; (1916) M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 BOM. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 BUR. L. T. 141 30

——— S. 539—*Religious Endowments Act (XX of 1863), s.* 18—Wakf—*Endowment for religious purposes and charity—Suit for scheme and removal of trustees—Sanction of Court, if necessary—Necessary parties, who are—Religious and charitable trust, when public trust—Limitation—Allotments for charity and maintenance of grantor's family, non-specification of, whether fatal to the trust.*

Where a *sanad* provides for the maintenance of a mosque and for *khairat* (charity), feeding of travellers etc., and the public offer of prayers at the mosque, the trust created is a religious, charitable and public trust.

A suit for the removal of persons professing to act as trustees of a *wakf*, for appointment of new trustees and for a scheme of management should be instituted with the sanction of the Advocate-General and no leave of the Court is necessary under section 18 of the Religious Endowments Act.

In such a suit the Court is not concerned with the question of possession or limitation, which can only arise when a suit for recovery of possession of trust property improperly alienated is brought by the trustees, who may be appointed and in whom the properties may be vested. The proper parties are the persons who were managing the trust professing to be trustees, irrespective of any person in possession of any part of the trust property.

A person electing to proceed under the Religious Endowments Act can be given only such special relief as that special Statute provides and if he seeks any relief beyond that he should proceed under section 539 of the Civil Procedure Code, 1882.

A *wakf* which does not specify the proportion in which the income is to be appropriated for the several objects is not invalid. C MAKHLAGHOR RAHMAN *v.* FAIZUR RAHMAN 880

CIVIL PROCEDURE CODE—(1882)—concld.

——— S. 578 707

——— S. 578—*Guardian* ad litem's *appointment—Notice—Irregularity.*

If in fact the Court has allowed a party to appear as the guardian of a minor and to conduct proceedings in his behalf the mere circumstance that notice was not issued to the guardian is immaterial and is curable as an irregularity under section 578 of the Code of 1882. PAT JAHNAVI PRASAD SINGH *v.* GHARBARAN DUBEY 404

CIVIL PROCEDURE CODE (ACT V OF 1908), S. 2 (2) 230, 887

——— S. 2 (2), O. IX, RR. 8, 9—*'Admits the claim or part thereof,' meaning of—Trial of suit Default of plaintiff—Remedy—Costs—Admission by defendant as to liability for part of amount sued—Decree of part and dismissal of rest of claim, whether amounts to decree—Appeal.*

A decree for part of a claim, which alone was admitted by the defendant, and the dismissal of the rest on plaintiff's default of appearance under Order IX, rule 8, is a decree within the meaning of section 2 (2), Civil Procedure Code, and is appealable.

The 'claim or part thereof' which a defendant may admit under Order IX, rule 8, Civil Procedure Code, must be the claim as laid down in the plaint and for the amount stated therein and not simply of the cause of action.

At the hearing of a suit on a bond for Rs. 90 plaintiff was absent. Defendant admitted execution, but pleaded that he extinguished the liability by work and labour done for plaintiff with the exception of Rs. 10. The Munsif gave a decree for Rs. 10 and dismissed the rest of the claim under Order IX, rule 8, Civil Procedure Code:

Held, (1) that the part dismissal of the claim was a 'decree' and was appealable;

(2) (*Seshagiri Aiyar, J., dubitante*)—that the plea of the defendant was a case, within the rule of Order IX, rule 8, Civil Procedure Code, of admitting a part of a claim and was neither a plea of set-off nor of a counter-claim.

Per *Coutts Trotter, J.*—Where a Court decrees the admitted part of a claim and dismisses the rest of it under Order IX, rule 8, Civil Procedure Code, the entire adjudication is a decree and must be so treated. The same adjudication, the same document, cannot be, as to part of it, a decree, and as to another part of it, something else.

The words 'admits the claim or part thereof' in the said rule apply to a case where, on examining the plaint and the defendant's admission in the written statement, it can be considered that he, there and then, agreed to pay the money or to submit to the relief claimed in the plaint.

As a rule, a plaintiff ought not to be shut out from the judgment seat where costs will afford a sufficient protection to the defendant as against the plaintiff who is guilty of some technical error or mistake.

Per *Seshagiri Aiyar, J.*—Section 2, clause 2, Civil Procedure Code, applies only to total dismissals of suits for default and not to partial dismissals.

CIVIL PROCEDURE CODE—(1908)—contd.

The word 'claim' in Order IX, rule 8, is not necessarily synonymous with the amount sued for. It may refer to the right litigated, irrespective of the arithmetical figure stated in the relief column. The fact that the burden of proof is on the defendant will not enable the plaintiff to get a decree in a case under Order IX, rule 8, Civil Procedure Code, if there was no admission of the right sued for. M MUNISWAMI GOUDU *v.* JUNJADU 65

——— S. 2 (2), O. XXXIV, R. 6—*Decree—Appeal—Ad valorem Court-fee.*

A decree passed under Order XXXIV, rule 6, of the Civil Procedure Code, 1908, is a decree within the meaning of section 2 (2) of the Code and a memorandum of appeal against such a decree should be stamped *ad valorem* on the amount decreed. A TAJAMMUL HUSAIN KHAN *v.* MUHAMMAD HUSSAIN KHAN, 14 A. L. J. 328 158

——— S. 2 (11)—*Suit on mortgage for sale—Death of mortgagor pending suit—Wrong person brought on record as legal representative of deceased defendant—Decree for sale—Subsequent suit by puisne mortgagee for setting aside sale—Sale, whether nullity—Legal representative, meaning of.*

Prima facie no decree can be binding against a person who has not been represented in the suit; but if there is on the record some person who is interested in defending the suit, the fact that that person does not completely represent the deceased is not a ground for holding that the decree is not properly obtained. It cannot, however, be inferred from this that the decree in a suit prosecuted successfully against a person as the legal representative of a deceased, when he has absolutely no interest in the property which is the subject-matter of the suit, is binding upon the estate of the deceased.

Under the enlarged definition of "legal representative" to be found in the Civil Procedure Code of 1908 a person in possession of the estate belonging to the deceased is competent to represent the deceased defendant.

Where, therefore, in a suit for sale on a mortgage, the mortgagee brought on the record as the legal representative of the mortgagor defendant his divided brother's son, though his right was a *spes successionis*, and not his daughter and obtained a decree for sale and purchased the property in Court-auction, and a puisne mortgagee sued to set it aside:

Held, that the puisne mortgage was entitled to do so and that the previous sale was a nullity and the puisne mortgagee was entitled to a decree for sale subject to the rights of the prior mortgagee. M MADDALA MADHAYARAYULU *v.* TANIKALLA SUBBAMMA, 31 M. L. J. 222; (1916) 2 M. W. N. 233 124

——— S. 9 88

——— Ss. 9, 83—*Alien enemy, suit against, if maintainable during continuance of war—Internment, effect of.*

Even during the continuance of a war an alien enemy can be sued in British Indian Courts and he would have every right to present his case before the Courts in accordance with the laws of procedure, no matter whether the cause of action arose before the war or after the war, and the fact of his having

CIVIL PROCEDURE CODE—(1908)—contd.

been interned does not cut down his liabilities. C ABDUL QADER KHALIFA v. FRITZ KAPP, 20 C. W. N. 691; 23 C. L. J. 493 951

——— S. 9—*Right to office—Suit to establish right of priest to perform ceremonies within certain* birt, *maintainability of — Legal character — Voluntary offering, suit for recovery of—Contract Custom.*

The right to hold a certain office in a certain place at a certain season of the year confers upon the holder of that right a legal character and a suit to establish such a right is maintainable under section 9, Civil Procedure Code.

But no right vests in any priest to claim to go to the house of a disciple, even when not called for by him, for performance of religious ceremonies there, and a suit does not lie for a declaration that the plaintiff is entitled to perform all funeral ceremonies within a certain *'birt.'*

No suit lies for the recovery of a voluntary offering if that suit is based on custom.

A suit by one priest for recovery of offerings made to another, on the ground that the latter unlawfully performed ceremonies within the former's *birt*, is not maintainable in the absence of an express contract whereby the defendant undertook to make refund to the plaintiff. PAT HIRA PANDEY v. BACHU PANDEY, 1 P. L. J. 381 345

——— S. 11 294, 543, 571

— — S. 11, O. XXI, R. 16—Res judicata—*Application to recognise assignment of decree—Objection not taken by judgment-debtor.*

Where the transferee of a decree applied to Court, under Order XXI, rule 16, for permission to execute the decree as transferee, and notice was thereon issued to the judgment-debtor, who did not object to the application, and the Court passed an order for onexecuti:

Held, that it was not open to the judgment-debtor to question the assignee's title in subsequent proceedings in execution. A TAJ SINGH v. JAGAN LAL, 14 A. L. J. 370; 38 A. 289 234

——— S. 11— Res judicata—*Decision of Revenue Court—Plaintiff not entitled to sue as co-sharer — Suit by plaintiff as* lambardar, *maintainability of—Co-sharer, cultivating, if tenant—Question, decision of.*

A decision of a Revenue Court deciding that the plaintiff as co-sharer was not entitled to maintain a suit for ejectment cannot operate as *res judicata* with reference to the question whether the plaintiff as a *lambardar* is entitled to maintain such a suit.

The question whether a co-sharer cultivating lands in a village in a portion of which he is a co-owner is invariably to be regarded as a co-sharer accountable for the rent to the body of co-sharers at the time of the distribution of profits or as a tenant on behalf of the general body of co-sharers, depends upon the circumstances of each case. A JAI RAM v. GULZARI MAL 612

——— S. 11—Res judicata—*Proceedings of Revenue Officers.*

As there are no Revenue Courts in Burma, there is no question of *res judicata* by reason of the orders of Revenue Officers. L B MAUNG KAW LA v. MAUNG KE, 9 BUR. L. T. 183 356

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 11, EXPL. (6), O. I, R. 8—*Suit litigated bona fide for community or section of public—Subsequent suit for same relief—Addition of new plaintiff—Prior suit instituted without Court's sanction under O. I, r. 8—Addition of individual to common rights*—Res judicata.

Explanation 6 to section 11, Civil Procedure Code, makes no reference to Order I, rule 8, and it is not, therefore, confined to cases in which permission to sue in a representative character is obtained under the latter rule.

The decision in a suit based on a common or public right does not cease to be *res judicata* in a subsequent suit, based on the same cause of action and praying for the same relief, by the mere addition of a new plaintiff in the latter suit, provided his interests are identical with those of the plaintiff in the prior proceedings.

Where persons litigate *bona fide* for a common right, the non-payment of the proper Court-fee or the addition of an individual relief will not render inoperative the rule of *res judicata* under section 11, explanation (6), in a subsequent suit where the common right alone is re-litigated.

One of the *agraharamdars* of a village sued to establish a right of way to himself and to recover certain village sites from two trespassers on behalf of all the *agraharamdars*. The other *agraharamdars* were made *pro forma* defendants and they were *ex parte*. The suit was dismissed. The 4th defendant in that suit brought the present suit against the same persons for recovery of the village sites alone, making the other *agraharamdars* as defendants Nos. 3 to 13. These latter remained *ex parte*. After the settlement of issues, the 2nd plaintiff, who was not a party to the previous proceedings, was brought on record. Defendants Nos. 1 and 2 pleaded that the suit was barred as *res judicata*. It was urged for plaintiffs that section 11, explanation (6), was inapplicable as (1) the previous suit was not sanctioned by Court under Order I, rule 8, (2) the proper Court-fee was not paid in that suit, (3) the reliefs in the two suits were not identical, (4) the parties were not the same:

Held, disallowing plaintiffs' objections, that the suit was barred as *res judicata*.

Per *Moore, J.*—The conditions under which a decision in a suit of the kind mentioned in explanation (6) to section 11, Civil Procedure Code, may constitute *res judicata* against persons not expressly named therein are (1) that there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit; (2) that the parties not expressly named in the suit must be interested in such right, if right to relief can be said to be claimed "in common" only between parties who would be benefited by such relief if granted, or who have such an interest in the right claimed that they could join as co-plaintiffs. M GODIMELLA RANGAMMA v. PANCHANGAM NARASIMHACHARYULU, 31 M. L. J. 26; (1916) 2 M. W. N. 258 116

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 13—*Foreign judgment, suit based on—Jurisdiction.*

A British subject who has been properly served cannot object to a judgment of the King's Bench Division on the ground of want of jurisdiction, where the contract on which the suit was based was one in which the price was payable in England. L B S. KING *v.* D. J. BUCHANAN, 9 BUR. L. T. 106 741

——— Ss. 20 (b), 105, 115—*Leave to sue, order refusing grant of Reversal of order on appeal against order returning plaint—Appellate Court, jurisdiction of—Suit for accounts against partners individually—Leave to sue, grant of, when some of the partners resident outside jurisdiction of Court where suit instituted—Cause of action—Suit, institution of, in wrong Court—Jurisdiction—High Court—Revision.*

The plaintiff sued in the District Munsif's Court of Paramakudi a firm consisting of three partners impeaching a settlement of account arrived at in Rangoon. One of the partners resided within the jurisdiction of the said Court, while the other two were residents of Rangoon. The plaintiff did not sue the partnership as a single defendant, but impleaded the defendants as separate individuals and separate parties. He applied for leave, under section 20 (*b*), for leave to file the suit against all the defendants in the Paramakudi Munsif's Court. The Munsif refused leave and this order was embodied in a separate order returning the plaint for presentation to the Court at Rangoon. On appeal against the latter order, the District Judge not only reversed it, but at the same time granted leave to the plaintiff under section 20 (*b*), Civil Procedure Code. The plaintiff moved the High Court in revision:

Held, (1) that the order of the District Judge was strictly within section 20 (*b*), Civil Procedure Code, as defendants were sued not as a firm but as separate parties;

(2) that, though the Munsif's order refusing leave to sue in Paramakudi was not appealable, it was competent to the District Judge to consider the order on the principle of section 105, Civil Procedure Code, preliminary to the reversal of the order of the Munsif returning the plaint for presentation to the proper Court;

(3) that, though under the peculiar circumstances of the case, the suit was only triable in the Court at Rangoon, the High Court would not interfere under section 115, Civil Procedure Code, as it could not be said that the District Judge had exceeded his jurisdiction in dealing with the case.

Obiter.—The principle of section 105, Civil Procedure Code, would apply not only to decrees and interlocutory orders, but also to orders and interlocutory orders which lead up to the final order. M ALAGAPPA CHETTY *v.* ANNAMALAI CHETTY, 4 L. W. 4 1 74

——— Ss. 22, 23, 151—"*After notice to the other parties,*" *interpretation of—Application of transfer, when to be made—Inherent power of Court.*

The words used in section 22 of the Civil Procedure Code, 1908, are mandatory. The words "after notice to the other parties", indicate that the notice must be given prior to the making of an application for transfer of a case and that a notice of the application issued by the Court to which the application is made is not what is intended.

CIVIL PROCEDURE CODE—(1908)—contd.

In a case where issues are settled, the application must be made at or before such settlement is made, and a delay in making such an application would render the application incompetent.

Section 151 of the Code of Civil Procedure, does not empower the Court to wholly ignore the provisions of section 22. P GULAB CHAND *v.* SHER SINGH, 150 P. W. R. 1916 616

——— Ss. 24, 150, *scope of—Transfer of case to temporary Court without definite local jurisdiction—Decree—Property sought to be attached situated in places not assigned to temporary Court's jurisdiction—Execution, whether can be effected by temporary Court—Decree-holder, remedy of.*

A suit for partition of immoveable properties, for recovery of a half share therein and for mesne profits, having been brought in the District Court of Kistna at Masulipatam, was transferred for disposal to the Temporary Subordinate Judge's Court established in that place. This Court was established in 1910, but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge to fix such local jurisdiction as he thought fit to do under section 10 of the Madras Civil Courts Act, 1873. The suit having been decreed, an execution petition was put in for the attachment of certain immoveable properties of the defendant for recovery of the mesne profits so decreed, but the places where the properties sought to be attached were situated had not yet been assigned to the local limits of the Subordinate Judge's jurisdiction:

Held, that the Subordinate Judge had no jurisdiction to execute the decree and that the proper course for the decree-holder was to have applied under section 39, Civil Procedure Code, to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached.

Per *Sadasiva Aiyar, J.*—Section 50, of the Civil Procedure Code, relates to the business generally of a Court arising over the whole area or in defined particular areas within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notifications of the Local Governments, while section 24 contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court.

Per *Moore, J.*—Territorial jurisdiction is a condition precedent to the execution of a decree. M VENKATACHALLAM *v.* SITHAYAMMA, 31 M. L. J. 22 296

——— S. 35—*Costs—Interest—Judgment not allowing interest on costs—Decree, interest on costs if can be included in—Decree, amendment of.*

A Court inserting interest on costs for the first time in the decree is within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree.

In a case in which the Pleader of a party signed the decree before it was signed by the Court and no objection as to inclusion of interest on costs was taken in appeal to the High Court, it is not open to the party subsequently to object to such inclusion. A KISHORI LAL *v.* BADRI DAS 218

——— S. 39 296

——— S. 47 230, 294

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 47, O. XXI, R. 92, CL. (3)—*U. P. Government Rules, rr.* 30, 32—*Execution before Collector—Suit to set aside sale, maintainability of—Fraud—Suit, if treated as application—Remedy.*

In an execution proceeding transferred to a Collector under section 68 of the Civil Procedure Code, 1908, the property attached was sold at auction and purchased by the decree-holder. After the confirmation of the sale the judgment-debtors presented a petition to the Collector asking that the sale should be set aside on the ground, *inter alia*, that the decree-holder had fraudulently kept them in ignorance of the pendency of the execution proceedings. The objection having been overruled the judgment-debtors instead of filing an appeal to the Commissioner, as provided by rule 45 of the Rules of the Local Government made in this behalf, filed a civil suit for the recovery of the property:

Held, that the suit was barred by Order XXI, rule 92, clause (3), of the Civil Procedure Code, or the corresponding provisions of clause (3), rule 32, of the Rules made by the Local Government.

Held, also, that the suit could not be treated as an application under section 47 of the Civil Procedure Code, as the Court in which the suit was instituted was not the Court executing the decree at the time when the decree was made over to the Collector. A NAZIR HUSAIN *v.* KANHAYA LAL 473

——— S. 47, O. XXXII, R. 15—*Lunatic, decree against—Not properly represented in suit—Execution—Objections to validity of decree, sustainability of—Enforceability or otherwise of decree, whether a question under s.* 47, *Civil Procedure Code.*

A judgment against a person who was *non compos mentis* at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution but should be reversed or annulled in some direct proceeding taken for that purpose, such as by way of review, revision or appeal or a regular suit in a Court of competent jurisdiction; but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made.

A Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree.

The question whether a decree obtained against a lunatic, who was made a party to the suit but was not legally represented, is operative or not, does not fall under section 47, Civil Procedure Code, as the lunatic was not a party to the suit in the proper sense of the term.

Case-law reviewed and discussed. C KALIPADA SIRKAR *v.* HARIMOHAN DALAL, 24 C. L. J. 375 856

——— S. 47—*Satisfaction of decree—Disputes inter se between judgment-debtors, order on—Appeal or second appeal, whether lies.*

Disputes *inter se* between judgment-debtors after satisfaction of the decree and in which the decree-holder has no interest are not questions arising between the parties to the suit within the meaning of section 47, Civil Procedure Code, and no appeal lies against an order passed on such disputes.

A decree passed in a suit against the deceased 1st defendant, who was the *hukdar* of a mosque, and his five sons directed that the decree should be gradually satisfied out of the surplus profits of suit lands to which the *hukdar* was entitled, after meeting the expenses of the mosque. For this purpose a Receiver was appointed by Court. After the larger portion of the decree amount had been paid, the 7th defendant, who was brought on the record as the legal representative of the deceased 2nd defendant, paid up the balance and applied to Court for discharge of the Receiver and the delivery of the lands to him. The 4th defendant applied separately for joint possession with 7th defendant. The Court dismissed the 4th defendant's petition and the lower Appellate Court dismissed his appeal against the order of dismissal. On appeal to the High Court:

Held, (1) that the matter was not one for decision under section 47, Civil Procedure Code;

(2) that no appeal lay against the order of the Primary Court nor a second appeal from the appellate order dismissing the appeal. M ANAVARDA KHAN *v.* MISIRI KHAN, 3 M. L. J. 44; (1916) M W. N. 468 179

——— S. 52—*Decree against legal representative of deceased as such—Legal representative in possession of assets belonging to deceased—Duty to account for assets—Burden of proof—Mesne profits, whether included in assets—Mortgagee becoming absolute owner of equity of redemption—Merger.*

Where a decree is passed against a party as the legal representative of a deceased person, it is for the decree-holder in the first instance to prove that some assets came to the legal representative, and the onus is then shifted on the latter to show how the assets were applied. Once it is admitted or proved that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received and to account for them.

Mesne profits, whether accruing in the shape of rent or interest, are for this purpose assets just as much as the real estate.

Where, therefore, the plaintiff, who had obtained a mortgage decree against the defendant as legal representative of the mortgagor, finding that the mortgaged property had been exhausted, obtained a personal decree against the defendant which he sought to execute:

Held, that the defendant, having failed to satisfy the Court that he had duly applied the property of the deceased, was personally liable to the extent of the property in respect of which he had failed so to satisfy the Court.

Where a mortgagee becomes also absolute owner of the equity of redemption, the equitable estate merges in the legal, unless there are any puisne or mesne encumbrances against which the equity of redemption is required to be kept alive.

Per *Sadasiva Aiyar, J.*—Assuming that a Court is bound to bring a non-existent equity of redemption to sale at the instance of a decree-holder and is not entitled under section 151, Civil Procedure Code, to stop the sale altogether on account of its having ceased to exist, it is a matter for consideration for the Court whether under Order XXI, rule 66, clause (*c*), Civil Procedure Code, it ought not to notify in the sale proclamation that the attached

CIVIL PROCEDURE CODE—(1908)—contd.

property is a right which had ceased to exist long ago. M RAJAH OF KALAHASTI *v.* PRAYAG DOSSJEE VARU, 31 M. L. J. 391 224

——— S. 60 (c)—*Agriculturist, meaning of—Burden of proof, when exemption from attachment pleaded by agriculturist.*

Section 60 (c) of the Code of Civil Procedure, 1908, protects from attachment in execution the whole house occupied by an agriculturist who belongs to the class of common agriculturists such as live in Bengal, that is, the *raiyat* who tills the field and whose main source of livelihood is cultivation.

Persons who have a small cultivation in land, but who have apparently been engaged in the jute business and also as middlemen, are not agriculturists within the meaning of section 60 (c), Civil Procedure Code.

The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. C ASHMATULLA SIRCAR *v.* PAN MAHMUD CHOWDHURY, 20 C. W. N 874 343

——— S. 68 473

——— S. 73, O. XXI, R. 65—*Execution sale in pursuance of consent decree—Sale held by an auctioneer, the nominee of parties—Agent of Court—Receipt of purchase-money by auctioneer, whether 'receipt of assets' by Court Rateable distribution — Consent decree, characteristics of*

Although an order (or decree) made by a Court on the consent of the parties is a mere creature of agreement and carries out the agreement between the parties, nevertheless it is an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of Justice, namely, it is an order capable of execution by the Court.

The employment of agents for the conduct of a sale in execution of a decree is clearly contemplated by Order XXI, rule 65, Civil Procedure Code, and the fact that the Court appoints a nominee of the parties to a consent decree to conduct the sale and dispenses with the usual preliminaries, such as attachment and the issue of notices, does not render it the less a sale by Court.

The receipt of purchase-money by an agent appointed under Order XXI, rule 65, Civil Procedure Code, to conduct a sale is equivalent to receipt of assets by the Court within the meaning of section 73, Civil Procedure Code.

The policy underlying section 73, Civil Procedure Code, is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained, that point of time is the moment when the entire purchase-money has been paid by the purchaser. It is immaterial whether the purchase-money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale.

A consent-decree provided that the defendant would sell his moveables through an auctioneer and satisfy the plaintiff's claim out of the sale-proceeds, but the defendant-judgment-debtor being afterwards unwilling to proceed with the sale the Court on the application of the plaintiff-decree-holder for execution issued an order upon the auctioneer to sell the property covered by the decree who thereupon sold it and received the purchase-money:

CIVIL PROCEDURE CODE—(1908)—contd.

Held, (1) that the sale was in essence a sale held by the Court in execution through a person appointed by Court under Order XXI, rule 65, Civil Procedure Code;

(2) that the receipt of the purchase-money by that person from the purchasers was equivalent to "receipt of assets" by the Court within the meaning of sub-section (1) of section 73, Civil Procedure Code;

(3) that a decree-holder who applied for execution after such receipt of the purchase-money was not entitled to rateable distribution. C J. C. GALSTAUN *v.* WOOMESH CHANDRA BANNERJEE 850

S. 83 951

——— S. 92—*Charitable trust—Relators—Suit for accounts against non-trustees, maintainability of.*

The relators of an author of a charitable trust cannot maintain a suit for an account against a third person, who is not a trustee, on the ground that he obtained possession of trust properties from the last surviving trustee. The relators have no *locus standi* against third parties and cannot demand accounts simply to facilitate recovery of the amount, if any, found due by new trustees, when appointed.

The relators can only claim accounts and enquiries from trustees under clause (*d*) of sub-section (1) of section 92, Civil Procedure Code.

An order for accounts and enquiries against third persons in possession of trust properties and for recovery of the amount, if any, found due on the enquiries can only be made in a properly constituted suit brought for that purpose by trustees duly appointed.

Such a suit, when brought, would be outside the contemplation of section 92, Civil Procedure Code. S TIKAMDAS MULCHAND *v.* GOKALDAS VISHINDAS, 10 S. L. R. 12 593

——— Ss. 92, 9, 115—*Preliminary issue regarding maintainability of suit—Revision—Civil suits, what are*—Ubhayakar's *right, if civil in nature* Dharmakarta, *if can impose conditions on* Ubhayakar—*Religious Endowments Act (XX of* 1863), *ss.* 14, 18—*Suits, to enforce privileges to worship—Sanction, if necessary for institution.*

A right to worship is a civil right, and may be enforced in Court as nobody can prevent a worshipper from proceeding to the temple and worshipping the deity.

Obiter dicta.—Where the claim is made to an office emoluments, however insignificant the emoluments may be, the plaintiff is entitled to seek the aid of the Court to have his right established.

Where a right has been acquired or exercised hereditarily for performing certain festivals in the temple and where such right is negatived by the *dharmakarta*, the person whose rights have been so infringed, is entitled to ask the Court to have that right declared in his favour.

Even though a person is hereditarily entitled to perform a festival, the *dharmakarta* may impose a condition on him, *viz.*, that it is open to him (the *dharmakarta*) to receive contributions from others to perform the festival on a grander scale than that person is really able to do.

There are three classes of cases which concern rights to enforce privileges in a temple. (1) The object of a suit may be to secure certain advantages to a trust, in which case, any two persons, with the

sanction of the Advocate-General or the Collector of the District concerned, can institute a suit in that behalf. (2). The Religious Endowments Act empowers persons who have an interest in the temple to go to a Court of law for a declaration that the trustee is bound to carry out certain duties. (3) The third class of cases is where individuals can claim rights, either as citizens, or as having a hereditary right, to worship in a temple or perform certain festivals. In such a case the suit is really for a direction that the officer in charge of the trust should perform the duties according to *mamool* and the sanction of the Advocate-General or the District Judge is not required for its institution either under section 92, Civil Procedure Code, or sections 14 and 18 of the Religious Endowments Act, 1863.

Quære.—Whether section 115, Civil Procedure Code, 1908, warrants interference by a High Court with a ruling by a lower Court on a preliminary issue, although it goes to the maintainability of the suit? **M** KADIRVELU CHETTY *v.* NANJUNDAIYAR, 3 L. W. 512 **88**

——— S. 92, O. I, R. 8—*Public trust, suit relating to, maintainability of, without consent of Advocate-General—Right to worship idol—Sufficient interest—Special interest.*

A suit relating to a public trust should not be brought except with the consent of the Advocate-General, unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust.

When the interest which the plaintiffs have in a public trust as members of the public is not sufficient to enable them to maintain a suit under section 92, Civil Procedure Code, without the consent of the Advocate-General, they cannot by saying that they represent the whole of the Hindu population get a sufficient interest to sue apart from section 92.

The fact that plaintiffs claim to worship the idol to which the property in suit has been dedicated in common with other persons who have the same interest, does not give them a right of suit under Order I, rule 8, Civil Procedure Code. **C** GIRIJA PROSUNNO ROY *v.* BECHARAM PATRA **846**

——— Ss. 92, 2 (2), 115—*Suit dismissed for want of cause of action—Final decision—Appeal—Cause of action for suit under s. 92, when arises—Jurisdiction in absence of misfeasance—Decision—Costs.*

Where a suit is dismissed for want of cause of action, no appeal lies at the instance of the defendant against a finding of fact which is not in his favour.

Under section 92 of the Civil Procedure Code no cause of action arises, save in the case of an alleged breach of a trust for a public purpose or where the direction of the Court is deemed necessary for the administration of any such trust. When a Judge in a case under section 92 of the Civil Procedure Code comes to a decision that there has been no misfeasance, his jurisdiction in the matter ends. He cannot record a decision binding on the parties that the trust is a public trust, nor can he make an order for the payment of costs from the estate of the trust. **PAT** BRIJ BEHARI LAL *v.* SHEVANATH PRASAD, 20 C. W. N. 1354 **837**

——— S. 100—*Appeal, second — Right to dispute finding not challenged before lower Appellate Court.*

Where the appellant did not challenge in the lower Appellate Court the finding by the first Court that certain sales by the guardian of a Hindu minor were not for legal necessity, he cannot be permitted to challenge it again in second appeal. **S** GEHIMAL DYALMAL *v.* KARMOOMAL SIROOMAL, 10 S. L. R. 38 **551**

——— Ss. 102, 115, O. XLIII, R. 1, O. XLVII, R. 7—*Review — Order granting review 'for sufficient ground'—Appeal—Revision—Power of single Judge of Patna High Court.*

Under Order XLIII, rule 1, clause *(w)*, Civil Procedure Code, an appeal lies against an order granting a review even where the original judgment is not appealable, but that is subject to the provisions of Order XLVII, rule 7. No appeal lies, therefore, against an order granting a review merely 'for sufficient ground.'

It is doubtful whether a Judge of the Patna High Court sitting singly can entertain an application in revision under section 115 of the Civil Procedure Code when he is not empowered by the Chief Justice to act as such. **PAT** SUNDAR LAL *v.* UPENDRA NATH SEAL **15**

——— S. 104 (6), SCH. II, PARA. 21—*Arbitration, private—Award, filing of, order of—Appeal, maintainability of—Expression of opinion, effect of—Questions not referred, decision of—Withdrawal of question—Private agreement on referred question—Failure to decide question, effect of.*

An appeal lies against an order directing an award, in an arbitration without the intervention of a Court, to be filed, although the Court has passed a judgment and a decree upon the award not in excess of or in accordance with the award.

Where an arbitrator merely expresses an opinion as to the law which would govern the inheritance to the property if a widow, party to the arbitration, were to die intestate and which point is not referred to the arbitrator, the award is not bad for deciding points not referred to the arbitrator, inasmuch as it is a matter which can be entirely separated without affecting the determination of other matters referred.

Where an arbitrator is given power to ascertain what is the divisible property of the family and to divide it up, as he thinks best among the members of the family he does not decide a point not referred to him if he allows the marriage expenses to an unmarried member of the family on finding that the marriage expenses of the other members of the family had been met out of the family income.

Where the parties to an arbitration deliberately withdraw certain questions from the arbitrator, they cannot be heard to say that there has been no decision thereon.

Where, in an agreement executed by the parties to an arbitration, it is distinctly laid down that the arbitrator is to decide as he pleases in regard to a widow's *stridhan*, maintenance and right of residence the arbitrator is not absolved from his duty to decide the question of the widow's right of residence on account of the parties coming to an agreement on the point, and his failure to do so vitiates the award. **A** HARI KUNWAR *v.* LAKHMI RAM JAN, 14 A. L. J. 481; 38 A. 380 **833**

——— S. 105 **74**

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 105, O. XXII, R. 9 (2), O. XLIII—*Abatement—Defect, error, irregularity.*

The words "error, defect or irregularity" in section 105, Civil Procedure Code, mean error, defect or irregularity affecting the decision of the case on the merits. **A** NIDDHA LAL *v.* COLLECTOR OF BULANDSHAHR, 14 A. L. J. 610 299

——— S. 110—*Privy Council, appeal to—Certificate of value by High Court—Certificate, whether conclusive as to value when based on wrong principle—Mortgage, suit for sale under—Adverse claimants—Appeal restricted to portion of subject-matter—Valuation, principle of—Causes of action, misjoinder of.*

In a suit for sale under a mortgage, which was valued at Rs. 38,000, the plaintiff impleaded as defendants certain persons who claimed adversely to the mortgagor. The High Court found that one of these claimants was not entitled to the portion of the mortgaged property to which he set up a claim and that the entire property was liable for the mortgage.

The aggrieved party applied for a certificate for leave to appeal to the Privy Council. In granting the certificate the High Court held that the value of the proposed appeal was not the value of the property sought to be exempted from the mortgage but the amount of the decree which imposed on the property a liability for Rs. 38,000:—

Held, (1) that the High Court erred in confusing the value of the mortgage with the value of the land and that as between the respondent (who was seeking to enforce his mortgage) and the appellant, the subject-matter of the suit was not Rs. 38,000, but was simply the value of the property which the appellant claimed;

(2) that the certificate of the High Court was not conclusive as to value, where, on the face of it, it was based on a wrong principle;

(3) that the joinder, in a mortgage suit, of a claim to obtain a declaration of right against an adverse claimant with the enforcement of rights under a mortgage was irregular. **P C** RADHA KUNWAR *v.* REOTI SINGH, 14 A. L. J. 1002; 20 C W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 3 M. L. J. 571; 18 BOM. L. R. 850; 24 C. L. J. 303; 38 A. 488 939

——— S. 110, O. XLV, R. 2—*Privy Council, appeal to—Petition for leave to appeal—Substantial question of law.*

Where the decree of the Chief Court affirmed the decision of the Court immediately below, the decisions of both Courts being based solely on the facts which were held to be established, and the petitioner applied for a certificate on the ground that his claim to a small portion of the property in dispute was not barred by time:

Held, that as no substantial question of law was involved in the appeal and the case was not "otherwise" a fit one for appeal to His Majesty in Council, the certificate prayed for could not be granted. **P** VIR SINGH *v.* TIRATH RAM, 64 P. R. 1916 583

——— S. 110, PARA. 2—*Privy Council, appeal to—Value of subject-matter—Material date for determination of value—Question of law, inference deducible from facts, if is.*

CIVIL PROCEDURE CODE—(1908)—contd.

The question whether or not upon certain given facts or data a tenancy is to be regarded as one at will or one of a permanent nature is a mixed question of law and fact.

In determining the value of the subject-matter of a suit for the purpose of section 110, para. 2, Civil Procedure Code, its value at the date of the decree from which the appeal is to be made to His Majesty in Council, and not the value at the institution of the suit, is to be taken into account.

Per *Sanderson, C. J.*—A plaintiff who brought his suit in the Munsif's Court paying Court-fees on the annual rental of Rs. 4-4, is not debarred from asserting afterwards (when applying for leave to appeal to the Privy Council) that the property in dispute is in fact worth Rs. 10,000 or more. **C** SURENDRA NATH *v.* DWARKA NATH, 24 C. L. J. 352 605

——— S. 114 348

——— S. 115 15, 74, 88, 837, 843

——— S. 115—*Failure to apply law, whether ground for revision.*

A failure to take into account a proposition of law as to which there is no doubt, is a ground for revision under section 115, Civil Procedure Code. **L B** MAUNG BA KYAW *v.* JANALLI 426

——— S. 115—*Revision—Interlocutory order.*

Interlocutory orders cannot or, at any rate, should not be interfered with on revision as a matter of course. **P** GULAB CHAND *v.* SHER SINGH, 149 P. W. R. 1916 608

——— S. 115—*Agra Tenancy Act (II of 1901), ss. 4, 167, 180—Suit for rent—Denial of tenancy—Appeal, second, to District Judge—Revision—Application to High Court, maintainability of—Jurisdiction.*

The plaintiff sued the defendant for rent under section 102 of the Agra Tenancy Act in the Court of the Assistant Collector of the 2nd class describing the defendant as a tenant at fixed rates of the land in suit. The defendant pleaded *inter alia* that the relationship between the parties was not of landlord and tenant within the meaning of the Tenancy Act. The Collector, on appeal, held that the land in dispute was not land let or held for agricultural purposes within the meaning of the words in the Tenancy Act and that the suit as brought was not maintainable. The District Judge, on second appeal, agreeing with the Collector dismissed the suit. On an application for revision to the High Court:

Held, per *Piggott, J.*—(1) That the application could not be brought within the four corners of section 115 of the Civil Procedure Code, 1908;

(2) that the High Court had no jurisdiction to entertain the application in view of the last clause of section 167 of the Agra Tenancy Act.

Per *Walsh, J.*—The decision of a District Judge given by way of an appeal from a Revenue Court is a decision of a Civil Court and is, therefore, subject to revision. **A** PRABHU NARAIN SINGH *v.* HARBANS LAL, 14 A. L. J. 281 279

——— S. 150 296

——— S. 151 536, 616

CIVIL PROCEDURE CODE—(1908)—contd.

——— Ss. 151, 152, O. XLVI, R. 1—*Reference to Chief Court, when competent—Inherent power of Court, when to be invoked.*

The original Court passed a decree excluding certain properties claimed by the plaintiff, but upon an application made by him under sections 151 and 152, Civil Procedure Code, the Court modified the decree by including those properties therein. The defendant appealed, but the Appellate Court being of opinion that no appeal lay against an order passed under these sections, made a reference to the Chief Court for orders as to what should be the procedure to be followed in the case:

Held, that the reference was not competent under Order XLVI, rule 1, as the rule empowers a Court to make a reference only when there is a suit or an appeal before it, in which the decree or order made by it would be final. In the present case, if the adjudication by the Subordinate Court amounted to a decree, a second appeal would lie; and if it was an order, then no appeal lay to the Additional Judge, so that the reference was incompetent in either case.

Where a specific remedy has been provided by the Civil Procedure Code the litigant should not for that purpose invoke the inherent power conferred upon the Court by section 151. The object of that section is to supplement, and not to replace, the remedies provided for in the rest of the Code. P LABHU RAM *v.* AMIR CHAND, 73 P. L. R. 1916; 105 P. W. R. 1916 633

——— Ss. 152, 153—*Amendment of a decree affirmed in appeal, application for—Jurisdiction of Trial Court.*

Where a decree is confirmed by the Appellate Court, the decree liable to be amended is only that of the Appellate Court and not that of the Court of first instance. The Trial Court has, therefore, no jurisdiction to entertain an application for amendment of the decree of the Appellate Court M BHAGIRATHI NETHIARAMMA *v* MEENAKSHI NETHIARAMMA, 4 L. W. 225; 31 M. L. J. 438; (1916) 2 M. W N. 249 891

——— S. 153 370, 891

——— O. I, R. 1—*Joinder of plaintiffs—Suit by co-owner in possession for injunction against trespasser, maintainability of.*

Per *Curiam*—One of several co-owners who is in possession of property can maintain an action for injunction against an intending trespasser without joining the other co owners as plaintiffs.

Per *Sadasiva Aiyar, J.*—Distinctions between 'real' and 'personal' actions known to English Law should not be introduced into Indian Courts.

The rule as to several 'heirs' of a deceased owner taking as 'one heir' known to English Law is not followed in either the Muhammadan or Hindu systems of Law. M SELAMBAYI *v.* SANGU PANDITHAN, 3 L. W. 542 147

——— O. I, RR. 1, 9; O. XXXII, R. 3—*Non-joinder of necessary parties, effect of.*

Where in a suit for profits for *zerait* land held by defendants in excess of their shares all the co-sharers are not made parties, the suit ought to be dismissed for non-joinder of the necessary parties in whose absence the excess could not be determined. PAT RAM ASRAY SINGH *v.* SHEONANDAN SINGH 868

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. I, R. 3—*Joinder of parties*—Ghatwali *land, suit by tenant of, against* ghatwal—*Secretary of State, if necessary party.*

In a suit by a tenant against his landlord, who is a *ghatwal*, for declaration of occupancy rights in a *ghatwali* land and for recovery of its possession, the Secretary of State is not a necessary party, though he may be a proper party and, therefore, the suit cannot be dismissed for the non-joinder of the Secretary of State.

Semble.—A *ghatwal* is not a mere servant of Government, but has an interest in the *ghatwali* land held by him. C KAILASH MAI *v.* DWARIKA NATH MAJHI 768

——— O. I, R. 8 116, 846

——— O. I, . 9 868

——— O. I, r. 10 (2)—*Joinder of defendant in course of trial — Evidence taken* supra, *admissibility of, against defendant newly added—Evidence Act (I of 1872), s. 33.*

Where a defendant, who was newly added during the course of a trial by direction of Court, did not object to evidence taken at a previous stage of the proceedings going on record or desire that it should be reheard, and it appeared that his interests had been fully represented by another defendant and he was fully cognizant of the steps taken by the former to prove their common case, and both of them jointly appealed against the judgment of the Trial Court and the objection as to the non-admissibility of the evidence against the new defendant was taken for the first time in second appeal:

Held, that the objection should be disallowed and that section 33 of the Evidence Act did not apply to the case. M RANGASAMI NAIDU *v.* SUNDARARAJULU NAIDU, 31 M L. J. 472 52

——— O. II, R. 5 792

——— O. VI, R. 4—*Fraud, no specific allegation of —Accounts, suit for, re-opening of, when allowable—Evidence, admissibility of.*

In a suit in which the plaintiff claimed that the defendant might be ordered to render correct accounts of the profits of certain property and upon taking of those accounts a certain document in favour of the defendant be held to be valid only for the amount found due on taking of the accounts, no specific fraud was alleged to have been committed in execution of the document, except that a certain debt was fraudulently entered as consideration:

Held, that under the circumstances of the case the plaintiff alleged no fraud entitling him to go into evidence to re-open the accounts which were settled at the time the document was executed. A RAMJI *v.* KOMAN DAS 603

——— O. VI, R. 4—*Fraud, suit based on—Pleadings Proof of fraud*—Ex parte *decree, suit to set aside, if barred by infructuous application to set it aside – Purchaser at certificate sale, rights and duties of, after cancellation of sale—Decree for rent obtained by such purchaser, validity of, after cancellation of certificate sale—Judgment pronounced on erroneous view of law, validity of, before reversal.*

General allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.

CIVIL PROCEDURE CODE—(1908)—contd.

Where a plaintiff seeks relief on the ground of fraud, he is bound, under Order VI, rule 4, of the Civil Procedure Code, to specify in his plaint the facts which constitute the fraud; and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

A judgment will be vacated if it is proved that the successful party has taken means to prevent service of notice upon the other or has procured a false return of service.

Where the plaintiff brought a suit to set aside an *ex parte* decree and a sale thereunder on the ground of fraud on the allegation that the processes in the suit and in the execution proceedings were suppressed, and it was found that these processes were, as a matter of fact, not served but there was no ground for holding that the non-service was in any way attributable to the defendant's (the plaintiff in the previous suit) interference:

Held, that as the plaintiff had failed to prove the fraud as laid in the plaint, he could not succeed in the suit.

The mere circumstance that a defendant has failed to have an *ex parte* decree set aside under section 108, Civil Procedure Code of 1882 or to have an execution sale set aside on the ground of material irregularity, does not debar him from seeking relief, in a suit properly framed for the purpose, on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud.

A judgment pronounced by a Court upon an erroneous view of the law and subject, therefore, to be reversed by an Appellate Tribunal, is treated as valid for all purposes of protection or justification to the party acting under it before reversal, and the same rule applies where the judgment is vacated for irregularity or like reason not attributable or chargeable to the plaintiff, or for which, he is not actually or constructively to blame.

The effect of the reversal of a certificate sale of a tenure is that as between the tenure-holder and the purchaser at the certificate sale, or his representative-in-interest, the latter becomes liable to make restitution to the former; but a decree for rent obtained by the latter and a sale held on the basis thereof are not in any way affected by the subsequent cancellation of the certificate sale. **C** NAGENDRA NATH BASU *v.* PARBATI CHARAN KOYAL, 20 C. W. N. 819 339

——— O. VI, R. 4—*Pleadings—Fraud, allegation of, clear statement of, necessity of—Mortgage—Redemption—Revenue Court proceedings—Ejectment of mortgagor, fraudulent—Suit for redemption, maintainability of.*

Where fraud is alleged and relied upon, it must, before it can be proved, be clearly stated in accordance with the provisions of Order VI, rule 4, of the Civil Procedure Code, 1908, but the rule does not apply where the party aggrieved raises no objection and fights the case at the original hearing as though the pleadings were in proper form.

In a suit for redemption by the mortgagors the mortgagee pleaded that the mortgage had ceased to exist, because previous to this the *zamindar*, having obtained a decree for arrears of rent, had in execution proceedings under that decree obtained ejectment of the mortgagors in the Revenue Court and that the mortgage having terminated the mortgagee-defendant had become a tenant under a *patta*. It was, however, found that the Revenue Court proceedings were all collusive and fraudulent:

Held, that the mortgagors were entitled to a decree of redemption without taking formal steps to get rid of the Revenue Court proceedings which were found to have no legal validity. **A** BENI MADHO *v.* BASANTO KUNBI 252

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. VI, R. 17 652

——— O. VI, R. 17, S. 153—*Hindu Law—Partition, suit for—Omission to specify some of the joint properties in plaint, effect of—Amendment.*

The plaint in a suit for partition of the properties of a joint Hindu family should set forth all the properties of the family. Should any, however, be omitted by inadvertance or mistake, the suit should not be dismissed but the plaint allowed to be amended by supplying the omission.

The widest power of amendment is given, not only to the original but also to the Appellate Court to enable the Court to try all matters properly in dispute between the parties. **PAT** MUKUNDA LAL *v.* JOGESH CHANDRA, 20 C. W. N. 1276; 1 P. L. J. 393 370

——— O. VII, R. 10—*Limitation Act (IX of 1908), s. 14, Expl. I—Return of plaint—Time necessary for re-filing, exclusion of—Proceedings in suit, termination of, by return of plaint.*

Where a suit was filed on the last day of limitation but the Court returned the plaint as being undervalued allowing five days' time to re-file the plaint in the proper Court and on that very day ordered the plaintiff to pay costs to the defendant, but the order assessing the amount of costs was recorded in the order-sheet three days after the return of the plaint, and the plaint was re-filed within the five days allowed by Court:

Held, that the suit was barred by limitation as there is no provision in the Limitation Act (IX of 1908) or in the Civil Procedure Code (Act V of 1908) for allowing further time to re-file a plaint, and the order allowing further time must be considered a nullity.

When a plaint is returned under Order VII, rule 10, Civil Procedure Code, the proceedings in the suit terminate on the day of the return of the plaint, and not on the day when the costs ordered to be paid by the plaintiff on such return are assessed and recorded in the order-sheet. **C** GANGA CHARAN DAS *v.* AKHIL CHANDRA SAH, 24 C. L. J. 355 595

——— O. VII, R. 11 (d).

Per *N. R. Chatterjea, J.*—If a suit appears from the statements of the plaint to be barred by any law, the proper course is to reject the plaint under Order VII, rule 11, clause (*d*), and not to dismiss the suit entirely. **C** PRAN KRISHNA SAHA *v.* KRIPA NATH 76

——— O. VII, R. 14 415

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. IX, Rr. 4, 9—*Application for restoration of application under rr. 4, 9 dismissed for default—Provincial Small Cause Courts Act (IX of 1887), s. 17, applicability of.*

When an application under Order IX, rules 4, 9; Civil Procedure Code, for the restoration of a suit dismissed for the plaintiff's default, is again dismissed for the default of the applicant (the plaintiff), the latter has the right to again apply under Order IX, rule 9, for the re-hearing of that application. **C** BEPIN BEHARI SAHA *v.* ABDUL BARIK, 21 C. W. N. 30; 24 C. L. J. 446 613

——— O. IX, R. 4—*Execution, application for—Dismissal for default—Restoration, maintainability of petition for—Jurisdiction—Limitation, plea of, when to be raised.*

Order IX, Civil Procedure Code, does not apply to proceedings in execution.

Applications for execution should, when struck off, be presented afresh and not revived as in the case of plaints.

An order restoring an application for execution, which was dismissed for default, is an order passed without jurisdiction and is a nullity.

An objection as to limitation may be taken at any stage of the execution proceedings, if the facts upon which the objection is based are patent upon the face of the record. **PAT** GUNJRA KOER *v.* LAKHAN KOER 337

——— O. IX, R. 8 65

——— O. IX, R. 9 65, 613

——— O. IX, R. 9, O. XXI, Rr. 58, 63—*Sale in execution—Objection dismissed—Withdrawal of execution proceedings—Fresh proclamation of sale, whether new cause of action—Order on objection passed summarily, whether conclusive—Suit for declaration that property is not liable to attachment—Limitation Act (IX of 1908), Sch. I, Art. 11.*

Proceedings having been instituted in execution of a decree for moneys secured on the property in dispute, plaintiff, the son of the judgment-debtor, preferred an objection under Order XXI, rule 58, which was summarily dismissed by reason of its belated appearance. He then brought a regular suit for a declaration that the property was not liable to attachment and sale in execution of the decree against his father but that suit was dismissed for default in December 1912. The decree-holder, owing to failure to secure an adequate bid in 1912, withdrew his execution, but presented a fresh application for sale by auction in 1915 and proclamation of sale was made. Plaintiff again brought a suit for the same declaratory relief as in the 1912 case:

Held, (1) that as the proclamation of 1915 furnished no fresh cause of action the present suit was barred by Order IX, rule 9, of the Civil Procedure Code;

(2) that the objection of the plaintiff having been rejected in 1912, the suit ought to have been brought within one year of that order of rejectment and not having been so brought was time-barred under Article 11 of the Limitation Act.

Any order on an objection made by a third party to attachment of property in execution of a decree is conclusive, whether that order was passed summarily or after investigation. **P** GOPAL SINGH *v.* GANPAT RAI, 66 P. R. 1916; 117 P. W. R. 1916; 130 P. L. R. 1916 321

——— O. XVIII, R. 11 701

——— O. XX, R. 2—*Judgment written and pronounced by Judge after transfer, validity of.*

Under Order XX, rule 2, of the Code of Civil Procedure a judgment written and pronounced by a Judge after his transfer is not illegal. **P** DAYA RAM *v.* JATTI, 80 P. R. 1916; 128 P. W. R. 1916 938

——— O. XXI, Rr. 1 (b), 2—*Joint decree—Partners holding joint decree—Satisfaction of decree—Payment out of Court to some of decree-holders, whether amounts to satisfaction of decree.*

A payment of the amount of a decree to two out of three joint decree-holders cannot be treated as a satisfaction of the decree even in part, unless it is admitted by the third decree-holder or unless it is proved that he and the other two decree-holders to whom the money was paid, own separate and definite shares in the joint decree-debt.

Per *Sadasiva Aiyar, J*—It is very doubtful whether two out of three partners can, in their individual capacities, legally claim definite shares in a particular decree-debt belonging to themselves and the other partners jointly.

The right of two out of three partners to receive on behalf of the partnership a partnership debt which has not merged into a decree has no bearing on the decision of the question whether, when the partners have become decree-holders, two of them can receive the joint decree-debt.

Payment to one or more of joint decree-holders will bind the rest if they were constituted as agents by the latter, but the status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree, and cannot merely be inferred from the position of the payee as managing member of the joint Hindu family of the decree-holders or as one of several partners decree-holders. **M** MAHOMED SIDAR SAHIB, & Co, *v.* NABI KHAN, (1916) M. W. N. 471; 3 L. W. 879; 31 M. L. J. 93; 20 M. L. T. 381 157

——— O. XXI, R. 2 (2) 369

——— O. XXI, R. 2, O. XXXII, R. 7—*Decree, adjustment of, out of Court—Minor, party to adjustment—Sanction of Court—Enquiry into question of adjustment—Evidence—Adjustment not conferring title, whether reason for dismissal of petition summarily.*

The provisions of Order XXXII, rule 7, Civil Procedure Code, apply to a compromise entered into even after a decree has been passed, and an adjustment of a decree to which a minor is a party requires the sanction of the Court.

It is incumbent on a Court to which a petition is presented for recording an adjustment of a decree, to hold an enquiry into the matter, take evidence and investigate and decide any questions of fact on which the parties may not be agreed. The Court cannot summarily reject the petition on the ground that a sale-deed executed by one party to the other was not registered and was, therefore, incapable of conveying title to the vendee.

The expression 'show cause' in paragraph 2 of Order XXI, rule 2, Civil Procedure Code, does not mean merely to allege cause nor even to make out

CIVIL PROCEDURE CODE—(1908)—contd.

that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. M DAVUD ROWTHER v. PARAMASWAMI PILLAI, 31 M. L. J. 207 70

——— O. XXI, RR. 9, 13—*Execution—Description of property in decree amplified in application for execution—Sale proclamation, terms of.*

The decree-holder, being apprehensive that the description of property given in the decree was not sufficient to identify it, gave an amplified description of it in the application for execution of decree:

Held, that in such a case the proper course for the Court was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree, and then enter for purposes of identification the description given by the decree-holder in the application for execution in order that intending purchasers might have an idea of the value of the property. But this entry should be made as a foot-note and it should be made clear that the additional information was furnished by the decree-holder. PAT RAGHUNATH TEWARI v. RADHESSOR KUAR 368

——— O. XXI, R. 13 368

——— O. XXI, R. 16 234

——— O. XXI, R. 16—*Assignment of decree—Execution, application for, by assignee—Assignee* benamidar *for judgment-debtor Proof of title.*

The assignee of a decree, who is found to have taken the assignment *benami* for one of the judgment-debtors, should prove his title before he can be permitted to execute the decree. M MOHAMAD ROWTHER v. PICHAI ROWTHER, 4 L. W. 534 624

——— O. XXI, R. 17, *scope of—Execution petition returned for amendment but not re-presented, whether step-in-aid of execution—Limitation Act (IX of 1908), Sch. I, Art.* 182.

An execution petition returned for amendment but not re-presented may yet give a fresh starting point for limitation.

Rule 17 of Order XXI, Civil Procedure Code, is an enabling one, which allows certain defective applications subsequently amended to be deemed applications "in accordance with law" with effect from the date of the first presentation. M KAMATCHI AMMAL v. PICHU IYER, 4 L. W. 103; (1916) 2 M. W. N. 152; 31 M. L. J. 561 876

——— O. XXI, R. 46 98

——— O. XXI, RR. 46, 64, 79—*Attachment and sale of debt—Procedure.*

A debt can be sold under Order XXI, rule 64, Civil Procedure Code, and delivery made in the manner prescribed in rule 79.

It is only when the garnishee or third party admits the debt that payment can be ordered to be made to the judgment-debtor, and if the former denies the debt, it is open to the judgment-debtor to have it sold or to apply for the appointment of a receiver with power to sue the garnishee for the recovery of the debt from him. L B M R R M. FIRM v U°ZAN 469

——— O. XXI, R. 50 (3) 429

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. XXI, R. 52—*Receiver, money in hands of—Disputes relating to such money, which Court can decide—Jurisdiction.*

A Receiver is an officer of the Court and money in his hands is regarded as being in the custody of the Court. Therefore, the only Court which has jurisdiction to decide disputes relating to such money is the Court in whose custody the money is, and not any other Court. PAT DEBENDRA v. CHANDRA SEKHAR, 1 P. L. J. 449 589

——— O. XXI, R. 57, *scope of—Attachment—Sale stayed by Appellate Court—Execution petition dismissed in consequence, effect of.*

Under Order XXI, rule 57, of the Civil Procedure Code an attachment shall cease only if the application for execution has been dismissed for any default of the decree-holder. In all other cases of dismissal, the Courts will have to decide on the facts of each case whether the order removing a petition from the file amounted to an adjudication of it so as to prevent the attachment from subsisting.

Where, therefore, after an attachment by a Court of first instance was stayed by an order of the Appellate Court the Court of first instance dismissed the application for execution:

Held, that the dismissal did not bear the effect of putting an end to the attachment under rule 57. M VALIAKATH PUTHIAH v. MANAKKAL PARAMESWARAN, 3 L. W. 601 240

——— O. XXI, RR. 58, 63 321

——— O. XXI, R. 63.

One *L* was ordered to pay a certain sum as contributory towards the fund of a Bank in liquidation. In the liquidation proceedings and in the order which was issued to another Court for execution, *L* was described as the proprietor of a firm styled Nand Lal-Santi Lal. On the attachment of certain goods one *S* filed an objection that *S* and not *L* was the sole proprietor of the firm. The execution Court refrained from inquiry as the order contained an express statement that *L* was the proprietor:

Held, that the order of the execution Court was not appealable inasmuch as it must be taken to be an order under Order XXI, rule 63, of the Civil Procedure Code, 1908. A SANTI LAL v. INDIAN EXCHANGE BANK, LAHORE, 14 A. L. J. 722; 38 A. 537 6

——— *O. XXI, r. 63—Burden of proof—Suit by claimant to property under attachment—Plaintiff, what must prove.*

A person intervening unsuccessfully as an objector in execution proceedings, on the strength of a document of title, who is obliged to bring a fresh suit to establish his title; must give *prima facie* evidence that the document represents a *bona fide* transaction, in order to get rid of the order which has been passed against him O. KALKA PRASAD v. SITLA BAKHSH, 19 O. C. 64 427

——— O. XXI, R. 64 469

O. XXI, R. 65 850

O. XXI, R. 66—*General Rules of Practice for Civil Courts in U. P., Ch. IV, r.* 5 (a)—*"Gift", property acquired by, if ancestral—Execution of decree.*

Property to which title is made out by gift is not property *inherited* within the meaning of rule

5 (*a*) of Chapter IV of the General Rules of Practice for Civil Courts in the United Provinces and is, therefore, not ancestral property. **A** FAZAL AHMAD *v.* WESAL-UD-DIN, 14 A. L. J. 669; 38 A. 481 **742**

—— —— O. XXI, R. 66, Ss. 2 (2), 47—*Sale proclamation—Objections of judgment-debtor, summary rejection of—Judicial decision—Appeal.*

On a notice issued to the judgment-debtor to settle the terms of a sale proclamation, he put in a statement of objections to the effect (1) that portions of the property advertised for sale should be described as ancestral, (2) that the specification of the property was incorrect and (3) that the properties were undervalued. The Court summarily rejected all the objections. On appeal:

Held, per *Piggott, J.*, that whether all orders passed by an execution Court in proceedings under Order XXI, rule 66, are decrees and appealable as such or not, an order refusing to enquire into the valuation was an appealable decision.

If after issue of notice under Order XXI, rule 66, the parties are seriously at issue with regard to the valuation of the property to be entered in the sale proclamation, the Court must go into the matter and determine it judicially, instead of accepting without question the decree-holder's valuation.

Per *Walsh, J.*—That the questions raised by the judgment-debtor were questions covered by section 47, Civil Procedure Code, and the decision complained of was a decision under the section from which an express right of appeal was given by the Code.

Quære (per *Piggott, J.*)—Whether a question raised by a judgment-debtor under Order XXI, rule 66, Civil Procedure Code, can be again raised under Order XXI, rule 90, Civil Procedure Code.

Obiter (per *Walsh, J.*)—Questions raised by a judgment-debtor under Order XXI, rule 66, as well as matters which he omitted to raise under the rule, cannot be set up after sale. **A** SHIAM LAL *v.* ROSHAN LAL, 14 A. L. J. 363 **230**

—— —— O. XXI, R. 69, O. XLI, R 5—*Ex parte decree, application to set aside, dismissal of—Appeal—Stay of proceedings in execution, application for—Discretion of original Court—Appellate Court, powers of.*

During the pendency of an appeal against an order refusing to set aside an *ex parte* decree, the original Court has discretion to stay proceedings in execution pending the disposal of the appeal. There is no such power vested in the Appellate Court. **PAT** JAMUNA PRASAD *v.* MAGAI RAM **443**

—— —— O. XXI, R. 79 **469**

—— —— O. XXI, R. 89 **779**

—— —— O. XXI, R. 90—*"Entitled to share in rateable distribution," "whose interests are affected by the sale", meaning of "Setting aside an execution sale," right of insolvent judgment-debtor to apply for—Conspiracy of auction-purchaser with other bidders to put down price, whether sufficient ground for setting aside sale.*

A judgment-debtor who has been adjudged an insolvent and whose property has been vested in an Official Receiver, has no interest to apply for setting aside an execution sale of his property under Order XXI, rule 90, Civil Procedure Code.

An allegation that the bidders at a Court auction conspired with the auction-purchaser to put down the price, is no ground for setting aside the sale.

The words "entitled to share in rateable distribution of assets" in rule 90 of Order XXI, Civil Procedure Code, refer to decree-holders who are entitled to a rateable distribution under section 73 of the Code. The right to receive dividend before the Official Receiver is not contemplated by the rule.

The words "whose interests are affected by the sale" in the same rule, refer to existing interests in the property sold and not to the claims of alleged creditors. **S** PRAGJI KALA *v.* ASSA JALAL, 10 S. L. R. 53 **530**

—— —— O. XXI, R. 90—*Sale, application to set aside—Irregularity, material, what is not.*

An omission to state in the proclamation of sale the precise amount of claims received from other decree-holders subsequently to the order directing the sale of the property is not a material irregularity, nor is the absence from the sale proclamation of a valuation of the property ordered to be sold a material irregularity when it has not a deterrent effect on the minds of the intending or possible bidders.

In a case where a bidder intends to bid for a number of lots and is allowed by the sale officer to deposit his one-fourth share of the purchase-money as soon as the sales have all been concluded, instead of at the conclusion of the bidding for each particular lot, though the sale officer is guilty of an irregularity, it is for the judgment-debtor to show that the irregularity committed was material in that it caused him substantial loss and in the absence of such evidence the sale cannot be set aside. **A** MOHAMED ALI *v.* MAHABIR PRASAD **411**

—— —— O. XXI, R. 92 (3) **473**

—— —— O. XXI, R. 95—*Order delivering possession to decree-holder auction-purchaser—Appeal.*

No appeal lies against an order under Order XXI rule 95, delivering possession to the decree-holder auction-purchaser. **PAT** ABDUL GANI *v.* RAJA RAM, 20 C. W. N. 829; 1 P. L. J. 232 **468**

—— —— O. XXII, R. 2 **154**

—— —— O. XXII, R. 3—*Application to bring on record legal representatives of deceased appellant—Limitation—Limitation Act (XV of 1877), s. 6, Sch. II, Art. 175 A—Limitation Act (IX of 1908), Sch. I, Art. 176—Minors.*

An application under Order XXII, rule 3, Civil Procedure Code, to bring on record the legal representatives of a deceased appellant must be made within six months of the latter's death.

Section 6 of the Limitation Act does not apply to such applications. **L B** MA MIN THIN *v* MAUNG PO WIN **438**

—— —— O. XXII, RR. 4, 11—*Application for amendment of decree—Death of one of respondents pending appeal—Legal representatives not brought on record, effect of Relief, whether can be granted.*

Where a decree is passed against all defendants equally, a partial amendment of it cannot be allowed as against some of the defendants alone.

CIVIL PROCEDURE CODE—(1908)—contd.

Where, therefore, during the pendency of an appeal against an order rejecting an application for amendment of a decree, one of the defendants-respondents died and no proper steps were taken to bring his legal representatives on record in time:

Held, (1) that it was not possible to amend the decree without having on record and hearing all the defendants;

(2) that the appeal having abated against the deceased defendant, it must be dismissed as against all, as the relief asked for could not be granted in the absence of one of the parties. M PONNAMBALA MOOTHAN v. MAHADEVA PATTAR, (1916) 2 M. W. N. 117 697

——— O. XXII, R. 9 209

——— O. XXII, R. 11 697

——— O. XXII, R. 19 154

——— O. XXIII, R. 1 (3)—*Same 'subject-matter', meaning of—Withdrawal of suit, whether bars fresh suit wherein causes of action and reliefs claimed different—Right of plaintiff in second suit to contest defence pleas in withdrawn suit—Alienation by widow—Reversioners' suit for declaration, withdrawal of—Subsequent suit for possession after widow's death, maintainability of.*

The term 'subject-matter' in Order XXIII, rule 1 (3), must be construed strictly.

Where, after withdrawing a suit without permission to bring a second suit, the plaintiff institutes a fresh suit based on a different cause of action and claiming a separate relief, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit within the meaning of Order XXIII, rule 1 (3), Civil Procedure Code.

In such a case the plaintiff in the second suit is not debarred from contesting the truth of the allegations made by the defence in the first suit.

The reversioners of a Hindu widow sued, during her lifetime, for a declaration that an alienation made by her was not binding on them. The alienee, in defence, pleaded that he was the *illatom* son-in-law of the last male owner. The widow having died during the pendency of the suit, the plaintiffs withdrew the suit and subsequently brought a suit for possession of the property alienated:

Held, that the second suit was not barred by the provisions of Order XXIII, rule 1 (3), Civil Procedure Code. M PANDILLAPALLI SINGA REDDI v. YEDDULA SUBBA REDDI, 31 M. L. J. 43; 20 M. L. T. 62; (1916) 2 M. W. N. 1; 4 L. W. 1 185

——— O. XXIII, R. 1, S. 115—*Withdrawal of suit, order for, in absence of formal defect—Jurisdiction—High Court—Revision.*

There is no general jurisdiction given by the Civil Procedure Code for allowing a party to withdraw a suit with liberty to bring a fresh suit on the same cause of action, except under the provisions of rule 1, Order XXIII, Civil Procedure Code.

An order allowing the plaintiff to withdraw a suit with permission to bring a fresh suit when there is no formal defect in the case, is not in accordance with law and the High Court will set it aside in revision C RAM CHANDRA DAS v. HACHUNIA FAKIR 843

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. XXVI, R. 9—*Local investigation by Court, value of—Procedure.*

It is doubtful whether under the provisions of the present Civil Procedure Code it is legal for the Court in person to hold any local investigation In case the Court holds any local investigation, the result of the investigation should be made a matter of record in order that the party adversely affected by it may have an opportunity of meeting it, and further, it should be used only for the purpose of enabling the Judge to understand the evidence and not for the purpose of finding his decision thereon. PAT ANANT LAL SAHU v GOKUL SAHU 344

——— O. XXXII, RR. 1, 7, 19—*Appeal—Death of guardian ad litem of minor appellant pending appeal—Fresh guardian not appointed—Decree against minor, validity of—Execution proceedings, appointment of guardian in—Sale in execution without objection, whether valid—Jurisdiction.*

The provisions of Order XXXII, rule 19, Civil Procedure Code, are imperative.

A decree passed against a minor appellant who was not at the time represented by a guardian *ad litem* is void and all proceedings had thereafter are also void. The position is the same as if the minor was not party to the appeal.

The subsequent appointment of a guardian *ad litem* in execution proceedings neither validates the decree, nor renders a sale held in the course of the execution legal, and the sale conveys no title to the purchaser

The fact that a minor appellant's interests were safeguarded by some of the defendants, whose defence was common with that of the minor, will not cure the defect of want of jurisdiction in the Court to sell the properties of the minor who was not properly represented on the record and as against whom the decree was a nullity. M CHUNDURY KRISHNAYYA v. KORIPALLI RAJU, 31 M. L. J. 39 154

——— O XXXII, R. 2 154

——— O. XXXII, R. 7 70

——— O. XXXII, R 7—*Minor—Compromise by guardian, when binding on minor—Leave of Court—Arbitration, reference to, in pursuance of compromise, whether amounts to sanction of compromise—Application for leave withdrawn.*

No next friend or guardian can compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings.

The action of a Court in referring a case to arbitration in accordance with a compromise between the guardian of a minor and the other parties to the suit is not equivalent to approving of the compromise on behalf of the minor

It is open to a guardian to withdraw a petition, asking leave to enter into a compromise, at any time before leave is granted. PAT HANUMAN RAI v. JAGDIS RAI 675

——— O XXXII, R. 15 856

——— O. XXXII, R. 19 154

——— O XXXIII, RR. 10, 11—*Pauper suit partly successful—Costs, defendant, if liable for whole—Court-fees—Equity.*

In a case in which a pauper plaintiff partly succeeds and partly fails, the Court is presumably intended to deal with such a case by combining

CIVIL PROCEDURE CODE—(1908)—contd.

the provisions of rules 10 and 11 of Order XXXIII of the Civil Procedure Code, 1908, and apportion the costs according to success and failure.

In a pauper suit it is not equitable to permit a plaintiff to penalise the defendant by exaggerating his claim.

Semble.—The question of the discretion of a Court in dealing with a case in which a pauper plaintiff has partially succeeded and partially failed is one which deserves to be dealt with by a special rule. **A** GANGA DAHAL RAI *v.* GAURA, 14 A. L. J. 657; 38 A. 469 46

——— O. XXXIII, R. 11 46

——— O. XXXIV, R. 6 158

——— O. XXXIV, R. 6—*Mortgage—Final decree making defendant personally liable—Order made ex parte—Practice—Equitable mortgage — Deposit of title-deeds, effect of.*

When there is a deposit of title-deeds, the Court treats that as an agreement to execute a legal mortgage and, therefore, as carrying with it all the remedies incident to such a mortgage. In a suit based on such a mortgage, the appropriate remedy is a decree for sale

In view of Order XXXIV, rule 6, Civil Procedure Code, permitting a Court to pass a final personal decree only when the balance due after sale of the mortgaged property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rules, except possibly in cases in which the judgment and preliminary decree have expressly made him liable personally.

Where the final decree is passed *ex parte*, the judgment-debtor should apply to the original Court which made it to set it aside, and not to the Appellate Court which confirmed the decree. **L B** BADIER RAHMAN CHOWDRY *v.* M. A. R. R. M. R. M. CHETTY FIRM 288

——— O. XXXIV, RR. 7, 8 799

——— O. XXXIV, R. 10—*Mortgage suit—Account in preliminary decree, if adjusted once for all—Money paid by mortgagee after preliminary decree either for rent or for supporting his title to mortgaged property, if can be added to mortgage money.*

Where in a preliminary decree in a mortgage suit a Court instead of directing an account to be taken inserts the actual amount the mortgagor is liable to pay, the account is not adjusted once for all but may vary from time to time.

If after the preliminary decree in a mortgage suit the mortgagee pays to the landlord the rent due in respect of the mortgaged property, or properly spends any money either for supporting or defending the title to the mortgaged property the amount so paid should be added to the amount found due on the mortgage in the preliminary decree, even though there was no express covenant in the mortgage-bond entitling the mortgagee to add such amount.

Semble.—After the preliminary decree in a mortgage suit the mortgagee is not bound to leave the mortgaged property in jeopardy (for non-payment of rent) until the Court decides the matter one way or the other (by the final decree). **C** ALLAHABAD BANK, LTD. *v.* MOTI LAL BARMAN 95

——— O XXXIX, R. 1 718

——— O. XL, R. 1—*Receiver, appointment of—Guardian of incapacitated person, whether can be appointed Receiver—Appellate Court, powers of, to interfere with appointment once made.*

It is not an inflexible rule of law that the guardian of an incapacitated person should not be appointed Receiver to his estate. The whole circumstances of the particular case must be looked at, and an Appellate Court will not in any case interfere lightly with an appointment, unless a general principle can be shown to have been infringed. **M** AIYA NADAR *v.* TENAMMAL, 4 L. W. 285; (1916) 2 M. W. N 256 939

——— O. XLI, R. 3—*Judgment—No record of findings—Report, evidentiary value of.*

Where the judgment of the lower Appellate Court was in the following terms:—"Counsel for the respondents admits that the evidence of the Naib-Tahsildar recorded in this Court is the best evidence available on either side. It follows that the appeal must be decreed. The appeal is, therefore, decreed with costs:"

Held, that it did not comply with the requirements of the law.

The report of a Tahsildar or Naib-Tahsildar, being the result of the investigation made by him, is only an expression of his opinion in the matter. It cannot be the sole basis of a decision in regard to a question of title. **A** KUBER SAITHWAR RAM TAHAL UPADHIA *v.* GUPTAI SAITHWAR 237

——— O. XLI, R. 4 743

——— O. XLI, RR. 4, 33—*Appeal by one co-defendant— Common ground—Power of Court to pass decree in favour of all defendants.*

Order XLI, rule 33, read with Order XLI, rule 4, of the Civil Procedure Code, gives the Appellate Court power to interfere with a decree if the decree is based upon grounds common to all the defendants although only one of such defendants has appealed against that decree. There is no justification for the proposition that a defendant who suffers a decree to be passed *ex parte* against him cannot benefit by the appeal of his contesting co-defendant. The object of rules 4 and 33 of Order XLI is to prevent contradictory decisions in the matter of the same suit. **PAT** RAM TAHAL SINGH *v.* SUKESWAR REYAIN, 1 P. L. J. 143 547

——— O. XLI, R. 5 443

——— O. XLI, RR. 17, 19 —*Appeal dismissed for default—One Vakil refusing to appear in absence of other - Negligence—Ground for setting aside order of dismissal for default.*

Adjournment of an appeal was sought on the ground that the better of the two Vakils both of whom represented the appellant, was absent from the station. The Court refused adjournment and proceeded to hear the appeal. The other Vakil declined to appear with the result that the appeal was dismissed for default:

Held, (1) that the Vakil's conduct amounted to a very gross neglect of his client's interests:

CIVIL PROCEDURE CODE—(1908)—contd.

(2) that there was no ground for setting aside the order dismissing the appeal for default. **PAT** RANG BEHARI LAL *v.* RACHEYA LAL, 1 P. L. J. 65 429

——— O. XLI, R. 19 429

——— O. XLI, RR. 22 (3), 33 305

——— O. XLI, R. 23 41, 105

——— O XLI, RR. 23, 25, 27 — *Remand — Conditional order.*

Where the Court of first instance came to findings on all the points raised and the lower Appellate Court, purporting to act under Order XLI, rule 23, Civil Procedure Code, remanded the case for trial on the condition that the plaintiff deposited the costs of the defendant in both Courts within seven days, the High Court set aside the order of remand and directed the lower Appellate Court to take up the case at the stage where it had left off and to act under Order XLI, rule 27, if it was of opinion that either of the parties had made out a case for the reception of additional evidence. **A** RAM SARUP SAHU *v.* RATAN SEN SINGH 239

——— O. XLI, R. 23, S. 11—*Remand for decision on merits — Fresh preliminary point, whether can be raised before trial Court after remand — Pleadings* — Res judicata.

Plaintiffs sued on a mortgage, but their suit was dismissed on the ground that no consideration for the mortgage had passed. Plaintiffs appealed to the High Court, which held that the passing of consideration was proved and remanded the case to the lower Court under Order XLI, rule 23 for decision on the merits. The defendants did not try before the High Court to support the judgment of the lower Court on any other ground. On the case being remanded to the lower Court they raised for the first time the objection that the mortgage-deed had not been properly attested within the meaning of section 59 of the Transfer of Property Act. The lower Court again dismissed the suit, on that ground:

Held, that the effect of the order of remand was to send back the case to the first Court to have the remaining issues tried, and that the latter Court was not competent to frame and try a fresh preliminary issue.

Held, further, that the technical plea of want of due attestation, in the form in which it was put forward, was a new one and ought to be treated as a plea put forward for the first time in appeal. The defendants not having raised the point when the case came up before the High Court for the first time, should be held to be precluded from taking it at a subsequent stage of the same litigation, either on the principles of *res judicata* as laid down in *Ram Kirpal* v. *Rup Kuari*, 6 A. 269; 11 I. A. 37; A. W. N. (1886) 286 (P. C.), or on the general discretion of an Appellate Court in dealing with a substantially new pleading, taken for the first time in appeal, and not admitting of satisfactory disposal without the recording of fresh evidence. **A** CHUNILAL *v.* HABIB ALI 571

——— O. XLI, RR. 25, 27 239

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. XLI, R. 27—*Admission of documents after closing case—Omission to record reason—Illegality —Remand with direction that case be re-heard by another Judge.*

It is illegal for a Court of Appeal to admit documents adduced by one party in evidence after the case has been closed, arguments heard and judgment reserved, without giving the opposite party an opportunity of rebutting them and without recording reasons for such admission.

When a case is remanded under such circumstances for being re-heard, the proper course is that the order of remand should be accompanied by a direction that the case be re-heard by some other Judge, as the Judge who originally heard the appeal may not be free from the impression formed at the first hearing. **C** GAJADHAR PROSAD *v.* LOHIA, 24 C. L. J. 451 698

——— O. XLI, R. 33 547, 743

——— O. XLIII, R. 1 15

——— O. XLV, R. 3 583

——— O. XLVI, R. 1 633

——— O. XLVII, R. 1—*Review—Application filed after filing appeal, maintainability of.*

An application for review of a decree after an appeal has been preferred against it is not maintainable. **A** MUHAMMAD YUSUF *v.* RAJA RAM 867

——— O. XLVII, R. 1—*Review, application for— Grounds.*

An application for review cannot be granted when it is made not on the ground of the discovery of new and important matter but on the ground that the judgment is erroneous on the merits. The applicant is not entitled to re-argue the whole case. **P** KHALIL *v.* YAQIN-UD-DIN, 135 P. R. 1916; 147 P. W. R. 1916 342

——— O. XLVII, R. 1—*Review, application for, maintainability of, when Appellate Court seised of case—Review application, pendency of, if bars Appellate Court from hearing appeal—Second appeal— Discretion, interference with—Costs, award of.*

Where an Appellate Court is seised of a case, and is empowered by law to grant the relief claimed by an applicant, the latter should have recourse to the Appellate Court and not to the Original Court.

Therefore, where a party to an appeal can present his case to the Court of Appeal by way of cross-objection or otherwise, an application for review to the original Court is incompetent and cannot be maintained.

The pendency of an application for review in the original Court does not preclude the Appellate Court from hearing the appeal and if the Appellate Court in its discretionary power refuses to entertain an application for extending time for filing cross-objections, the Chief Court on second appeal will not interfere without adequate reason.

There is nothing unreasonable or contrary to law in awarding full costs to a successful co-defendant. **P** PUNJAB SINDH BANK, LTD. *v.* RAM KISHEN 529

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. XLVII, RR. 4, 7—*Review—"Strict proof," meaning of—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 173 Sufficient cause for excusing delay.*

The expression "strict proof" in clause *(b)* of the proviso to rule 4, Order XLVII, Civil Procedure Code, means proof according to the formalities of law and does not refer to sufficiency of proof in securing a particular conviction of the judicial mind. It means anything which may serve directly or indirectly to convince a Court and which has been brought before the Court in legal form and in compliance with the requirements of the law of evidence.

An application for review of judgment based on the discovery of new evidence made more than 90 days after the date of the decree but shortly after the discovery of the new evidence, which was not within the applicant's knowledge and could not have been adduced by him when the judgment was passed, is not barred under the law of limitation. **C** CHANDRA KANTA *v.* LAKSHAN CHANDRA 651

——— O. XLVII, R. 7 15, 651

——— SCH. II, PARAS. 10, 14 (b) 761

——— SCH. II, PARAS. 10, 15, 16—*Arbitration, reference to—Absence of some of the arbitrators during enquiry—Award, signing of, by absentees after submission to Court—Illegality—Decree in terms of illegal award—Appeal.*

Under section 10 of Schedule II, Civil Procedure Code, it is incumbent upon all the arbitrators to sign the award before it is filed in Court, and a Court has no power to allow any of them to sign it after it is duly submitted.

A decree passed in accordance with an award which was signed by some of the arbitrators after its submission to Court is illegal and invalid.

Though it is open to the Court which made the reference to set aside an invalid award yet, when the objections to its validity have been overruled by it and a decree has been passed in terms of the award, an appeal does not lie from such a decree under section 16 of Schedule II, Civil Procedure Code, except where the decree is in excess of or not in accordance with the award.

Per *Atkinson, J.*—A provision in the petition of compromise providing that any of the parties might object to the award on any account is *ultra vires* and contrary to the procedure applicable to arbitration proceedings arising in a pending suit, as laid down by Schedule II, Civil Procedure Code, and more especially by clause 15 thereof. **PAT** KHUDIRAM MAHTO *v.* CHANDI CHARAN MAHTO, 1 P. L. J. 303 358

——— SCH. II, PARA. 12 887

——— [SCH. II, PARA. 14 (b) 761

——— SCH. II, PARA. 15 358

——— SCH. II, PARA. 16 358, 914

——— SCH. II, PARAS. 18, 22—*Arbitration—Award how far bars subsequent suit for same reliefs—Specific Relief Act (I of 1877), s 21.*

A valid award will be a bar to a suit based on any of the claims embraced in the submission and covered by the award. It is, however, open to a party to impugn the validity of the award or to show that some part of the claim was not covered by it and if he succeeds in the latter such part should be dealt with on its merits. **L B** MA YON *v.* MAUNG KYA GAING, 9 BUR. L. T. 98 710

——— SCH II, PARA. 21 833

——— SCH. II, PARA. 22 710

CODICIL. *See* WILL.

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE (VI OF 1914), S. 3—*"Obtaining," meaning of—Receiving goods ordered before Ordinance, whether offence—"Attempt to obtain", rule of law applicable to—Penal Code (Act XLV of 1860), s. 511—Interpretation of penal Statutes.*

The accused was charged with contravening the Royal Proclamation of the 9th September 1914 at Madras between the 21st and 26th November by obtaining and attempting to obtain goods from an enemy and from an enemy country. It appeared that on the 28th July the accused had cabled to his agent (who afterwards became an enemy) an order for 28 bales of tobacco leaf and on the 31st July the agent wrote saying that he had executed the order. These bales were shipped at Amsterdam on the 7th October and consigned to the London agents of the accused, who paid the freight, took them out and re-shipped them for Madras where they arrived on the 21st November. The Ordinance prohibiting commercial intercourse with the enemy had come into force on the 14th October. It further appeared that on the 26th November accused wrote two letters, one to his Amsterdam agents and the other to Blum Bros., an enemy firm in Goch. In these letters the accused sought to get his tobacco stored with Blum at Goch in Germany sent to Amsterdam and undertook to pay the incidental charges:

Held, (1) that inasmuch as the goods in question were shipped before the 14th October 1914, the date when the Ordinance came into force, the accused could not be convicted of "obtaining" enemy goods within the meaning of section 3 of the Ordinance.

(2) (*Coutts Trotter, J.*, dissenting) that the charge could not be altered into one of obtaining goods at Madras from his London agents by way of transmission from an enemy, as, if the accused be held to have obtained the goods in London, he could not again be convicted of obtaining them from himself.

(3) that the conduct of the accused in sending the letters of the 26th November 1914 amounted to an attempt within the meaning of section 511, Indian Penal Code, which also applied to cases punishable under some other law, and that it could not be contended that it was no offence for the accused to send for his own goods, as the removal of merchandise, even though acquired before the war, from the enemy country after knowledge of the war without a Royal license is illegal.

Per *Wallis, C. J.*—A Penal Statute has no retrospective operation, unless the intention of the

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE—concld.

Legislature that it should have such effect is clearly indicated.

The word "obtaining" in section 3 of the Commercial Intercourse with Enemies Ordinance VI of 1914, includes procuring, or ordering the goods from the enemy as well as taking delivery of them on arrival.

Though the provisions of the Indian Penal Code do not in terms apply to offences created by special laws, there is no reason why the same rule should not apply to cases of attempts which are punishable under some other law.

Per *Coutts Trotter, J.*—The same goods could be "obtained" twice within the meaning of the section and such an act would constitute a second offence under the latter part of the sub-section, but as the accused had not been charged under it, the charge could not be altered, especially in view of the fact that the accused acted without realising that he might be breaking the law.

Whenever the Legislature declares a series of Acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand, and if he proceeds to the completion of the series of acts, he is guilty of the crime.

Breaches of law enacted to safeguard the welfare and safety of the Empire in war time must be punished, if only as a warning to others. M FREDERICK EDMED HOOPER *v.* EMPEROR, 4 L. W. 82; 20 M. L. T. 180; (1916) 2 M. W. N. 161; 17 CR. L. J. 321 497

COMPANIES ACT (VI OF 1882), S. 74—"*Manager*", *definition of—Default in filing balance-sheet—Managing Agents and Directors, liability of.*

The expression "Manager" as used in section 74 of the Companies Act, 1882, includes every person or body of persons who conducts or conduct the affairs of a Company and to whom its management, subject to the control of the Directors, is entrusted.

Where, therefore, a firm is entrusted with the management of a Company, it cannot escape liability for its misfeasance or non-feasance merely by calling itself "Managing Agent" instead of "Manager".

Where the balance-sheet of a Company should have been made out and filed with the Registrar of Joint Stock Companies on the 20th August 1913, but was not in fact submitted till the 22nd October, and consequently the Chairman of Directors and the Managing Agents of the Company were convicted under section 74 of the Companies Act, 1882:

Held, (1) that the Chairman of Directors could not escape liability on the ground that he depended upon the Managing Agents to do all that was necessary and had on several occasions asked them to do so, but that he was bound to take such reasonable measures as he could to prevent default being made and not having done so, was rightly convicted;

(2) that the fact that one of the members of the firm, which acted as Managing Agents, was also punished in his individual capacity as a Director was no reason for not punishing him as a member of the firm. P TOTA RAM *v.* EMPEROR, 18 P. R. 1916 CR.; 17 CR. L. J, 306. 482

COMPANIES ACT—contd.

——— Ss. 81, 125, 151—*Contributory, liability of—Calls, unpaid, barred by time, if recoverable by liquidator—Limitation Act (IX of 1908), Sch. I, Art.* 112.

Once a member of a company, which is being wound up, is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound up, that is to say, to the extent of his original share held in the company which remains unpaid, he is liable to contribute to the assets of the company for payment of the debts due to creditors and the expenses of winding up under section 61 of the Indian Companies Act, VI of 1882.

When a Court makes calls from persons on the list of contributories for the amount for which they are shown as liable in the list prepared by the liquidator, it is not the right of a company which is being enforced by the liquidator but a statutory right of the creditors of a company to enforce against the contributories of an insolvent company through the Court the obligation which the shareholders took upon themselves when they originally subscribed in the event of insolvency subsequently overtaking the company, and the calls are recoverable although they have become statute-barred under Article 112 of the Limitation Act and ceased to be recoverable debts by the company. A JAGANNATH PRASAD *v.* U. P. FLOUR AND OIL MILLS CO., LTD., 14 A. L. J. 349; 38 A. 347 159

——— Ss. 125, 151 159

——— S. 169—*Appeal, right of, extent of.*

A right of appeal under the provisions of section 169 of the Companies Act, 1882, is co-extensive with the right of appeal conferred by the Code of Civil Procedure, 1908. A SANTI LAL *v.* INDIAN EXCHANGE BANK, LAHORE, 14 A. L. J. 722; 38 A. 537 6

COMPENSATION. *See* CRIMINAL PROCEDURE CODE, S. 250; LAND ACQUISITION ACT, S. 11; LANDLORD AND TENANT.

———, liability for, by person enjoying benefit of non-gratuitous act—Act done without knowledge of person benefited 794

COMPLAINT. *See* CRIMINAL PROCEDURE CODE, SS. 195, 202.

COMPROMISE. *See* BENGAL TENANCY ACT, S. 147 *(a)*; REGISTRATION ACT, S. 17 *(b)*

———, admissibility of, in evidence—Family settlement—Civil Procedure Code (Act V of 1908), O. XVIII, r. 11—Objection as to admissibility—Procedure 701

———, views of parties as to, if absolute 243

CONFESSION. *See* EVIDENCE ACT, S. 24.

———*Punishment, lenient, award of, to confessing accused.*

An accused person should not be encouraged to confess by the knowledge that if he does so he will receive lenient punishment. A confession may be an indication that the accused is not an entirely

CONFESSION—concld.

irreclaimable and hardened criminal and where this is so, it may and very properly should be taken into consideration in awarding punishment. U B NGA KYAW ZAN HLA *v.* EMPEROR, U. B. R. (1916), II, 114; 17 CR. L. J. 402 962

CONSENT DECREE, characteristics of 850

CONSIDERATION. *See* MORTGAGE; SALE.

——, presumption as to payment of 56

CONSPIRACY, when not indictable 991

CONSTRUCTION OF DOCUMENT. *See* DOCUMENT, CONSTRUCTION OF; EVIDENCE ACT, S. 92.

CONTEMPT. *See* INJUNCTION.

CONTRACT, recission of, by another contract—Contract, abandonment of 305

—— Sale in favour of minor through guardian —Obligation arising from 23

——, *tripartite—Specific performance—Rights and liabilities of contracting parties.*

The plaintiffs, defendant and his landlords entered into a tripartite agreement that the plaintiffs would give to the landlords a plot of land in exchange for the land the defendant held under them as his homestead and the defendant would vacate the land he held, in favour of the plaintiffs, on receipt of a consideration in money from them and on receiving from his landlords, out of the lands they would get in exchange, an equal piece of land with similar rights for the purpose of his residence. The defendant, on getting Rs. 60 from the plaintiffs, did not vacate the land by removing his huts, whereupon the plaintiffs brought a suit for recovery of its *khas* possession, the landlords having been added as co-defendants:

Held, that the landlords must grant a lease of a convenient plot of land, out of the lands they got in exchange, in favour of the defendant with similar rights and of equal quantity with the land the defendant held under them and that on the execution of such a lease, the plaintiffs would get *khas* possession of the land in suit. C KANGALI DHUBI *v.* ICHHAMOYI DEBI 840

CONTRACT ACT (IX OF 1872), S. 23 575

——— —Ss. 37, 74—*Mortgage—Cash consideration—Repayment in kind in monthly instalments, stipulation for—Whole amount payable on default—Document, construction of—Penal clause, interpretation of—Penalty, relief against—Evidence Act (I of 1872), s. 92.*

A deed of mortgage which was executed for Rs. 1,500, being the amount found due by the mortgagor on a settlement of accounts, provided for its repayment in 10 yearly instalments each of 7½ *putties* of paddy. Then the deed provided that, on default of delivery of the paddy in any of the instalments, the *total* amount with interest at one per cent. per mensem was immediately payable:

Held, per curiam, that extrinsic evidence of the intention of the parties was inadmissible to construe the document.

Per *Abdur Rahim, J.*—On a proper reading of the document the parties intended that, by the delivery of each instalment as provided, 1/10th of the entire debt including the principal and interest or profits was to be discharged, and that on default of payment of any instalment, the balance of the principal amount and not the balance of paddy was payable.

Per *Ayling, J.*, dissenting.—On the principle that the party breaking a primary term of a contract should not be placed in a more favourable position than the party entitled to enforce it, the intended effect of the covenant was that the mortgagors were to be liable for the total of the unpaid instalments of paddy on default of any one instalment.

The primary proviso that, in consideration of the former debt, defendants should deliver ten annual consignments of 7½ *putties* of paddy, is enforcible under the explicit terms of section 37 of the Contract Act and cannot be relieved against as a penalty under section 74 of the Act.

The proviso for payment of the total of the unpaid instalments on default of any one instalment might be regarded as penal and the proviso for payment of interest on such instalments is undoubtedly penal; but in granting relief against the penalty the Court must not give plaintiff less than he would be entitled to if the document had contained no stipulations at all for consequences of breach.

On the face of it, section 74 of the Contract Act has reference not to the primary term of the contract but to stipulation as to the consequences of a breach. M SURYADEVARA SEETARAMAYYA *v.* SURYADEVARA KOTAYYA 111

——— S. 43 563

——— S. 56—*"Act impossible in itself," meaning of —Practical impossibility - Contract to supply articles of a particular kind within specified time—Breach of contract—Damages, suit for—Defendant, what must prove.*

Where impossibility of performance is assigned as a ground for non-performance of a contract, it should be shown that both parties were aware of the implied term as to impossibility.

In such cases, what the Courts have to consider is whether it was practically impossible for the promisor to perform the contract not on the date when it was entered into, but within the time specified for its performance.

The language of the first part of section 56 of the Contract Act referring to an "act impossible in itself" suggests that the impossibility which would relieve the promisor from liability must not relate to circumstances which render performance impossible, such as failure to keep to the time or difficulties which may have to be experienced in carrying out the terms, as these contingencies are referred to only in the second part of the section, but practical impossibility will excuse the promisor though the act may be physically possible of performance.

Where, therefore, the plaintiff sued for damages on the ground that the defendant had entered into a contract with him to supply 151 bales of cotton twist of a particular quality within 75 days of the contract, but had failed to perform the contract as agreed upon:

Held, that inasmuch as the defendant had failed to make out that it was practically impossible to perform the contract within the specified time, the

CONTRACT ACT—contd.

plaintiff was entitled to damages for breach thereof. M SOORYAPRAKASALINGAM GARU v. SHAW TRIKAMDAS, (1916) 2 M. W. N. 131 625

—— —— Ss. 60, 61 375

—— —— S. 69 198

—— —— S. 70—*Compensation, liability for, by person enjoying benefit of non-gratuitous act—Act done without knowledge of person benefited—Mortgage—Payment of mortgage amount by stranger—Subrogation—Transfer of Property Act (IV of 1882), s. 95.*

The question which Courts have to decide under section 70 of the Contract Act is almost entirely, if not entirely, a question of fact.

No right to compensation under the section arises when there was no intention to benefit the person who is alleged to have enjoyed the benefit of the non-gratuitous act and when the act was done without the consent or knowledge of such person.

The equitable doctrine of the subrogation of a mortgage in English Law, though not in terms contained in the Transfer of Property Act, is not inconsistent with any provision of that Act.

The doctrine, which is applicable to India, is that if a stranger pays off a mortgage on an estate, he presumably does not intend to discharge that mortgage but to keep it alive for his own benefit. The mortgagor's consent to the payment is not necessary to entitle the person paying to be subrogated to the position of the mortgagee, for the mortgagor's position is in no wise substantially altered, except that, instead of owing money to one creditor, he owes it to another.

One *A* obtained a mortgage-decree against the 1st defendant and, in execution, applied for sale of the hypotheca. The 2nd defendant, who held a simple money-decree against 1st defendant, meantime brought the property to sale in execution of his decree and purchased it himself. About two years afterwards, the property was again put up for sale by the Collector at the instance of the mortgagee. The 1st defendant borrowed Rs. 2,463 from plaintiff, paid off the mortgage amount and averted the sale. He then executed a sale-deed of the property to the plaintiff for the consideration already advanced, *plus* Rs. 1,500 which he had received from the plaintiff from time to time. The plaintiff, who was already in possession under a ten years' lease from 1st defendant, was ejected by 2nd defendant in a suit filed by him for recovery of possession. Plaintiff brought the present suit for recovery of Rs. 4,000, the consideration for the sale-deed, from 1st defendant and prayed that Rs. 2,463 thereof, which was applied in discharge of the mortgage, be recovered from 2nd defendant personally and by sale of the mortgaged land. The Subordinate Judge decreed all but a small portion of the claim against the 1st defendant and dismissed the claim against the second, holding that the 1st defendant had no saleable interest in the land when he conveyed it to the plaintiff. On appeal to the High Court, it was urged for the plaintiff that the second defendant was liable under section 70 of the Contract Act, or in the alternative, by virtue of plaintiff's being subrogated to the rights of the original mortgagee:

CONTRACT ACT—contd.

Held, (1) that plaintiff was not entitled to compensation under section 70 of the Contract Act as the payment was not made by him to benefit 2nd defendant, nor with his knowledge or consent;

(2) that plaintiff stood in the mortgagee's shoes and was entitled to enforce the claim for sale of the property for the amount of the mortgage.

Per *Batchelor, J.*—The plaintiff, in making the payment behind the back of the 2nd defendant, was depriving the 2nd defendant of an option which the law allowed him to exercise. For, to the 2nd defendant it was open either to pay off the mortgage or to stand by and let the property be sold. When therefore, the plaintiff, without reference to the 2nd defendant, intruded himself in order to make the payment without the 2nd defendant's knowledge it cannot be said that such payment was made for the 2nd defendant.

Per *Shah, J.*—The mortgage-decree was against 1st defendant and was being executed against him at the time. He was, therefore, clearly interested in satisfying the decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so, and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgage-decree to the mortgagee at the instance of defendant No. 1. B TANGYA FALLA v. TRIMBAK DAGA, 18 BOM. L. R. 700 794

—— —— Ss. 73, 81, 83—*Vendor and purchaser—Delay in taking delivery, liability of purchaser for deterioration of goods owing to—Property in goods, when passes to purchaser.*

Under section 73 of the Indian Contract Act, a defaulting purchaser, delaying to take delivery of goods purchased by him, is bound to compensate the seller for any loss occasioned by reason of such delay, owing to deterioration of goods in the ordinary course of things, *e. g.*, by rainfall, even though the property in the goods has not passed to the purchaser.

Property in goods under a contract of sale does not pass to the purchaser until it is weighed by the vendor, unless there are other terms of the agreement or some particular trade or local usage to the contrary. S FIRM OF TARACHAND GHANSHAMDAS v. MESSRS. LOUIS DREYFUS & CO., 10 S. L. R. 14 449

—— —— S. 73, ILL. (c)—*Contract to sell, breach of—Damages, rate of—Breach of contract, date of.*

Ordinarily damages for breach of contract to sell are to be calculated at the market rate prevailing on the date on which a breach of contract was committed.

Where no time was fixed for delivery of the goods sold and the plaintiff gave notice to the defendant that he would not accept delivery after a certain date:

Held, that the contract must be deemed to have subsisted till the date fixed in the notice and the damages should be calculated on the difference between the rate prevailing in the market on that date and the contract rate. A GAURI DATT BASDEO v. NANIK RAM CHAUTHMAL, 14 A. L. J. 597 203

CONTRACT ACT—contd.

——— S. 74 111

——— S. 74—*Interest—Penal stipulation—Discretion.*

A bond contained a covenant to pay interest at the rate of Rs. 12 per cent. by a certain date, and if the money was not paid on that date, the interest was to run at Rs. 24 per cent. from the date of the bond:

Held, that the stipulation to have retrospective effect was penal and could not be enforced.

It is in the discretion of the Court to award interest in such cases at such rate as it deems proper. A SONAI SINGH *v.* RANDHIR SINGH 624

——— Ss. 81, 83 449

——— Ss. 102, 103—*Railway receipt, whether 'document of title' or 'instrument of title'—'Title,' meaning of—Stoppage in transitu, right of seller to, as against pledgee of railway receipt.*

A railway receipt issued to the consignor of goods is a 'document' or 'instrument' of title as defined in sections 102 and 103 of the Indian Contract Act wherein "document" and "instrument" are interchangeably used, and the assignee or pledgee of such a receipt has a right of delivery of or previous payment of an advance on goods as against an unpaid seller's right of stoppage *in transitu*.

Whenever any doubt arises as to whether a particular document is a "document showing title" or "a document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented.

Quære:—Whether apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act (II of 1900) would be conclusive on the point?

The word "title" in the expressions "documents showing title" and "instruments of title" in sections 102 and 103 of the Indian Contract Act relates only to the right to receive delivery of the goods to which the document or instrument relates. It has nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title, but, if so, the same is true of all other documents contained in the genus "documents of title" the fact that a document confers title in this sense cannot be used as a distinguishing mark of a particular species of the genus. The only point in which a bill of lading differs from other documents of title is that its assignment, whether upon a re-sale or by way of pledge, operates as constructive delivery of the goods to which it refers.

Section 102 of the Indian Contract Act is intended to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, who, by virtue of the assignment of the bill obtains constructive delivery of the goods. Section 103 is intended to do the same in favour of a *bona fide* pledgee for value that the previous section does in the case of assignments upon a re-sale.

The Indian Contract Act is an amending as well as a consolidating Act and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. **P C** RAMDAS VITHALDAS DURBAR *v* AMERCHAND & Co., 20 C. W. N. 1182; (1916) 2 M. W. N. 110; 18 BOM. L. R. 670; 20 M. L. T. 194; 31 M. L. J. 541; 4 L. W. 342; 14 A. L. J. 1045; 24 C. L. J. 320; 85 L. J. P. C. 214 954

——— S. 103 954

——— Ss. 124, 125—*Indemnity, contract of—Agreement to indemnify against loss of possession—Breach—Damages, suit for, if lies when title impaired and possession not actually lost—Measure of damages.*

In a suit for damages based on a contract to indemnify the plaintiff against loss of possession it is not necessary for plaintiff to prove that possession has *actually* been lost. The sale of the property in auction at the instance of a decree-creditor of the promisor and the consequent impairment of title constitute a valid and sufficient cause of action. Where the promisee's title is lost, he suffers nonetheless because he has yet sustained no practical inconvenience or has not had occasion to sell the property and estimate the damage sustained with reference to any actual diminution in the price obtainable.

In such a case the sums necessary to be expended by the plaintiff in order to cure the defect in or the loss of title so caused would be the measure of damages.

A right to damages on account of the future determination of the plaintiff's possession by reason of the purchase of the property at auction sale by strangers will not be sustained. Nothing short of actual disturbance of possession will justify the claim. **M** BHAWANI *v.* ANANTHA KAMTHI, 20 M. L T. 263; (1916) 2 M. W. N. 294; 31 M. L. J. 556; 4 L. W. 357 789

——— S. 125 789

——— S. 134—*Original agreement void — Creditor withdrawing his claim against legal representatives of deceased principal – Surety, liability of.*

Where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor and is not discharged by the creditor withdrawing his claim against the legal representatives of the deceased principal.

The plaintiff sued to recover a sum of money alleged to be due from the ancestor of defendants Nos. 1 to 6 on a *bahi* account, defendant No. 7 being impleaded as a surety. All the defendants filed a joint written statement to the effect that the contract was void on account of the minority of the principal debtor at the time. Plaintiff then withdrew his claim against the legal representatives of the deceased debtor (defendants Nos. 1 to 6) and elected to proceed against the surety only:

Held, that the surety, having subscribed to the written statement filed by the defendants Nos. 1 to 6, must himself be taken to have urged the non-liability of the latter and that it was, therefore, with his implied assent that they were discharged from liability. **P** SOHAN LAL *v.* PURAN SINGH, 54 P. R. 1916; 158 P. L. R. 1916 537

CONTRACT ACT—concld.

——— Ss. 230, 236—*Broker liable as principal—Custom and usage of Calcutta Gunny Market—Evidence Act (I of 1872), s. 92, Prov. (5)—Evidence of custom or usage incidental to contract—Arbitration and award by Bengal Chamber of Commerce—Jurisdiction.*

An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court, on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plaintiffs, disregarding the fact that the contract in question was made by plaintiffs as brokers, although in fact the plaintiffs had no principals and the contract was not, therefore, enforceable. The plaintiffs alleged that there was a custom in the market in respect of gunny, hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well-known to the Chamber, the award was properly made and valid.

The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it:

Held, that sections 230 and 236 of the Indian Contract Act, the former of which deals with undisclosed principals and the latter with persons falsely contracting as agents, were not applicable to this case.

Held, also, that evidence of usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent.

That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made **C** *In the matter of* JOY LAL & Co. *v.* MONMOTHA NATH MULLIK, 20 C. W. N. 365 3

——— S. 236 3

CONTRIBUTION, *suit for—Agreement to contribute in case of payment of debt by one party—Execution of fresh security, whether amounts to payment.*

The giving of a new security does not amount to a payment which entitles a plaintiff to demand contribution.

Where, therefore, in a suit for contribution it appeared that the parties had compromised a previous suit agreeing to pay in equal proportions the money borrowed by the plaintiff, the compromise-deed providing that if the creditors realised the money from either party such party would have a right of contribution as against the other party, and the plaintiff had been obliged to execute a fresh security for the money due under one of the earlier bonds:

Held, that, as no money had been actually paid by the plaintiff, her suit was not maintainable. **O** JAGANNATH KUAR *v.* SHEO SINGH, 19 O. C. 44; 3 O. L. J. 441 439

———, suit for, by one partner against another, parties to 910

CONVICTION on evidence partly inadmissible, effect of 981

CO-OWNER'S POSSESSION, *effect of—Abandonment by one co-owner and exclusive possession by another, effect of.*

One co-owner is entitled to treat the possession of another as his own, unless and until by open assertion and exercise of hostile title the latter acquires an indefeasible title.

But a co-sharer, who has abandoned the land, cannot say that his co-sharers, who have since the abandonment been in actual and exclusive possession, did all this on his behalf. **C** TOMEJUDDI *v.* MULAI CHOWKIDAR 72

CORPORATION, contracts made by agents of, how far binding on 305

CO-SHARER, *rights of—Joint property—Right to joint possession—Co-owner asserting exclusive right under adverse claimant, effect of, on rights of other sharers—Ouster, what constitutes.*

A co-owner of an estate is entitled to a decree for joint possession of a parcel of the joint property, against his co-sharer who is in possession thereof by asserting an exclusive right under a title derived from an adverse claimant.

Per *Mookerjee, J.—Prima facie* co-owners are entitled to hold joint possession of joint property. Consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established, so as to justify exclusive occupation of the joint property by one of the co-owners.

A co-sharer who has been ousted from joint property by another co-sharer is entitled to recover joint possession.

To constitute ouster, a physical eviction is not essential, if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other co-owners, there is an ouster in law. **C** JATINDRA NATH ROY *v.* SABIDANNESSA KHATUN, 24 C. L. J. 165; 20 C. W. N. 1258 36

COSTS. *See* CIVIL PROCEDURE CODE, s. 92.

———, assessment of, mode of 529

——— Discretion of Court 46

———, imposition of terms, as to payment of 239

———, interest on, whether can be included in decree 218

———, non-payment of, effect of 534

———, of suit pending reference for account 83

COURT-FEE, *ad valorem*, on appeal 158

——— *Declaration, suit for, that certain ex parte decree is invalid.*

In order to determine the amount of the Court-fee payable in a suit the Court has to look at and see in each particular case what is the nature of the relief claimed and, for that purpose, it must look at the allegations that are contained in the plaint.

The Court-fee payable in a suit for a declaration that a certain *ex parte* decree, declaring that certain alienations were not valid, is not binding on the plaintiff, is Rs. 10, and not an *ad valorem* Court-fee on the amount of the decree sought to be declared invalid. **C** BAGALA SUNDARI DEBI *v.* PROSANNA NATH MUKERJEE 797

COURT FEES ACT (VII OF 1870), S. 7, CL. X (a)—*Specific performance—Possession of property claimed in addition to execution and registration of sale-deed—Court-fee.*

A suit for the specific performance of a contract to sell in which the plaintiff seeks to force the vendor to execute and register a sale-deed and also to hand-over possession of the property should be stamped only under clause x (*a*) of section 7 of the Court Fees Act. **A** NIHAL SINGH *v.* SEWA RAM, 14 A. L. J. 434; 38 A. 292 . . 275

——— SCH. I, ART. 1 AND SCH. II, ART. 11—*Decree against firm—Execution, application for, against alleged partner—Order rejecting application—Appeal, Court-fee on memorandum of—Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (3).*

An order refusing execution of a decree against an alleged partner of a firm against which the decree is passed, has the force of a decree and an appeal against such order should be stamped *ad valorem*, the matter being governed by Court Fees Act, Schedule I, Article 1, and not by Schedule II, Article 11. **L B** VALLIAPPA CHETTY *v.* RUNGASAWMY NAICKER, 6 L. B. R. 300 429

——— SCH. II, ART. 11 429

CRIMINAL LAW AMENDMENT ACT (VIII OF 1913, s. 3—Abetment by conspiracy—Option of prosecution to proceed under s. 107, or s. 120B—Penal Code—"Where no express provision has been made for the punishment of such a conspiracy," meaning of 670

CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 30 171

——— S. 36 165

——— S. 55 (1) 495

——— Ss. 87, 88, 89, 537—*Attachment and sale of property of absconding offender—Proclamation, publication of—Application for return of property made more than two years after attachment, whether barred—Proceedings under ss. 87, 88, validity of—Remedy, when proceedings illegal.*

The most important part of the publication of a proclamation under section 87, Criminal Procedure Code, is the publishing of it in the accused's place of residence and the thirty days allowed by the section should be reckoned from the date of such publication.

Magistrates when acting under section 87 should always make an endorsement or statement in writing validating the proclamation, as contemplated by clause (3) of the section.

An application under section 89 for return of the property attached, made more than two years after the attachment, is barred.

Section 89 does not apply to a case where the attachment is irregular and invalid. **P** MALA SINGH *v.* EMPEROR, 40 P. W. R. 1916 CR.; 17 CR L. J. 414 974

——— S. 88 974

——— Ss. 88, 89—*Joint Hindu family—Absconding accused, attachment of interest of, effect of—Receiver, appointment of, after attachment—Rights of other co-parceners—Attachment of father's share—Rights of afterborn sons.*

By the Full Bench.—The undivided interest of an absconding member of a joint Hindu family in the family property is liable to attachment under section 88 of the Code of Criminal Procedure.

What has to be attached under the section is the share of the defaulting member of the family, which is subject to the rights of the other members of the family and may be realised by a Receiver in a suit for partition or otherwise.

By the Division Bench.—The effect of an attachment under section 88, clauses (3) and (4), of the Criminal Procedure Code, read with clause (7), is only to secure to the Government the enjoyment of the income during the continuance of the attachment, and not to vest the property or the share of the absconder in the Government as confiscated.

Quod the property attached the rights of the Government are governed by the ordinary Hindu Law.

The language of sections 87 to 89 does not warrant the construction that the attachment effects a severance of a joint family or precludes the afterborn sons of the absconder from claiming their shares in the property on partition. **M** SECRETARY OF STATE *v.* RANGASAMY AIYANGAR, 31 M. L. J. 84 & 120; 20 M. L. T. 58 & 60; 4 L. W. 21 & 24; (1916) 2 M. W. N. 85 & 90; 17 CR. L. J. 296 . . 168

——— S. 89 168, 974

——— S. 106—Lathis, *whether "arms."*

Lathis are 'arms' within the meaning of section 106 of the Criminal Procedure Code. **PAT** SARJUG LAL *v.* EMPEROR, 17 CR. L. J. 313 489

——— S. 107—*Charge against collective body of persons—Proof against each person, necessity of—General hostility, effect of.*

In a charge under section 107 of the Criminal Procedure Code, 1898, against a collective body of persons it is insufficient to suggest that they are indulging in feelings of hostility towards another body of persons. There must be definite evidence in the case of each and every person charged under this section that there is a danger of a breach of the peace by him. **A** SHAMBHU NATH *v.* EMPEROR, 14 A. L. J. 656; 17 CR. L J. 400; 38 A. 468 832

——— S. 107—*Magistrate — Jurisdiction—Bad character—Person resident of place beyond jurisdiction—Proceedings, legality of.*

Under section 107 of the Criminal Procedure Code, a Magistrate can deal with persons who have a general reputation as bad characters and who happen to be within his jurisdiction, no matter whether they are residents of a place within his jurisdiction or not. **A** EMPEROR *v.* MUNNA, 17 CR. L. J. 390; 14 A. L. J. 1074 822

——— S. 107—*Security to keep peace — Order, legality of.*

Where in a proceeding under section 107 of the Criminal Procedure Code, 1898, it was found that acts done by each of the accused persons were of such a provocative nature that the only probable result was the disturbance of the public tranquillity:

Held, that, although the order drawn up in writing in accordance with the police report might have been

CRIMINAL PROCEDURE CODE—contd.

expanded, the order of the Magistrate to the accused to furnish security to keep the peace was justified and proper. A CHUNNI LAL *v.* EMPEROR, 14 A. L. J. 430; 17 CR. L. J. 301 173

——— S. 110—*Security for good behaviour—Appeal to District Magistrate—Judgment, what to contain.*

A Court of Criminal Appeal, dismissing an appeal summarily, is not bound to write a judgment, but an appeal from an order requiring a person to furnish security to be of good behaviour is certainly distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence.

A District Magistrate should not dispose of an appeal from an order requiring a person to furnish security to be of good behaviour otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant, both in the Court below and in his memorandum of appeal. A LAL BEHARI *v.* EMPEROR, 14 A. L. J. 415; 38 A. 393; 17 CR. L. J. 309 485

——— Ss. 110, 55 (1) (c), 123—*Security-bond—"Residing," meaning of—Jurisdiction.*

A person residing with his wife within the jurisdiction of a Magistrate can be tried by him under section 110, Criminal Procedure Code, though he happens to be outside the jurisdiction when arrested under section 55 (1) *(c)*, Criminal Procedure Code. L B EMPEROR *v.* NGA PO AUNG, 8 L. B. R. 378; 17 CR. L. J. 319 495

——— S. 123 495

——— Ss. 133, 135 (b), 137 (1)—*Conditional order, what should state—Opponent, right of, to reasonable opportunity to show cause—Evidence—Information to Magistrate, admissibility of, against opposite party—Order based on local enquiry, legality of.*

An order under section 133, Criminal Procedure Code, cannot, even by consent of parties, be based upon information gathered at a local inquiry.

In a proceeding under section 133, Criminal Procedure Code, the report or the other information whereon the Magistrate takes action before making the conditional order is no evidence against the opposite party.

Reasonable opportunity should be given to the opposite party to show cause as contemplated by section 135, clause (*b*) and to adduce evidence as prescribed by section 137 (1) before making the order absolute.

An order issued under section 133, Criminal Procedure Code, should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it.

When in a proceeding under section 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. C RAIMOHAN KARMOKAR *v.* EMPEROR, 20 C. W. N. 1171; 17 CR. L. J. 409 969

CRIMINAL PROCEDURE CODE—contd.

——— Ss. 135 (*b*), 137 (1) 969

——— Ss. 145, 146—*Attachment, when can be withdrawn—Opposing claims to mesne profits—Procedure.*

In order to enable a Magistrate to withdraw an attachment ordered under section 146 of the Criminal Procedure Code, it is not necessary that there should be a decree in favour of all the parties, and if there is an adjudication by a Civil Court in favour of some of the parties that is sufficient for the purpose; of enabling the Magistrate to walk out of the property unless this is done the parties will have no remedy.

Where, in an application made under section 145 of the Criminal Procedure Code, a Magistrate, in consequence of a dispute with regard to the ownership of certain properties, attached them as he was not satisfied that any one of the parties was in possession, and then the counter-petitioner and another brought several suits and obtained decrees for certain shares in the property:

Held, that as the applicants would not be able to bring a suit to recover possession of the property more than six years having elapsed since the Magistrate took possession, the proper course for him to follow was to withdraw the attachment as there had been a civil adjudication in favour of some of the parties;

(2) that the Magistrate would have no jurisdiction to pass an order with regard to mesne profits and the proper course for him to follow was to deposit the money in Court and allow the parties to litigate their rights in respect of the share due to them for mesne profits. M VITOBA RAO *v.* NARASINGA RAO, 4 L. W. 55; 20 M. L. T. 247; (1916) 2 M. W. N 173; 17 CR. L. J. 331 597

——— Ss. 145, 148, 439—*Possession proceedings—Award of costs—Discretion of Magistrate—High Court, revisional jurisdiction of.*

A Magistrate should, in awarding costs in proceedings under section 145, Criminal Procedure Code, hold an enquiry as to the expenditure in costs actually incurred by the party in whose favour the order is made.

——— S. 145 (7)—*Charter Act* (24 *&* 25 *Vic. C.* 104), *s.* 15—*High Court—Revision—Death of party pending revision—Abatement—Power to deal suo motu on merits in absence of questions affecting jurisdiction.*

Clause 7 of section 145, Criminal Procedure Code, regulates only proceedings under the section and its purview cannot be extended to others, such as revisional proceedings before the High Court under the Charter Act.

On the death, therefore, of the petitioner, pending disposal of a revision petition in the High Court under the Charter Act against an order passed under section 145, the proceedings abate and his son will not be permitted to be brought on the record to prosecute it.

The High Court will not deal, in revision, with the Magistrate's order *suo motu* when the Magistrate had complied with all the formalities essential to his having jurisdiction. M SUBBARAJU *v.* RAMBHADRA RAJU, 17 CR. L. J. 339; 4 L. W. 449 821

CRIMINAL PROCEDURE CODE—contd.

The High Court, however, has no jurisdiction to interfere with an award of costs in such proceedings either under section 107 of the Government of India Act, 1915, or under section 439, Criminal Procedure Code. **PAT** NEMDHARI SINGH *v.* RAM TAHAL RAI, 17 CR. L. J. 348 524

—— Ss. 145, 435—*Revision—Power of High Court to interfere with order passed under s.* 145, *Criminal Procedure Code—Government of India Act,* 1915 (5 & 6 *Geo.* 5, *C.* 61), *s.* 107—*Superintendence, meaning of—Jurisdiction—Irregularity—Prejudice, meaning of—Decree of Civil Court, effect of, in proceedings under s.* 145, *Criminal Procedure Code.*

High Courts in India which have no statutory power of superintendence cannot, under section 435 of the Criminal Procedure Code, send for the record of proceedings which are in substance and in fact proceedings under Chapter XII of the Code and were conducted by a Magistrate who had jurisdiction.

A Chartered High Court has power under section 107 of the Government of India Act to interfere with an order passed by a Magistrate under section 145 of the Criminal Procedure Code, where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction. It will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but it can and will interfere where there has been a material irregularity, which amounts to a refusal to exercise or an usurpation of jurisdiction or which has prejudiced a party to the proceedings. In order to establish prejudice it is not sufficient to show that there has been an erroneous decision on a question of law or fact, but it must be shown that the irregularity has prevented a party from having a fair trial.

No hard and fast rule can be laid down that a Magistrate in proceedings under section 145 of the Code must give effect to a recent decision or proceeding of a Civil or Criminal Court.

Per *Sharfuddin, J.*—The High Court cannot under the Criminal Procedure Code interfere with any order passed by a Subordinate Magistrate in a proceeding under section 145 of the Code, but it can interfere under section 107 of the Government of India Act, 1915.

In a proceeding under section 145 of the Code, a Magistrate is bound to respect a Civil Court decree; if he does not do so, he acts without jurisdiction. But he is not blindly to follow the decree. If after the passing of the decree the Magistrate finds on evidence that a party's possession has been disturbed or that possession has changed hands, he has jurisdiction to pass orders under the section.

But in all such cases the Magistrate is bound to refer to the Civil Court decree and give reasons in his judgment why he passes an order against the party who has obtained that decree.

Per *Roe, J.*—The power of superintendence in section 107 of the Government of India Act is not a legal fiction whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by prohibition and mandamus. It is confined to cases in which the Court has acted without jurisdiction or in excess of jurisdiction or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial, however erroneous in law or fact that decision may appear to be. **PAT** PARMESSAR SINGH *v.* KAILASPATI, 17 CR. L. J. 369; 1 P. L. J. 336 801

——— S. 146 507

——— S. 148 524

——— S. 149 523

——— S. 195—*Complaint, filing of, before sanction—Illegality.*

A sanction to prosecute obtained after filing a complaint for an offence specified in section 195, Criminal Procedure Code, is bad in law, and a conviction based on such a complaint cannot be maintained. **P** RAJA RAM *v.* EMPEROR, 33 P. W. R. 1916 CR.; 17 CR. L. J. 405 965

——— S. 195—*"Sanction", meaning and essentials of—Direction to prosecute, whether sanction.*

It is not essential to the validity of a sanction under section 195, Criminal Procedure Code, that it should be addressed to a particular complainant, for it only removes the bar put by the section on the jurisdiction of the Court. But sanction implies the existence of a person who desires to prosecute, and it is not desirable that it should be so indefinite as to be capable of being used by any possible prosecutor.

A sanction is quite distinct from a direction to prosecute. A sanction leaves the private prosecutor to exercise his unfettered discretion as to whether he will proceed or not. An order expressly ordering a prosecution is, therefore, not a sanction.

The order of a Magistrate ordering a prosecution *suo motu* is not a sanction.

A Collector ordering the prosecution of a person for an offence under section 182, Penal Code, for making false allegations against one of his subordinates in a written petition puts himself in the position of a prosecutor and is disqualified from performing the judicial function of deciding whether to grant a sanction or not. His order is a mere executive order. **S** DODUMAL *v.* EMPEROR, 10 S. L. R. 65; 17 CR. L. J. 305 481

—— Ss. 195, 439—*Sanction to prosecute, application for, whether can be dismissed in default—Revision.*

An application under section 195, Criminal Procedure Code, for sanction to prosecute must be proceeded with on the merits and cannot be dismissed in default if the applicant is absent on any of the dates fixed for the hearing. **P** DHANPAT *v.* KESHO RAM, 34 P. W. R. 1916 CR.; 17 CR. L. J. 417 977

——— S. 195 (1) (c)—*"Offence committed by a party", interpretation of—Abetment of forgery—Party to proceeding—Prosecution without sanction legality of.*

CRIMINAL PROCEDURE CODE—contd.

The expression "offence committed by a party" in section 195 (1) (*c*) of the Criminal Procedure Code is loosely used for "offence alleged to have been committed by a party," and the provisions of the sub-section apply to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described as "a party to any proceeding in any Court" in which the document in question has been produced or given in evidence, that is to say, who is or has been a party to such proceeding.

A person alleged to have abetted the forgery of a document cannot be prosecuted for the offence without the sanction of the Civil Court, if he was a party to the proceeding with respect to the document in that Court.

Semble.—Once a Magistrate has taken cognizance of an alleged forgery, the person accused cannot be permitted to obstruct his proceedings by filing a civil suit on the basis of the document impeached, inasmuch as section 195 (1) (*c*) of the Criminal Procedure Code prohibits only the cognizance of an offence alleged to have been committed by a party to a suit after he became such party. A BHAWANI DAS *v.* EMPEROR, 14 A. L. J. 74; 38 A. 169; 17 CR. L. J. 289 161

—— S. 195, (6)—*Sanction, expiry of time for currency of—Extension of time—High Court, power of.*

The High Court has power to extend the time of a sanction to prosecute, even after the expiry of the six months for which it remains current. B KRISHNA, KERING & CO. *v.* J. R. MILLER, 18 BOM. L. R. 686; 17 CR. L. J. 377 809

—— Ss. 197, 254, 439—*Scope of s.* 197—*Protection afforded by section, applicability of—'Acting as such public servant,' meaning of—Public servant acting ultra vires—Sanction—'Talayari' of village, whether public servant under s.* 197—*Charge, framing of—Revision by High Court.*

The protection afforded by section 197, Criminal Procedure Code, applies to all cases where, in the professed exercise of an official's duties, an offence is committed.

Where the initial jurisdiction is wanting and a jurisdiction is assumed by an official who, in such assumed capacity, acts to the prejudice of a person, he is not acting 'as such public servant' within the meaning of section 197. Where, however, the official has jurisdiction to take cognizance of a matter, and in professedly exercising that jurisdiction commits an offence or acts *ultra vires* of his powers, he is acting 'as such public servant' within the meaning of the section. If he simply uses his position as a public servant to commit an illegal act, he is not within the protection afforded by the section. The test is, not whether the particular act is within his powers, but whether he acted in the capacity with which he is clothed.

Where a Village Munsif, in the trial of a civil suit, ordered the attachment before judgment and subsequent removal of a cart belonging to the defendant, who thereupon lodged a complaint of theft against the Village Munsif:

CRIMINAL PROCEDURE CODE—contd.

Held, that though the Village Munsif acted *ultra vires* of his powers, he acted as a Judge and could not be prosecuted without the sanction required by section 197.

A *Talayari* is not within the protection afforded by section 197, Criminal Procedure Code, and no sanction is necessary under it for his prosecution.

The High Court will not interfere in revision with an order framing a charge against an accused person. M SANKARALINGA TEVAN *v.* AVUDAI AMMAL 826

—— S. 199—*"In his absence", meaning of—Enticing married woman from father's control—Right of father to complain, when husband stands by—Penal Code (Act XLV of* 1860), *ss.* 498, 499.

The words "in his absence" in section 199 of the Code of Criminal Procedure, refer to the original entrustment and not to the time of the complaint, and the restriction is not intended to afford immunity to an offender but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate.

The object of the law is not so much to afford protection to the husband or the guardian, as to inflict punishment on those who interfere with the sacred relation of marriage.

Where, therefore, the wife was not under the care of her husband at the time when the accused enticed her away and the husband, learning of the elopement, went away and the complaint was filed by the father, without consulting the husband, the latter not being anxious to complain:

Held, that the fact that the husband stood by, did not prevent the temporary guardian from preferring the complaint. M RATHNA PADAYACHI, *In re*, 17 CR. L. J. 363 667

—— S. 202—*Complaint, dismissal of—Right of accused to appear before issue of process—Order for investigation by Police Officer without recording reasons—Irregularity—Revision, High Court's discretion to interfere in.*

Magistrates should follow the procedure clearly laid down in Chapter XVI of the Criminal Procedure Code dealing with complaints to Magistrates.

A Magistrate who is not satisfied as to the truth of the complaint of an offence of which he is authorised to take cognizance, when he takes action under section 202, Criminal Procedure Code, must record his reasons.

An accused person cannot be represented by a Pleader before a Magistrate to argue the points which arise in the case of a complaint, until the Magistrate has made up his mind to issue process for compelling his attendance.

Where on a complaint a Magistrate directed a previous local investigation to be made by a Police Officer without recording his reasons under section 202, Criminal Procedure Code, and on the report of the investigation allowed the accused to be represented by a Pleader to argue the points which arose in the case and to put in a detailed statement of the points and the facts upon which the defence relied and then dismissed the complaint:

Held, that the procedure adopted by the Magistrate was quite inconsistent with the scheme of the Criminal Procedure Code, and that although it was discretionary with the High Court to set aside or not the order of dismissal in such a case, the order must be set aside and the matter must go back to a different Magistrate for disposal in accordance with law. C BALAI LALL MOOKERJEE *v.* PASHUPATI CHATTERJEE, 17 CR. L. J. 396; 21 C. W. N. 127 **828**

——— Ss. 203, 437—*Dismissal of complaint—Order for further enquiry by District Magistrate, grounds for—Possibility of conviction on further enquiry—Landlord and tenant—Removal of crops by tenant—Decision by Revenue Court, whether evidence at criminal trial—Questions of civil nature—Penal Code (Act XLV of 1860), s. 379—Madras Estates Land Act (Mad. I of 1908), ss. 90, 212.*

An order of dismissal passed under section 203, Criminal Procedure Code, should not be set aside by a District Magistrate on the bare ground that it is possible that, on further enquiry, the accused may be convicted.

Where the accused is tried for removal of crops after the immoveable property had been distrained, under section 379, Indian Penal Code, and section 212 of the Madras Estates Land Act, the finding of a Revenue Officer under section 90 of the latter Act is not evidence for any purpose and cannot be relied on as a ground for further enquiry into the charge that was thrown out by a Magistrate under section 203, Criminal Procedure Code.

Disputes between landlords and tenants should be left to Revenue Courts and not taken up by Criminal Courts. M BAKIR ALLI KHAN SAHIB, *In re*, 17 CR. L. J. 406 **966**

——— Ss. 221, 222 **971**

——— S. 222, 234, 439—*Joinder of charges—Committal to Sessions on distinct charges—Form of order—Joint trial, illegality of—Sessions Judge, discretion of, to try separately—High Court, jurisdiction of, to revise the committal order—Revision.*

A Magistrate ordered that the accused do stand his trial before the Sessions Court on three distinct charges of breach of trust and of falsification of accounts in respect of each breach of trust. The accused moved the High Court in revision to quash the commitment on the ground that he could not be tried at one and the same trial for six charges:

Held, that the order was not materially defective as the charges were distinctly specified and that it would be premature for the High Court to interfere with it at that stage as the Sessions Judge could try separately each of the charges. If a joint trial on all the six charges was intended, it was illegal and opposed to sections 222 and 234, Criminal Procedure Code. M KRISHNAMURTHI AYYER, *In re*, (1916) 2 M. W. N. 179; 17 CR. L. J. 369 **801**

——— S. 223 **971**

——— S. 234 **801**

——— Ss. 237, 238, 423, 439, 537—*Appellate Court, powers of, to alter finding—Omission to frame charge, on which altered finding to be given, effect of—Revision, whether ground for—Opium Act (I of 1878), s. 9 (c), (f)—Conviction under s. 9 (c), alteration of, by Appellate Court into one under s. 9 (f)—Legality—Prejudice to accused—Possession of opium on behalf of master—Offence.*

An Appellate Court has unqualified power to alter the finding of the trial Court on appeal while maintaining the conviction, and its omission to frame a charge on which it gave its altered finding and call on the accused to meet it will not render its proceedings illegal unless the accused was prejudiced by the omission.

An omission to frame a charge is not a ground for revision unless there has been consequent miscarriage of justice.

Where the master is himself not entitled to be in possession of opium, the servant cannot plead possession on behalf of the master to a charge under section 9 (*c*) of the Opium Act.

Where a conviction under section 9 (*c*) of the Opium Act was altered by the Court of Appeal into one under section 9 (*f*) of the Act taken with section 114, Indian Penal Code, and no charge was framed under the latter section, but the conviction and sentence of the trial Court were maintained:

Held, that there was no case for interference by the High Court, as the accused was not misled in his defence and no miscarriage of justice was caused by the failure to frame a charge, the facts to be proved having been disclosed in the trial under section 9 (*c*) of the Opium Act. M MANNAR KRISHNA CHETTY, *In re*, (1916) 2 M. W. N. 267; 4 L. W. 373; 17 CR. L. J. 384 **816**

——— S. 238 **816, 984**

——— S. 250—*Compensation, award of—Statement made at Police enquiry, whether 'complaint.'*

A statement made by a person at a Police enquiry, which results in the institution of criminal proceedings against another, is not a 'complaint' made by him within the meaning of section 250, Criminal Procedure Code, when the case is not instituted either on his complaint or on information given by him but as a result of enquiry by the Police. PAT SARJUG PRASAD SINGH *v.* EMPEROR, 1 P. L. J. 106; 17 CR. L. J. 336 **512**

——— Ss. 250, 537—*Order awarding compensation whether can be made after order of discharge—Failure to embody order in original judgment—Irregularity—Magistrate, whether can make provisional order of imprisonment.*

An order awarding compensation must, as a rule, be part of the original judgment directing the discharge of the accused and before the order of discharge is read out, the Magistrate should make up his mind to call upon the complainant to pay compensation. But there is nothing in section 250 of the Criminal Procedure Code to show that the levy cannot be made after the order of discharge.

Failure to embody an order awarding compensation to the accused in the original judgment is merely an irregularity curable by section 537 of the Criminal Procedure Code.

Section 250 of the Criminal Procedure Code does not give any power to the Magistrate to order imprisonment in default of payment of fine. It is only on the failure of the attempt to recover the amount

CRIMINAL PROCEDURE CODE—contd.

awarded as compensation that the Magistrate can pass an order directing the imprisonment of the complainant.

Where, therefore, in an order discharging the accused the Magistrate made a note to the effect that the complainant would be called upon to show cause why he should not pay compensation and after giving the complainant time to answer the charge, the Magistrate came to the conclusion that he should be directed to pay compensation and called upon him to do so or undergo imprisonment in default:

Held, (1) that the proceeding awarding compensation did not contravene the provisions of section 250 and was not illegal;

(2) that even if it was regarded as a separate order contravening section 250, the defect merely amounted to an irregularity which did not prejudice the accused and was cured by section 537;

(3) that the provisional order for imprisonment was beyond the jurisdiction of the Magistrate. M DHANUKODI ASARI *v.* MUTHUSWAMY AIYAR, 4 L. W. 32; (1916) 2 M. W. N. 159; 17 CR. L. J. 314 490

——— — S. 254 826

——— — Ss. 289, 292—*Right of reply, when accused merely tenders as evidence documents identified by prosecution witnesses in cross-examination.*

Section 292, Criminal Procedure Code, must be read in connection with section 289 and must be construed accordingly. When so read, the right to reply which is given by section 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded.

The prosecution has not a right of reply when the accused do not adduce evidence in the sense above mentioned but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution. C EMPEROR *v.* SREENATH MAHAPATRA, 43 C. 426; 20 C. W. N. 976; 17 CR. L. J. 423 983

——— — S. 292 983

——— — Ss. 337, 339—*Approver, prosecution of, on forfeiture of pardon—Procedure.*

If the trying Magistrate thinks that an approver has not made a full disclosure of the facts and that he should forfeit his pardon, he must discharge him at the termination of the trial; he has no power to direct his prosecution. He can only record his opinion that the approver has wilfully concealed something essential or given evidence which is positively false, and let the District Magistrate take action to prosecute the approver under section 339, Criminal Procedure Code, if he thinks fit. If so advised, the Crown may proceed against him for the offence in respect of which he was given a conditional pardon. When put on his trial for that offence he may plead to a competent Court his pardon in bar, and that is a plea that the Court is bound to hear and decide upon before going further and putting him on his defence. If he be committed to the Sessions, he can plead it again in the Sessions Court and the Judge will decide it before putting him on trial for the substantive offence. L B EMPEROR *v.* NGA PO KET, 17 CR. L. J. 337 513

CRIMINAL PROCEDURE CODE—contd.

——— — Ss. 337 (3), 339—*Pardon, tender of, to approver—Forfeiture of pardon—Wilfully concealing anything essential or giving false evidence—Absconding before cross-examination, effect of.*

Section 339, Criminal Procedure Code, must be construed strictly, and a person to whom pardon has been tendered can only be tried for the offence in respect of which he was pardoned, if it is shown that he has forfeited the pardon either (*a*) by wilfully concealing anything essential, or (*b*) by giving false evidence.

Absconding before conclusion of cross-examination does not amount to wilful concealment. L B MAUNG PO HLA *v.* EMPEROR, 9 BUR. L. T. 76; 17 CR. L. J. 391; 8 L. B. R. 357 823

——— — S. 339 513, 823

——— — S. 342 492

——— — S. 345 515

——— — S. 350 (1)—*Transfer of part-heard case—Right of accused to have prosecution witnesses re-summoned.*

The provisions of section 350, Criminal Procedure Code, are applicable to a case which, after being part-heard, comes upon the file of another Magistrate who exercises jurisdiction by transfer under section 528, and it is necessary that the proviso to section 350 should be given effect to and the accused made acquainted with the fact that he is entitled to have the prosecution witnesses re-called. U B BARACHI *v.* EMPEROR, U. B. R. (1916) II, 108; 17 CR. L. J. 401 961

——— — S. 367—*Misdirection to Jury, what amounts to—Heads of charge, principles applicable, to preparation of—Functions of Judge and Jury—Cross-examination, scope of, whether can be restricted by Court.*

Mere non direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively.

A Judge is not required under section 367, Criminal Procedure Code, to write out *in extenso* the charge which he addresses to the Jury, but he should set forth in writing the headings of his charge; and such headings afterwards form part of the record of the proceedings in the trial before him. As the term "heads of charge" itself implies, the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law, and the object of those heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the Jury, and the nature of his summing up of the evidence, not only for the prosecution but also for the defence. The headings of charge do not purport, nor are they intended by Statute, to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. They should only record, in an intelligent form and with sufficient fullness, the points of law and the directions given by the Judge to the Jury.

But in considering the language used, one must not parse the headings of charge as if it were an indictment. The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the Judge gave to the Jury, and that they were right and proper, then there can be no ground of complaint, even though the phrascology and form adopted might be open to question.

It is the sole function of the Judge to direct the Jury on all matters of law and the Jury must take their direction in law from the Judge. The Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. **PAT** EKNATH SAHAY *v.* EMPEROR, 17 CR. L. J 353; 1 P. L. J. 317 657

——— Ss. 408 (b), 30—*Sentences by a Magistrate with powers under s. 30—Accused sentenced to two years' imprisonment, appeal by—Appeal, forum of, where co-accused sentenced to five years.*

A Magistrate of the first class invested with special powers under section 30, Criminal Procedure Code, sentenced one of the accused to two years' rigorous imprisonment and the other accused to five years' rigorous imprisonment. The former appealed to the Sessions Judge, who declined jurisdiction:

Held, that the appeal lay to the Chief Court under section 408 *(b)*, Criminal Procedure Code. **P** AHMAD KHAN *v.* EMPEROR, 17 Cr. L. J. 299: 122 P. L. R. 1916; 5 P. R. 1916 Cr. 171

——— S. 423 515, 816, 988

——— Ss. 423, 428, 537—*Appellate Court, remand by, of case for re-trial with direction to record additional evidence and give decision after consideration of original and fresh evidence - Illegality—Prejudice to accused—High Court—Revision.*

On appeal against a conviction by a Sub-Divisional Magistrate under sections 147 and 148 of the Penal Code, a Sessions Judge set aside the conviction and sentence and ordered a re-trial, with a direction that the Magistrate should take further evidence and should record a fresh decision on the evidence already recorded and also on the additional evidence. After remand the Magistrate recorded additional evidence, but after considering the entire evidence on the record again convicted the accused and passed the same sentence as before On appeal against the second conviction by the Magistrate, the Sessions Judge, at the request of both parties, discarded the additional evidence but confirmed the conviction on the evidence originally recorded:

Held, per *Chamier, C. J.*—that it was not necessary for the High Court to order a re-trial by the Magistrate even if the order of the Sessions Judge was not merely irregular but illegal. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence and the Sessions Judge had already recorded his findings on the original evidence only, it was unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment.

Per *Jwala Prasad, J.*—The first order of the Sessions Judge, in appeal, setting aside the convictions and sentences, ordering a re-trial of the accused, and directing the Magistrate to take additional evidence but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was wholly illegal; but as the accused had not been prejudiced in any way by such order, a re-trial was, under the circumstances of the case, not necessary. **PAT** GAJANAND THAKUR *v.* EMPEROR, 1 P. L. J. 99; 17 CR. L J. 332 508

——— S. 424—*Appeal—Dismissal—Judgment.*

A District Magistrate disposed of an appeal with the following judgment: "No one appears. I see no reason to interfere. I dismiss the appeal:"

Held, that the judgment was not in conformity with the law, inasmuch as it did not disclose whether or not the Magistrate had examined the evidence as it was clearly his duty to do. **A** RAM BHAROSE *v.* EMPEROR, 14 A. L. J. 327; 17 CR L. J. 353 657

——— S. 428 508

——— S. 435 801

——— S. 436—*Order of discharge—Revision by District Magistrate—Committal to Court of Session on grounds of expedency—Illegality.*

A District Magistrate, acting under section 436, Criminal Procedure Code, set aside an order of discharge of a Police Officer on a charge of extortion, on the ground that the charge related to the conduct of a Police Officer and that it was desirable that the case should be tried by the Court of Session:

Held, that it was incumbent on the District Magistrate to record his own finding on the evidence before committing the case to the Court of Session and that the gravity of the charge was not a sufficient reason for interfering with the lower Court's order of discharge. **PAT** SRIKISHEN LAL *v.* EMPEROR, 1 P. L J. 97; 17 CR. L J. 330 506

——— S 437 966

——— S. 437—*Order of discharge—Revision—Misapprehension of evidence Power of Court of Revision to order fresh inquiry—Procedure—Notice to accused.*

The revisional jurisdiction conferred by section 437, Criminal Procedure Code, in cases of orders of discharge, may be exercised on the ground of misapprehension of evidence by the lower Court, and the Court of Revision is justified in ordering a re-consideration of the evidence already taken.

Before an order under section 437 is made, it is not obligatory to give notice to the accused. **S** BEGRAJ BASHARAM *v.* EMPEROR, 10 S. L. R. 68; 17 CR. L J. 349 525

——— S. 439 524, 801, 816, 826, 977

——— Ss. 439, 423—*Discharge, order of, by Presidency Magistrate - High Court's power of revision.*

The High Court has power, under section 439 read with section 423, Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case.

CRIMINAL PROCEDURE CODE—contd.

When one of four accused persons jointly charged with an offence was discharged by a Presidency Magistrate and on appeal by the others who were convicted, the High Court directed his evidence to be taken, and on such evidence being taken and considered the appeal was dismissed and a Rule was issued upon that person to show cause why the order of discharge should not be set aside and the case against him inquired into again:

Held, that although the High Court was not deprived of its jurisdiction to revise the order of discharge by the mere fact of calling upon the accused to give his evidence in the case, yet under the circumstances of the case the order of discharge should not be set aside and the case against him should not again be inquired into. **C** EMPEROR *v.* NANDA GOPAL ROY, 20 C. W. N 1128; 17 CR. L. J. 428 988

——— S. 433—*Revision, limitation for—Practice of Calcutta High Court.*

The well-known practice in the High Court of Calcutta is that an application for criminal revision must be made within sixty days from the date of the order complained of and to this period an addition of the time which is necessary for obtaining copies is allowed. This is not an inflexible rule, and in exceptional circumstances it might be departed from. **C** KHETRA MOHAN GIRI *v.* DARPA NARAIN GIRI, 20 C. W. N. 1170; 17 CR. L. J 419 979

——— Ss. 439, 345, 423, *scope of—Compoundable offence—High Court—Power of, in revision, to sanction composition of offence—Interpretation of Statutes.*

Section 439 of the Criminal Procedure Code, which defines the powers of the Court of Revision, does not confer on it the power to sanction the composition of offences, and a Revisional Court cannot, therefore, sanction the composition of a compoundable offence after conviction of the accused.

An order for composition is in no sense a consequential or incidental order within the meaning of section 423 (*d*), Criminal Procedure Code.

When a special provision, obviously exhaustive in its scope, has been made for a special topic, as in section 345, Criminal Procedure Code, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in section 423 (*d*).

Section 439, Criminal Procedure Code, empowers a Court of Revision, not to exercise all the powers of an Appellate Court, but only such powers as are conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428.

The criminal revisional jurisdiction of a High Court is not included in its criminal appellate jurisdiction, although its civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction. **C** AKSHOY SINGH *v.* RAMESWAR BAGDI. 20 C. W. N. 1071; 17 CR. L. J. 339 515

——— Ss. 443, 446 165

——— S. 476, *nature of proceedings under—Preliminary inquiry—Examination of accused—Thumb-impressions—Evidence Act (I of 187?), s. 73.*

Proceedings in inquiries under section 476, Criminal Procedure Code, are judicial procedings and the person against whom they are directed is in the position of an accused person.

CRIMINAL PROCEDURE CODE—contd.

Therefore, the examination of such a person as a witness in the course of such proceedings is *ultra vires.*

He can only be examined under section 342, Criminal Procedure Code and cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution, nor can he be compelled to make any thumb-impressions under section 73 of the Evidence Act. An Expert's opinion regarding such impressions would also be inadmissible. **L B** MAUNG PO NYUN *v.* MUTU KURPEN CHETTY, 17 CR. L. J. 316 492

——— S. 476, *scope of—Person not party to proceeding nor examined as witness, whether can be sent to nearest Magistrate—Penal Code (Act XLV of 1860), s. 196—Using evidence known to be false, what constitutes—Abortive attempt to secure medical certificate, whether offence under s. 196.*

A Magistrate has no jurisdiction to send a person, who has not been a party to any proceedings before him and who has not been examined as a witness in a case, to the nearest Magistrate under section 476 of the Criminal Procedure Code. Nor can he direct an enquiry under that section into an offence under section 161, Indian Penal Code, as that section is not mentioned in section 195, Criminal Procedure Code.

In order to constitute an offence under section 196, Indian Penal Code, there must be some evidence *in existence* which the party is either using or attempting to use. A mere attempt to get a medical certificate, which is refused, does not fall under section 196. **M** KATARI VEERANNA, *In re*, 17 CR. L. J. 388 820

——— S. 488—*Maintenance, order of, whether determined by refusal of wife to comply with decree of restitution of conjugal rights obtained by husband.*

A Magistrate ought to treat an order of maintenance made by him as determined, if the wife fails to comply with a decree for restitution of conjugal rights obtained by the husband and refuses to live with him. **L B** MAUNG THA U *v.* MA MYA KHIN, 9 BUR. L. T. 162; 17 CR. L. J. 412 972

——— S. 514—*Forfeiture of surety-bond in default of accused's appearance—Suicide by accused—Mistaken admission that accused was alive, effect of.*

On the death of an accused person by suicide before the date fixed for his appearance, the sureties are discharged from liability, and they cannot be penalised in the forfeiture of their bonds by reason of their mistaken admission that he was alive

Per *Beaman, J.*—The object of the surety-bonds is, as far as possible, to ensure that an accused person shall not evade justice in the ordinary sense, that is to say, by flying the country or the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts. **B** RAMA BAPU PUJARI, *In re*, 18 BOM. L. R. 683; 17 CR. L. J. 393 825

——— S. 537 490, 508, 816, 974

CRIMINAL PROCEDURE CODE—concld.

——— S. 562, *scope of—Offence of manufacturing illicit liquor—Sentence—Punjab Excise Act (I of 1914), s. 61.*

Section 562 of the Criminal Procedure Code is intended to apply to those offenders (especially youthful ones) who, without being persons of depraved character, may, on occasion, succumb to sudden temptation.

The view, sometimes expressed, that, because an excise offence is a *malum prohibitum* and not a *malum in se*, the culprit should be mortified in pocket rather than in person, is wholly incorrect.

The accused were convicted under section 61 of the Excise Act, 1914, for the offence of manufacturing liquor contrary to law and being in possession of it and were sentenced to four months' rigorous imprisonment and a fine of Rs. 50 each. On appeal the Sessions Judge reduced the sentences, on the ground that this was appellants' first offence, that the principle of section 562, Criminal Procedure Code, applied and that appellants were father and son. The Government applied for enhancement of the sentences:

Held, that as the offence of manufacturing illicit liquor implied a good deal of preparation and as it was mostly done with the intention of selling to others it could not be said to be done in consequence of succumbing to sudden temptation; that when a man was found for the first time by the Police manufacturing illicit liquor, he had probably done it at least a dozen times before; and that as it deprived the Government of revenue, besides demoralising the people, deterrent sentences were necessary in such cases;

(2) that the Legislature intended that substantial terms of imprisonment should be awarded in these cases, as was shown by the fact that the maximum term of imprisonment was raised by section 61 of the present Excise Act. P EMPEROR *v.* SUJAN SINGH, 19 P. R. 1916 CR.; 41 P. W. R. 1916 CR.; 144 P. L. R. 1916; 17 CR. L. J. 310 486

——— SCH. III, CLS. III AND V 165

CRIMINAL TRIBES ACT (III OF 1911), S. 23—*Punishment, enhanced—Accused being member of criminal tribe at subsequent and not at previous conviction, effect of.*

Section 23 of the Criminal Tribes Act applies to the case of a previously convicted accused who is a member of a notified criminal tribe at the time of his present conviction, although his tribe had not been notified as such at the time of his previous conviction. O EMPEROR *v.* MANDAI, 3 O. L. J. 265; 17 CR. L. J. 392 824

CROSS-EXAMINATION, scope of, whether can be restricted by Court 657

CROWN GRANTS, construction of 254

———, rights of, in increase of land by sea 902

CUSTOM. *See* BUDDHIST LAW; CIVIL PROCEDURE CODE, s. 9.

——— and usage of Calcutta Gunny Market 3

———, certificate on point of—Evidence, conflicting 884

CUSTOM—contd.

———*—ABADI—Succession to non-proprietor—Right of collaterals—Burden of proof—Occupation by common ancestor, proof of, if material.*

Where a non-proprietor in possession of a house in the village *abadi* dies, his near collaterals are, in the absence of a special custom to the contrary, entitled to possession as against the proprietors. It is not necessary to prove that a common ancestor occupied the house originally. P KALA *v.* HASHIM, 63 P. W. R. 1916; 127 P. L. R. 1916 291

———— ADOPTION—Brahmans *of* Mauza *Nurpur*, Tahsil *Garhshankar*, *District Hoshiarpur—Adoptee, whether entitled to succeed collaterally in adoptive family—Decision in previous suit, whether operates as* res judicata *against nominal defendant—Civil Procedure Code (Act V of* 1908), *s.* 11.

A decision arrived at in a previous suit cannot operate as *res judicata* against a person who was in that suit merely a nominal defendant.

A person who has been formally adopted by *Brahman* of *Mauza* Nurpur, Tahsil Garhshankar, District Hoshiarpur, is entitled to succeed collaterally in the adoptive family. P GOKAL CHAND *v.* MILKHI, 65 P. R. 1916; 157 P. L. R. 1916 543

——— —ALIENATION *made 12 years before suit—Necessity—Standard of proof—Speculative suit.*

In a suit by a remote reversioner to challenge a sale made by the last male owner, it appeared that there were several other reversioners who did not attack the alienation and that the vendor's brother had acquiesced in the sale. The vendees contended that the sale had been forced by hard times. It was found that the years before and after the date of the alienation were exceedingly hard years of draught and scarcity:

Held, (1) that the vendor's allegation was *prima facie* correct, and that considering that the suit was filed 12 years after the alienation a very high standard of proof of necessity could not be insisted on;

(2) that as the vendor's brother had two sons still unmarried, the suit was speculative and deserved to fail on this ground also. P FATTEH KHAN *v.* BAZ KHAN, 87 P. L. R. 1916; 165 P. W. R. 1916 875

———— ———Pathans *of Mamanpur, Attock District, powers of—Distinction between gift and bequest —Appeal, new question whether can be raised for first time in.*

Among *Pathans* of Mamanpur in the Attock District, there is no restriction upon alienation by a male proprietor.

There is no distinction in principle between a power to gift and a power to bequeath.

Where the parties in a case go to proof solely on the question whether the land in suit is ancestral and whether a right of alienation exists, the plaintiff cannot be allowed to raise an altogether new contention for the first time in appeal. P AKBAR KHAN *v.* KHAN BAHADUR, 69 P. R. 1916; 120 P. W. R. 1916; 131 P. L. R. 1916 335

CUSTOM—contd.

———IMPARTIBLE ESTATE—*Custom of primogeniture—Estate granted by Maharaja of Chota Nagpur—Badla estate*—Putra putradi, *meaning of—Evidence—Custom, proof of.*

The Badla estate in the Chota Nagpur District is governed by a custom whereby it descends as an impartible estate to the eldest male heir by lineal descent. This custom prevails in all the estates granted by the Maharaja of Chota Nagpur to his relations.

Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applies with equal force to another branch of the same family.

Per *Atkinson, J.*—The words *putra putradi* used in a grant convey an absolute perpetual estate in the lands descendible from generation to generation coupled with full power of alienation, though these words of limitation may be controlled by custom limiting their scope and operation.

Custom conclusively proved and established can override or modify the ordinary law.

Per *Chapman, J.*—It is quite impossible to say that in 1765, before the arrival of the British jurisdiction in the forests of Chota Nagpur, the words *putra putradi* had acquired a technical significance; the Privy Council decisions dealing with this expression were in respect of Wills prior to 1868, by which time the expression acquired a technical significance. **PAT** JAI GAJENDRA NATH SAHI DEO *v.* LAL MATHURLAL NATH SAHI DEO, 20 C. W. N. 876; 1 P. L. J. 109 **383**

———NECESSITY—*Mortgage, suit on—Proof of necessity after 30 years—Part of consideration money shown to be for necessity—Mortgagee entitled to hold land as security—Adjournment of case on payment of costs—Non-payment, effect of.*

Where in a suit by a mortgagee for possession of the mortgaged land, the plea of want of legal necessity was raised but it appeared that a fair proportion of the amount was for such necessity:

Held, (1) that the plaintiff could not be expected to prove details of transactions some thirty years old, specially when the mortgage was registered and the mortgagor was literate;

(2) that he was at any rate entitled to hold the land as security for such amount as he had shown to be for valid necessity.

When a suit is adjourned on payment of costs and such costs are not paid, the suit is liable to be dismissed. **P** RAM CHAND *v.* ALI AKBAR, 90 P. W. R. 1916 **534**

OR PERSONAL LAW—Bhandari Khatris *of Jalalabad, Amritsar District—Custom, proof of—Presumption in case of high caste Hindus.*

Each case of alleged custom has to be decided primarily upon the proof actually adduced in that case and not upon *a priori* grounds.

Where the parties concerned are high caste Hindus not depending for their subsistence on agriculture, the presumption in the first instance is in favour of the applicability of Hindu Law to the exclusion of custom.

CUSTOM—contd.

Bhandari Khatris of *Mauza* Jalalabad, Amritsar District, are, in matters of succession, governed by ordinary agricultural custom, and not by their personal law. **P** SHIB DIAL *v.* MATHRA DAS, 61 P. R. 1916; 161 P. W. R. 1916 **561**

———PRE-EMPTION—Wajib ul-arz—*Mortgage—Construction of document*—Intiqal, *meaning of.*

A document provided that the executants would pay annually the interest and in default of payment of interest for two years, the creditors shall have the right, without waiting for the expiry of the time fixed, to file suit and to recover their due from the property mortgaged (*makbuza*). The *wajib-ul-arz* of the village recorded a right of pre-emption in case of a transfer of any kind to co-sharers in a certain order and also provided that in case of a mortgage, "if the owner of the property be not capable of redeeming or do not wish to redeem, then *hissadar karibi, etc.*, will have power to take the property for himself by depositing the mortgage money together with the costs. If any *hissadar* of *arazi* or *hissa* take any additional sum of money from the creditor to whom the property is mortgaged by making a *maqful* of the same property, then the terms of the mortgage bond will apply to the said debt also:"

Held, (Richards, C. J., dubitante) that the document did not purport to create a mortgage.

Per *Richards, C. J.*—The word *intiqal* is a very general word and includes all classes of transfers.

An extract from a *wajib-ul-arz* is evidence to be taken into consideration in considering the issue as to whether or not a custom of pre-emption exists; the record is supposed to be the record of an old custom existing for a long time. But the mere production of the extract from the *wajib-ul-arz* is insufficient to prove the existence of the custom which it is necessary for the plaintiff to prove in order to entitle him under the circumstances of the case to be substituted for the defendant. **A** KHURSHED ALI *v.* ABDUL MAJID, 14 A. L. J. 441; 38 A. 361 **510**

———SUCCESSION—*Custom* versus *Hindu Law—Sodhi Khatris of village Samalsar, Tahsil Moga, Ferozepore District—Daughter or nephew.*

In matters of succession the *Sodhi Khatris* of village Samalsar, Tahsil Moga, Ferozepore District, follow Hindu Law and not agricultural custom.

Therefore, a daughter and daughter's son succeed to the ancestral immoveable property of a male *Sodhi Khatri* proprietor of Samalsar in preference to his nephews and grandnephews. **P** HARCHAND SINGH *v.* MUNSHI RAM, 143 P. W. R. 1916; 142 P. L. R. 1916 **471**

——— ——— Jats *of Kharar Tahsil, Ambala District—Daughter* versus *collaterals—Property non-ancestral—Burden of proof*—Res judicata, *chance remark in judgment in previous case, whether operates as.*

In a dispute with regard to succession to alleged ancestral property, the onus is on those who allege the property to be ancestral and the circumstance that they happen to be defendants in the case does not shift the onus on to the plaintiff.

CUSTOM—concld.

Where, therefore, the daughters of one *H*, a *Jat* of *Mauza* Rurki in the Kharar Tahsil of the Ambala District, sued to establish their claim to succeed to their father's estate and the suit was contested by the deceased's collaterals on the ground that the property was ancestral and that they had a preferential right of succession:

Held, (1) that the onus was on the collaterals to prove that the property was ancestral;

(2) that a mere chance remark in the judgment in a previous case brought to contest an alienation by the deceased's widow did not operate as *res judicata* when the matter was not put in issue and there was no proper finding on it;

(3) that as the collaterals had failed to establish any special custom whereby daughters were excluded by collaterals in the matter of succession to non-ancestral property, the collaterals were excluded by the daughters. P DEVI DITTA *v.* INDAR DEVI, 56 P. R. 1916 542

DAMAGES. *See* VENDOR AND PURCHASER; RIPARIAN RIGHTS.

———, rate of, when to be ascertained 203

———, suit for—Breach of contract—Proof 625

———, suit for, if lies when title impaired and possession not actually lost—Measure of damages 789

DECLARATORY SUIT. *See* LIMITATION ACT, ART. 120; SPECIFIC RELIEF ACT, s. 42.

DECREE, adjustment of, where minor is party, whether requires sanction of Court 70

——— affirmed in appeal, amendment of—Jurisdiction of Trial Court 891

———, assignment of—Execution, application for, by assignee—Assignee *benamidar* for judgment-debtor—Proof of title 621

———, awarding larger relief than in plaint, legality of 106

———, whether binding on a person not represented in the suit 124

——— of Civil Court, effect of, in proceedings under s. 145, Criminal Procedure Code 801

——— directing sale of property reserving rights of prior mortgagee, whether capable of execution 152

——— *passed after death of plaintiff, effect of.*

A decree passed in favour of a party after his death is a nullity. L B MA MIN THIN v. MAUNG PO WIN 438

———, scope of 106

———, suit to set aside on ground of fraud—Proof 847

DEFAMATION. *See* PENAL CODE, s. 499.

DHARMAKARTA, power of 88

DIHDAR, definition of—Acknowledgment by taluqdar, *effect of—Suit by superior proprietor—Defendant's under-proprietary rights acknowledged by previous proprietors—Estoppel,*

DIHDAR—concld.

A *dihdar* was generally a person to whom a certain portion of the property sold was assigned by the vendee for his subsistence.

A grant can be presumed from an acknowledgment by the *taluqdar*.

Where in a suit by the superior proprietor of the village in which the plots in dispute were situated, it appeared that the defendant had been in the enjoyment of his *dihdari* rights within the knowledge of the previous superior proprietors and had been mortgaging the same for more than 12 years prior to the suit:

Held, that it was no longer open to the plaintiff to question the defendant's under-proprietary rights. O KISHUN *v.* SHYAM SUNDAR, 19 O. C. 27 441

DISCHARGE, order of, by Presidency Magistrate—High Court's power of revision 988

DISPOSSESSION from streamlet, what amounts to—Temporary disturbance of possession, effect of 916

DIVORCE ACT (IV OF 1869), Ss. 3 (1), (2), (3), 10 *—Petition for dissolution of marriage—District Court, jurisdiction of.*

Where in an application for dissolution of marriage it appeared that the petitioner and his wife last lived and cohabited together at Bangalore, that the respondent did not reside and had not for many years resided, within the Ambala District and that at the time of the institution of proceedings she was not residing at any place within the Punjab:

Held, that having regard to the definitions of the terms "High Court," "District Judge" and "District Court" in section 3 of the Divorce Act, the District Judge of Ambala had no jurisdiction to try and determine the case. P MORTON *v.* MORTON, 76 P. R 1916; 122 P. W. R. 1916; 1:9 P. L R. 1916 367

——— S 10 367

DOCUMENT, construction of *See* REGISTRATION ACT s. 17 (*b*).

———, construction of—Mortgage—Cash consideration—Repayment in kind in monthly instalments, stipulation for, effect of 111

———, *construction of—Mortgage—Sale and agreement for re-purchase, when amounts to mortgage—Burden of proof.*

A sale of property followed by an agreement for its re-purchase within a specified time may be a species of mortgage, but the onus of proving that the transaction is a mortgage lies on the party asserting it. L B MAUNG KYA HNIN *v.* MAUNG KO KYAW 336

———, *construction of—Partnership—Agreement of partnership defining rights of parties in lands and water-course, construction of—Civil Procedure Code (Act V of* 1908*), O. VI, r.* 17*—Amendment of pleadings, when to be allowed—Party not acting* bona fide, *whether entitled to amendment.*

On 13th May 1889, *J*, a Muhammadan owning a water-course and lands watered thereby, entered into an agreement with two Hindus, *B* and *T*, whereby, in consideration of the latter supplying money every year for cultivation purposes on certain terms, the former made them partners for ever in the lands and the water-course to the extent

DOCUMENT—concld.

of one-third. The important clause ran as under: "I, *J*, give in writing that in Makan Bhatiani and Khajwi there is a Karia which takes its supply from Dhoro Naro. In all the rights and interests of the lands within the limits of this Karia, and in this Karia, I take *B* and *T* as partners with myself having one-third share. From this day, in this Karia and all the rights and interests of the land, one-third share of the above Hindus is and shall remain in force and there are two shares of mine and will remain as such. We become, and shall remain, bound and responsible with each other, according to the following terms."

On 22nd May, 1891, a second document was executed by *J* and one *D* (another Muhammadan) in favour of *B* and *T* as under:—"We, *J* and *D*, give in writing that there is land measuring 350 and 1,000 acres in our possession. In all our rights and interests of this land and of the Karia and in all its branches *B* and *T* have one-third share by a partnership deed dated 13th May 1889, and they are our partners. Now in all the land which we have received this year we have made *B* and *T* third-share partners with ourselves. The terms of our previous deed shall be considered cancelled and we have settled the following terms."

The partnership continued for 20 years, and in the meantime *J* and the two Hindus *B* and *T* died. In 1913, the representatives of the Hindus brought the present suit, seeking partition and possession of one-third share of the immoveable property included in the documents above recited:

Held, that the documents did not effect any absolute transfer of the one-third share in the lands and the Karia to the Hindus, but created a partnership whereby the lands and the Karia became partnership property; consequently the suit, as framed, was not maintainable;

that the suit should have been one for dissolution of partnership and for accounts of a dissolved partnership, as, the partnership not being for any definite term, it was open to either party to terminate it;

that amendment of the plaint could not be allowed, as it would change the cause of action and help the plaintiffs who had not acted in good faith. **S** BILAWAL *v.* GIANMAL, 10 S. L. R. 58 652

———, construction of, whether sale or mortgage 210

———, execution of, what amounts to 56

———*Material alteration—Alteration to carry out original intention of parties, effect of.*

An alteration in an instrument made in good faith by one of the parties to it, without knowledge of the other, to carry out the original intention of the parties does not vitiate the instrument.

Therefore, an alteration made by a mortgagee in a registered mortgage-bond by inserting the words "per cent." at the place where the rate of interest was stated to be "Re. 1 per mensem," does not make the mortgage unenforcible, if the original intention of the parties was that interest was to be paid at the rate of Re. 1 per cent. per mensem. **C** ANANDA MOHAN SAHA *v.* ANANDA CHANDRA SAHA 182

——— OF TITLE, validity of, Civil Court whether can adjudicate upon 446

EASEMENT, interference with. *See* INJUNCTION.

———*Right to discharge surplus water—Natural right Right to obstruct, acquisition of, by prescription—Nature of proof—Limitation Act (IX of 1908), s.* 26.

A plaintiff seeking to enforce a right to discharge surplus water through a watercourse on the existence of an easement must prove the acquisition of the easement under section 26 of the Limitation Act. He will not, however, be precluded from urging as an alternative case that he has, apart from the easement, a natural right to the discharge, provided the matter was brought before the Trial Court in some form, in which case, on proof of the right, it is open to the defendant to establish the acquisition of a right to dam the flow under the said section. **L B** MAUNG THA TE *v.* KO SHWE BYAN 394

EASEMENTS ACT (V OF 1882), Ss. 15, 17—*Right of part owner of dominant heritage to use water—Long user for over statutory period—Prescriptive title, acquisition of—Use of water for joint cultivation—Cessation of joint cultivation, whether affects easement.*

There is no substantial difference between the English and Indian laws as to the acquisition of a prescriptive title to water and the inferences and presumptions deducible from long user of the same.

If there has been long-continued user of water in a tank or channel and the enjoyment is inconsistent with any other inference than that it has been as of right, Courts will infer a title by prescription.

When user is proved the presumption is that it is of right until the contrary is shown.

Plaintiffs and defendants jointly owned plot *A*, each being entitled to a definite but unascertained share therein. They jointly cultivated betel in it by using water which flowed into it from tank *B* through channels *C* and *D*. The site of tank *B* and channel *C*, belonged to defendants and channel *D* belonged in part at least to plaintiffs. It was in evidence that plaintiffs had been taking water from *B* to the land *A* for 60 or 80 years:

Held, (1) that plaintiffs had acquired a prescriptive right to the water of the tank and not a mere license for its use;

(2) that plaintiffs' joint user with defendants did not affect the nature of the right, which was a right over the servients heritage acquired by the plaintiffs as part owners of plot *A*, and that, consequently, the cessation of their joint cultivation would not extinguish the easement. **M** SWAMINATHA MUDALY *v.* VELU MUDALY, 4 L. W. 128; (1916) 2 M. W. N. 192 749

——— S. 17 749

EJECTMENT. *See* AGRA TENANCY ACT, S. 177 (*e*); LANDLORD AND TENANT.

———Lambardars, *two—Oudh Rent Act (XXII of 1886), s* 26 (2).

Where there are two *lambardars* in a village, and there is no sub-division of land between them, any one of them is alone entitled to eject the tenants of the village, inasmuch as section 126 (2) of the Oudh Rent Act gives extensive powers to a *lambardar*. **U P B R** RIKHI *v.* BADRI SINGH, 3 O. L. J. 251 760

———*Suit for possession—Decree—Decree not executed within time—Second suit for possession, maintainability of—Merger, principle of, applicability of,*

EJECTMENT—concld.

If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but the doctrine of merger does not apply to decrees for ejectment.

The mere fact that a plaintiff obtained a decree for possession of a certain land, would not entitle him to get possession of that land in a second suit if he had never been in possession within twelve years; but if after the decree the plaintiff gets into possession, otherwise than in execution, and is dispossessed within twelve years of the second suit, he has a cause of action irrespective of the previous decree and is entitled to bring a second suit for possession, the previous decree being part of his title.

Quære.—Whether a decree-holder is entitled to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has become incapable of execution by lapse of time. **A** DHANRAJ SINGH *v.* LEKHRANI KUAR, 14 A. L. J. 709; 38 A. 509 601

———, *suit for—Proof.*

A plaintiff suing in ejectment must, in order to succeed, strictly prove his title. **PAT** ADIT NARAYAN SINGH *v.* MAHABIR PROSAD TEWARI, 1 P. L. J. 324 687

ESCHEAT—Iqrar-malikan—Mafrur, *application of.*

Where, under the terms of an *iqrar-malikan*, a house occupied by a tenant escheats to the *zemindar* if the former becomes *mafrur*, the expression *mafrur* does not apply to the case of a person who is entitled as heir to occupy the house of a deceased tenant but has never actually been in its occupation. **O** SHEO NATH *v.* SAMPAT, 3 O. L. J. 274 843

ESTOPPEL. *See* LANDLORD AND TENANT.

———Acknowledgment by *taluqdar*, effect of—Suit by superior proprietor—Defendant's under-proprietary rights acknowledged by previous proprietors 441

EVIDENCE—*Torture resorted to extract evidence—Evidence, value of—Police officers, duty of.*

Evidence obtained by torturing the deponent has no value.

The conduct of Police officers guilty of such practices condemned. **A** GOKUL SINGH *v.* EMPEROR, 17 CR. L. J. 351 527

EVIDENCE ACT (I OF 1872), S. 8 962

——— S. 10 999

——— Ss. 13, 42, 43, 90 — *Judgments not* inter partes, *recitals in, whether admissible—Scope of* s. 90.

A judgment, not *inter partes*, may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, but the recitals in the judgment cannot be used as evidence in a litigation between the parties.

All judgments are conclusive of their existence as distinguished from their truth, so every judgment is conclusive evidence, for or against all persons, whether parties, privies, or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision rendered. The law attributes unerring verity to the substantive as opposed to the judicial portions of the record.

EVIDENCE ACT—contd.

The authority of the person making a grant, the genuineness whereof is presumed by the Court under the provisions of section 90 of the Evidence Act, is not proved by that section. **C** BASI NATH PAL *v.* JAGAT KISORE ACHARJEE, 20 C. W. N. 643 298

——— Ss. 24, 8, 27—*Confession of accused, relevancy of.*

Statements made by an accused person, which are inadmissible under section 24 of the Evidence Act, cannot be made admissible by section 27, unless the person giving the information was accused of an offence and was in the custody of a Police Officer.

Where an accused person accompanies a Police Officer and points out the spot where the stolen property is hidden, it amounts to conduct, proof of which is admissible under section 8 of the Evidence Act. **U B** EMPEROR *v.* NGA AUNG BA, U. B. R. (1916), II, 114; 17 CR. L. J. 402 962

——— S. 27 962

——— S. 32 (1)—*Statement of deceased, admissibility of, as to cause of death—Transaction, one—Penal Code (Act XLV of 1860), s. 330.*

Where a person commits suicide as the result of ill-treatment received at the hands of an accused person and that treatment is the cause though not the direct cause of the death, the whole affair, ill-treatment and subsequent suicide, forms one transaction and, therefore, statements made by the deceased as to the cause of his death are admissible in evidence under section 32 (1) of the Evidence Act. **P** EMPEROR *v.* FAIZ, 20 P. R. 1916 CR; 17 CR. L. J. 438 998

——— S. 32 (2) 201

——— S. 33 52

——— S. 35 201

——— S. 35—*Birth register kept by* tapadar, *entry in, relevancy of.*

An entry in a birth register kept by a *tapadar* in the discharge of his official duty is relevant under section 35, Evidence Act. **S** GEHIMAL DAYALMAL *v.* KARMOOMAL SIROOMAL, 10 S. L. R. 38 551

——— Ss. 42, 43 298

——— S. 58, *scope of—Transfer of Property Act (IV of 1882), s. 49—Admissions in pleadings of execution or contents of documents inadmissible or invalid—Denial of liability on technical grounds—Decree, award of, on such admissions—Contract preceded by negotiations reduced to writing Unregistered document, admissibility of, to prove prior oral contract.*

The Courts should not act on admissions made by parties in their pleadings, when the documents whose execution or contents are thus admitted are not receivable in evidence or are incapable by law of creating rights and liabilities and when the admissions are accompanied by denial of liability on the ground of such defect.

Per *Sadasiva Aiyar, J.*—If the legislative provision declaring such a document to be inadmissible in evidence or ineffectual for certain purposes (or both) is based on reasons of public policy, a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in favour of either party.

EVIDENCE ACT—contd.

The Courts are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. While section 58 of the Evidence Act can be invoked where documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws, it cannot be invoked to overrule the provisions of non-revenue enactments. Provisions relating to compulsory registration of documents or to the legal impotence of certain unregistered or unattested documents to create title or to convey property must be deemed to have been enacted on high grounds of public policy and Courts should not be astute in creating loopholes for evading the plain intentions of the Legislature M SEETAMMA *v.* KRISHNASWAMY ROW, (1916) 2 M. W. N. 33; 31 M. L. J. 240 18

——— Ss. 63, 32 (2), 35, 65, 91—*Grant, copy of translation of, annexed to report of an officer—Admissibility to prove contents—Evidence, secondary—Entry in public record.*

A translation of a *parwana* or grant forming the enclosure to the report of a public officer is not admissible as secondary evidence of the contents of the grant under section 63 of the Evidence Act, nor under section 32 (2) or section 35.

Sections 91 and 65 of the Evidence Act make it clear that, when a written grant is lost, secondary evidence can be given of it only as defined by law. M AMBALAVANA PANDARASANNADHI *v.* KUPPACHI AMMAL, 4 L. W. 331 201

——— S. 65 201

——— Ss. 65, 66—*Secondary evidence, admissibility of—Original not forthcoming—Presumption.*

Where a Court of first instance decides to admit secondary evidence of a very old document, when it is not known what has become of the original document, its discretion in admitting such secondary evidence ought not to be disturbed, except upon very special grounds.

Per *Walsh, J.*—Sections 65 and 66 of the Evidence Act must be read together and the adverse party must not be presumed to have knowledge that he would be required to produce an original document so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. A MANGRA *v.* BEDI RAM 328

——— S. 66 328

——— S. 68 14

——— S. 73 492

——— S. 90 298

——— S. 90—*Deed, thirty years old—Genuineness—Presumption—Evidence to prove genuineness, if necessary.*

A sale-deed more than 30 years old is presumed to be genuine under section 90 of the Evidence Act and no evidence is required to prove its genuineness. A GULAB *v.* MUHAMMAD ISMAIL 518

——— S. 91 201

——— S. 92 111, 432 864

EVIDENCE ACT—concld.

——— S. 92—*Evidence of conduct, admissibility of, to show that mortgage is really* kobala *—Relinquishment of tenancy in favour of creditor, if could be made by application for mutation of names.*

Evidence of conduct is admissible to show that a document which was on the face of it a *kot kobala* (mortgage) was in reality a *kobala* (deed of sale).

When a debtor after having executed a *kot kobala* of a holding applies to the landlord for mutation of the name of the creditor as the *de facto* tenant and such application is accepted by the landlord, the effect is to render the transaction a complete alienation of the holding and the debtor is not entitled to redeem. C ALI SHEIKH *v.* IMAM ALI SARKAR 102

——— S. 92 (1)—*Promissory note—Recital as to consideration—Proof of payment of a different kind, whether admissible.*

Under section 92 (1) of the Evidence Act, it is open to the parties to an instrument to show that the special consideration mentioned in the document is not really what passed between them. M NARA REDDIAR *v.* DORAISWAMI REDDI, (1916) 2 M. W. N. 474; 31 M. L. J. 36; 3 L. W. 589 301

——— S. 92 (5).

Evidence of usage of trade applicable to contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent. C *In the matter of* JOY LAL & Co. *v.* MONMOTHA NATH MULLIK, 20 C. W. N. 365 3

——— S. 102 432

——— S. 105 813

——— S. 106 455

——— S. 114 421

——— Ss. 115, 116, 117—*Landlord and tenant—Denial of landlord's title after expiry of term and before surrender—Estoppel, whether ends with the term.*

Sections 115, 116 and 117 of the Evidence Act are not exhaustive, and there may be rules of estoppel applicable other than what is contained in those sections.

Per *Sanderson, C. J.*—A person let into possession of a land as a tenant for a term is not entitled, on the expiry of the term, to set up his title to the land against that of the landlord without in the first instance going out of possession and restoring possession to the landlord.

Per *Mookerjee, J.*—A person who has been let into possession as tenant is estopped from denying his lessor's title even after the expiration of the tenancy without first surrendering possession.

Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, *first*, possession, *secondly*, permission; when these conditions are present, the estoppel arises and the estoppel prevails so long as such possession continues. C BHAIGANTI BEWA *v.* HIMMAT BIDYAKAR 24 C. L. J. 103; 20 C. W. N. 1335 7

——— Ss. 116, 117 7

EXECUTION OF DECREE. *See* CIVIL PROCEDURE CODE, s. 24; O. XXI, r. 9; LIMITATION ACT, s. 15; Sch. I, ART. 182.

———, application for, by assignee of decree—Proof of title 624

———, application for—Dismissal for default—Restoration, maintainability of petition for—Jurisdiction—Limitation, plea of, when to be raised 337

——— Attachment—Sale stayed by Appellate Court—Execution petition dismissed in consequence of 240

——— before Collector—Suit to set aside sale, maintainability of—Fraud—Suit, if treated as application—Remedy 473

——— Decree against firm—Execution, application for, against alleged partner—Order rejecting application—Appeal, Court-fee on memorandum of 429

——— *Decree giving certain areas in specified plots of* shamilat*—Executing Court, duty of.*

Plaintiff applied for execution of a decree which gave him certain areas in certain specified plots of *shamilat*. It appeared that the defendants had failed to get the decree set aside. They also sued for a partition of the whole *shamilat* but failed as it was found that they had more than their share:

Held, (1) that the failures of the defendants-respondents could not affect the plaintiff's right to execute the decree and the Court was bound to order execution;

(2) that the admission by the plaintiff that the Naib-Tahsildar's measurements were correct could not be twisted into a surrender by him of their decree. P HARNAM SINGH *v.* BHAGWAN SINGH, 85 P. L. R. 1916; 163 P. W. R. 1916 867

——— *Decree, mortgage—Rights of prior mortgagee reserved—Decree, if capable of exectuion.*

A decree directed the sale of the right, title and interest of the judgment-debtor in certain specified immoveable property, with the further direction that the rights of the prior mortgagees of the specified property were reserved and exempted from the operation of the decree. On an objection being taken to the execution of the decree on the ground that it was vague and incapable of execution:

Held, that the decree was not vague and was capable of execution. A SAHEBZAD SINGH *v.* LALSA SINGH, 14 A. L. J. 324 152

——— Dismissal of first application for non-payment of *batta*—Second application made more than three years after, whether barred 594

——— Enforceability or otherwise of decree, whether a question under s. 47, Civil Procedure Code, 1908 856

——— Ex parte *decree, proceedings in execution of—Setting aside of* ex parte *decree, effect of—Subsequent decree on merits, whether revives previous proceedings—Limitation Act (IX of 1908), Sch. I, Art. 182.*

Applicant having obtained an *ex parte* decree on the 29th May 1906 sued out execution. On the 23rd October the *ex parte* decree was set aside and a decree passed on the merits. Prior to this, however, there had been an application for attachment and sale of the judgment-debtor's property and although on the 27th August an order for sale had been passed, proceedings were stayed till the disposal of the application to have the *ex parte* decree set aside. After this various orders for sale were made and set aside, the last application being dated the 8th April 1911. It appeared that no proper application for execution was presented to the Court since the *ex parte* decree was set aside up till the 11th January 1913:

Held, (1) that all the previous applications and proceedings that took place under the *ex parte* decree became null and void where it was set aside and that they were not revived when the decree on the merits was passed;

(2) that, therefore, the present application was time-barred and the applicant could not obtain execution. P MATHU MAL *v* PALA MAL, 78 P. W. R. 1916; 103 P. R. 1916; 133 P. L. R. 1916 110

——— *Petition by judgment-debtor setting forth full satisfaction—Order striking off execution application with consent of decree-holder—Consent secured by mistake, effect of—Satisfaction petition, filing of, after time—Fresh execution application, whether barred.*

A decree-holder having applied for execution of his decree, the judgment-debtor filed a petition in Court on 12th November 1909, stating that the decree was fully satisfied by an adjustment made by parties out of Court. The petition, however, was filed after the period of limitation prescribed for applications for notice under Order XXI, rule 2, Civil Procedure Code had expired. The execution application was dismissed by the Court with the consent of the decree-holder. The decree-holder put in a fresh application for execution on 15th July 1914, after an intervening application which he allowed to be dismissed. The judgment-debtor objected that it was barred by reason of the Court's order on 12th November 1909. The decree-holder contended that his consent to the order was given by mistake and that as the defendant's petition was barred, the order of the Court, dated 12th November 1909, was a nullity:

Held, (1) that the order of the Court on 12th November 1909 was the record of an adjustment of the decree certified to the Court, which could be recognized under Order XXI, rule 2 (2), Civil Procedure Code;

(2) that if the decree-holder made a mistake in giving his consent to the order, it did not vitiate the order, though it was open to the decree-holder to have moved the Court by way of review;

(3) that, even if defendant's application setting forth the adjustment was out of time, the order passed thereon was not a nullity and the only course left to the decree-holder was to have appealed against the order and as he failed to do so, the order became final. L B MAUNG PO MYAING *v.* PALANIAPPA 369

——— Petition returned for amendment but not represented, whether step-in-aid of execution 876

——— Proceedings, stay of—Discretion of original Court—Appellate Court, power of 443

——— *Rent-decree—Court, power of, to specify manner of execution—Landlord, right of, to choose manner of execution—Equity.*

It is not competent to a Court to direct in what manner a landlord shall execute his decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the tenant. PAT KESHO PRASAD SINHA BAHADUR *v.* LALJI RAY, 1 P. L. J. 138 535

EXECUTION OF DECREE—concld.

——— Sale in pursuance of consent decree—Sale held by an auctioneer, the nominee of parties—Agent of Court—Receipt of purchase-money by auctioneer, whether 'receipt of assets' by Court—Rateable distribution—Consent decree, characteristics of 850

——— Step-in-aid of execution, when will save limitation 237

EXECUTOR. *See* WILL.

——— or administrator, duty of, to exhibit inventory or account 950

EX PARTE DECREE, setting aside of, effect of 110

——— suit to set aside, if barred by infructuous application to set it aside 339

FAMILY ARRANGEMENT. *See* REGISTRATION ACT, s. 17 (b).

FAMILY SETTLEMENT. *See* COMPROMISE; HINDU LAW.

———, doctrine of. *See* HINDU LAW.

FERRY, "right of ferry", "ferry boat", meaning of 782

FINDING *questioning admitted fact—Court, duty of.*

A Court cannot arrive at a finding so as to question a fact not disputed by the parties in their pleadings. O RAMMAN LAL *v.* RAM GOPAL, 3 O. L. J. 367 713

FOREST ACT (VII OF 1878), Ss. 41 (b), 42—*Rule* 4, *framed by Government of Bombay under s.* 41 (b)—Ultra vires *Interpretation of Statutes—Laws curtailing common law rights or imposing new obligations—Douotful expression, effect of.*

Rule 4 of the Rules for Sind framed by the Government of Bombay under section 41 (*b*) of the Forest Act, prohibiting the moving of timber from private land without a certificate from the holder or manager of such land, is *ultra vires*; consequently a conviction for a breach thereof, under section 42 of the Act, is illegal.

Where the words of a Statute leave the intention of the Legislature in doubt, the Courts will lean against the construction which imposes a burden on the subject. A law which interferes with common law rights or imposes fresh obligations must not operate through implication, but should be expressed in clear and unambiguous language. S MITHO *v.* EMPEROR, 10 S. L. R. 9; 17 CR. L. J. 364 668

——— S. 42 668

FRAUD. *See* CIVIL PROCEDURE CODE, O. VI, R. 4.

———, allegation of, clear statement of, in pleadings, necessity of 252

——— *Minor, suit to set aside decree against—Guardian, gross negligence of—Fraud and negligence, no proof of—Suit, maintainability of.*

It is possible for a minor, where his guardian has conducted his case with gross negligence, to come to the Court and seek relief by way of review of judgment.

If it be sought to set aside a decree obtained against an infant properly made a party and properly represented in the case and if it be sought to do this by a separate suit, the plaintiff in such a suit can only succeed upon proof of fraud or collusion. A BENI PRASAD *v.* LAJJA RAM, 14 A. L. J. 438; 38 A. 452 63

FRAUD—contd.

———, *nature of—False allegations in former plaint proved by perjured evidence, proof of, if necessary—Fraud in proceedings, proof of, necessity of.*

Where a suit is brought to set aside a decree on the ground of fraud and the fraud alleged in the plaint is that certain false allegations were made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence, the suit is not maintainable.

In such a suit it must be demonstrated that some fraud has been practised upon the Court in the course of the judicial proceedings which terminated in the decree complained of. A KURE *v.* JHINGURIA 847

———, *pleading and proof of—Vendor and purchaser—Limitation — Sale, consideration for — Vendor's remedy, when part of consideration not paid—Hindu widow's suit for cancellation of sale on ground of fraud dismissed—Effect of dismissal on reversioner—Pardanashin lady—Burden of proof.*

A plaintiff impeaching a transaction on the ground of fraud should distinctly, accurately and specifically set forth in the plaint the facts constituting the alleged fraud.

The proof of fraud must be consistent with the case set out in the pleadings. When one kind of fraud is charged, another kind of fraud cannot, on failure of proof, be substituted for it.

Non payment of any part of the consideration for a conveyance will not, by itself, invalidate the sale. The vendor's right, in such a case, is to recover the unpaid balance of purchase-money.

A plaintiff seeking to avoid the Statute of Limitation on the ground of fraud must, besides setting forth the facts constituting the fraud, state the time when the fraud was discovered, to enable the defendant to meet it and the Court to see whether the discovery might not have been made earlier.

Where the plaintiff has once established fraud the defendant is bound to show that the plaintiff had had clear and definite knowledge of the facts constituting the particular fraud earlier than the date of the alleged discovery and for more than the period prescribed for the suit.

The dismissal of a suit for cancellation of a conveyance by a Hindu widow on the ground that it was fraudulently brought about will not affect the reversioners, who are entitled to impeach it as not binding on the inheritance in their hands.

The plaintiff, a Hindu widow, sued for cancellation of a conveyance executed by her to the defendant, on the allegation that the document was not read out and explained to her. There was, however, a distinct acknowledgment by her in the document that the recitals were correct. At trial, she said that her signature was taken on blank sheets which were subsequently filled in without her knowledge and that no part of the consideration was paid to her:

Held, (1) that the burden of proving that the recitals in the document were untrue lay on plaintiff;

(2) that as two distinct theories of fraud were set up in the plaint and at trial, plaintiff was not entitled to the relief prayed. C BANSIRAM *v.* SECRETARY OF STATE, 20 C. W. N. 638 284

FRAUD—concld.

——— in securing decree, effect of 49
——— , suit based on - Pleadings—Proof of fraud 339

GENERAL RULES OF PRACTICE FOR CIVIL COURTS IN U. P., CH. IV, R. 5 (*a*) 742

GENERAL CLAUSES ACT (I OF 1868), s. 2 925

GHATWALI LAND, suit by tenant of, against *ghatwal* —Secretary of State, if necessary party 788

GIFT, property acquired by, whether ancestral 742

GOVERNMET OF INDIA NOTIFICATIONS No. 680 1-B, DATED 19TH MARCH 1912, AND No. 732-D, DATED MARCH 1913 165

GOVERNMENT OF INDIA ACT, 1915 (5 & 6 Geo. 5, c. 61), s. 107 801

GRANT—*Grant for services to be rendered - Resumption, right of, where services not required or discontinued—Burden of proof—Evidence—Presumption*

Where a grant of land is made for services rendered and to be rendered, the grantor is not entitled to resume either on the discontinuance of the services or of his no longer requiring them to be performed. Where, however, the grant is made as remuneration for or in lieu of wages or service, the land would be resumable on the discontinuance of the service.

The burden of proving that the land is resumable lies on the party seeking to resume.

Where the deed of grant is not produced and the only evidence as to its nature goes no further than that the grant was made for services, the presumption is that those services were services rendered in the past and to be rendered in the future and that the land is not, therefore, resumable. **B** BASLINGAPPA *v.* CHANDRAPPA, 18 BOM. L. R. 695 860

———*Maintenance grant—Presumption—Duration of grant.*

Where lands are granted by way of maintenance, the presumption is that the grant is made for the lifetime of the grantee. **O** BUNIYAD HUSAIN *v.* HAZIR-UN-NISA, 3 O. L. J. 354 764

GUARDIAN *AD LITEM*, appointment of. *See* CIVIL PROCEDURE CODE, 1908, O. XXII, R. 1

——— of minor defendants, appointment of—Consent of person appointed not obtained—Interest adverse to minors—Fit and proper person—Irregularity 707

——— *not formally appointed but allowed to represent minor, effect of.*

Where in a suit an application for appointment of a guardian *ad litem* is made and the guardian nominated in the application is allowed to represent the minor at the trial, the mere omission of a formal order appointing the guardian is not fatal to the suit. **PAT** RAM ASRAY SINGH *v.* SHEONANDAN SINGH 868

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 7—*Scope of proceedings under the Act - Welfare of minor—Elaborate enquiries as to nature of property forbidden*—Res judicata.

Proceedings under section 7 of the Guardians and Wards Act are summary and the order made by Court should be based on considerations of the minor's welfare. Elaborate enquiries as to the nature of the property left by the deceased are outside the scope of the Act and any decision that the Court may arrive at will not operate as *res judicata*. For the purposes of the Act, it is enough that the application is made on the footing and with the claim that the minor is separately entitled to separate property. The order appointing a guardian should be made on that footing, leaving it to him to institute suits on behalf of the minor for the recovery of the property which he claims. **B** GURAPPA SHIVGENAPPA *v.* TAYAWA SHIDAPPA, 18 BOM. L. R. 343; 40 B. 513 16

HINDU LAW. *See* CUSTOM.

———ADOPTION—*Adopted son's right of inheritance when there is afterborn natural son—Sudras—Kayasthas, if Sudras—Illegitimate son of Sudra—Dattaka Chandrika, authority of—Dedication, image of deity, if essential for.*

According to the law prevalent in Bengal *Kayasthas* are considered as Sudras.

Amongst Sudras no religious ceremony is necessary for an adoption. The giving and taking of a son are essential to give validity to adoption. *Putresthi jag* and *namakarana* are not essential.

Pollution on account of the birth of a relative at the time of an adoption does not vitiate the adoption amongst the Sudras, as such pollution is only a bar to religious acts and renders religious ceremonies inefficacious but does not affect the secular acts of gift and acceptance of a son—which alone are sufficient for making a valid adoption by the Sudras.

The Dattaka Chandrika is a work of undoubted authority in Bengal on the subject of adoption—its authority prevailing over other works on the same subject.

Amongst Sudras an adopted son is entitled to share equally with the afterborn natural son in the rights to the ancestral, secular and *debutter* properties.

An *ekrar* executed by an adoptive father at the time of making an adoption that if a son is afterwards born of his loins, the adopted son and the afterborn natural son shall be equally entitled to all the moveable and immoveable properties that may be left by him, is valid and binding on his heir and legal representative.

Obiter.—The mere purchase of an estate in the name of a *thakur* (deity) does not prove its dedication.

A permanent image of a deity is not absolutely essential for a dedication of property to a *thakur*.

An illegitimate son of a Sudra has no right to a share of the father's properties in his lifetime but the father may, if he chooses, give him an equal share with his legitimate son and it is only upon the father's death that he becomes entitled to a moiety of the share of the legitimate son.

A Sudra father is not required by law to recognise an illegitimate son.

Amongst Sudras the son by a female slave is not legitimate and has no status as a son unless his father chooses to give it to him. **C** ASITA MOHAN GHOSE *v.* NERODE MOHAN GHOSE, 20 C. W. N. 901 127

HINDU LAW—contd.

——— ALIENATION *by mother of her minor son's property in excess of her authority—Limitation Act (IX of* 1908), *Sch. I, Art.* 44.

Per *Pratt, J. C.*—Under Hindu Law the sale by a Hindu widow or guardian mother, in excess of her authority, is void and not voidable and Article 44 of the Limitation Act does not apply to such an alienation.

Per *Crouch, A. J. C.* (contra).—Under Hindu Law, when a mother, as the natural guardian, sells a portion of her minor son's property for good consideration but in excess of her powers, *e. g.*, without legal necessity, the purchaser is entitled to the benefit of Article 44 of the Limitation Act. S GEHIMAL DYALMAL *v.* KARMOOMAL SIROOMAL, 10 S L. R. 38 551

——— ——— Grant from Hindu widow claim for declaration based on—Defendant's plea of adverse occupation under alleged Will of last male owner —Finding against defendant—Appeal—Waiver of objection to lower Court's finding at hearing, effect of—Decision by Appellate Court as to widow's power to transfer—Jurisdiction 958

——— ——— ——— *of widow's estate by widow—Reversioner, next, consent of, effect of.*

Where a Hindu widow alienates the whole widow's estate with the consent of the whole of the next reversion, the alienation is valid, irrespective of any consideration of necessity, as the reversioners transfer as heirs, the estate having been accelerated by the widow's disclaimer.

In all other cases, *i. e.*, where only part of the estate is alienated by her with the consent of some or all of the next reversion, or the whole estate is alienated with the consent of some and not of all of the next reversion, the consent raises only a presumption of the propriety of the alienation. Ordinarily, to raise this presumption the consent of the whole of the next reversion is necessary, but in special cases the consent of a part of the next reversion may suffice. S JIWATMAL BHUROMAL *v.* GIANBAI, 10 S. L. R. 49. 681

——— APOSTACY—*Hindu's conversion to Islam, effect of—Suit by convert for his share in family property—Limitation Act (IX of* 1908), *Sch. I, Arts.* 127, 142.

The effect of a Hindu's conversion to Muhammadanism is *ipso facto* to separate him from the coparcenary.

The plaintiff, a Hindu convert to Islam, sued to recover possession of the property left by his uncle, as a member of a joint Hindu family still existing at the time of the uncle's death. Part of this property was ancestral. It appeared that on the uncle's death in 1909 his daughters had taken possession of the whole property, that the suit was brought in 1911 and that the plaintiff had embraced Islam 10 or 11 years before suit:

Held, (1) that as by reason of his conversion to Islam, plaintiff was not a member of the joint Hindu family at the time when the suit was instituted, it was for him to prove that the separation of the family had not taken place more than 12 years before suit;

(2) that as he had failed to prove that he remained a member of a joint Hindu family as late as within 12 years of the date of the institution of the suit, his suit was, under Article 142 of the Limitation Act, barred by time;

(3) that in that portion of the property which was ancestral the plaintiff was entitled to the share which was his at the time of his conversion. P GANGA SINGH *v.* BEGAM, 57 P. R. 1916; 159 P. W. R. 1916 549

——— *BYRAGEE MAHAMT*—Sudra, *if can become* yati *or* sanyasi—*Inheritance—Usage and custom, finding of, if questionable in second appeal—Evidence, sufficient to establish usage or custom.*

A *Sudra* cannot become a *yati* or *sanyasi* according to the Smritis.

A person who once renounced the world and adopted a religious order like that of a *byragee mahant* would not, by reverting to worldly affairs in his new life, cease to be a *byragee mahant* and if a well-defined usage or custom governs the succession in the new order there is nothing in Hindu Law to prevent the said usage or custom binding him and his property after his death.

The *chela* of a *byragee mahant* who has been nominated by him as his successor can inherit the properties left by him, if there is an usage or custom to that effect.

The finding of the first Appellate Court as to the existence of a custom or usage cannot be questioned in second appeal on the ground that the evidence to establish the said custom or usage is not sufficient. C LOCHAN BINMALI *v.* ADHAR CHANDRA MAHANTA 630

——— DEBT—*Appropriation of money by agent—Decree—Mortgage to pay off antecedent debt—Liability of sons and grandsons under mortgage.*

Where a Hindu father executed a mortgage to pay off a simple money-decree passed against him for not having accounted for some money belonging to a person whose agent he was:

Held, that the consideration was an antecedent debt binding on the sons and grandsons of the mortgagor.

Semble.—If an antecedent debt relates to a transaction which was tainted with immorality, its existence would not entitle the subsequent mortgage to be enforced against the joint family property. A NIDDHA LAL *v.* COLLECTOR OF BULANDSHAHR, 14 A. L. J. 610 209

——— 'Pious obligation' of son to pay fathers' debt, nature and extent of 918

——— FAMILY SETTLEMENT, *when valid.*

A "family settlement" is valid in law if at the time it was arrived at there was a *bona fide* dispute, *bona fide* settled by the members of the family. There is a great difference between a settlement of family disputes or even the screening of family scandals and yielding up property on a threat of litigation. It is reasonable that the former should bind the members of the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it.

Where a baseless claim was put forward to the property of a widow and the lady, in order to avoid being forced to litigation, consented to give the property to the claimant:

Held, that under the circumstances the settlement was not a "family settlement" and the reversioners, who were not parties to the settlement, were not bound by it. **A** HIMMAT BAHADUR *v.* DHANPAT RAI, 14 A. L. J. 340; 38 A. 335 **148**

——JOINT FAMILY *fund Money earned by two brothers, if constitutes joint family property—Appeal, second—Findings of fact unsupported by evidence, if reversible in second appeal.*

The mere fact that two brothers of a Mitakshara family coming to Calcutta worked as coolies and out of the money they so earned purchased a house, does not legally warrant the conclusion that the house was acquired out of a joint family fund, in the absence of any evidence that the money earned by them was ever put into a common till or treated as money belonging to the two brothers representing a joint Hindu family. **C** MOTI BOLLI *v.* BHAGWAN MISRI. **655**

—— —— —— *Mortgage by only some of the brothers —Suit to enforce security—Joinder of non executant brother as representative of deceased executant—Decree and sale in execution—Partition—Suit by purchaser for possession—Enquiry into validity of mortgage as regards non-executant—Joint dwelling house —Purchaser's right to joint possession—Transfer of Property Act (IV of 1882), s. 44—Civil Procedure Code (Act V of 1908), ss. 1, 47—*Res judicata—*Symbolical possession—Suit by purchaser for actual possession, maintainability of—*Ex parte *decree—Plea of fraud in suit for possession.*

Section 47, Civil Procedure Code, is no bar to a suit for actual possession by a purchaser who obtained only symbolical delivery after confirmation of the execution sale.

An *ex parte* decree may in a subsequent claim of the plaintiff be impeached on the ground of fraud by the persons against whom it was obtained.

The validity of a mortgage as against a person not a party thereto cannot properly be raised and determined in a suit to enforce the security, though such person is impleaded as representative of a deceased executant.

But the question can be raised in a subsequent suit for recovery of the mortgaged property and an enquiry into the same is not barred by the doctrine of constructive *res judicata* on the ground that it was not pressed at the trial of the mortgage suit.

Where some of the brothers, members of an undivided Hindu family, execute a mortgage of the whole property, the decree obtained in a suit to enforce the mortgage, and the sale in execution thereof, will only pass the interest of the mortgagor brothers and not of those who did not join in the mortgage.

A stranger purchaser of the share of an undivided Hindu co-parcener cannot claim to be put in joint possession of the family dwelling-house. He can either ask for delivery of possession of what he acquired by purchase by partition in execution proceedings, or resort to a separate suit for partition. **C** GIRIJA KANTA CHAKRABUTTY *v.* MOHIM CHANDRA ACHARJYA, 20 C. W. N. 675 **94**

LEGAL NECESSITY—*Manager, power of—Discretion.*

A certain discretion must be allowed to the manager of a Hindu joint family but he is expected to deal with the family property as a reasonable person would deal with his own. **H 8**

Under the circumstances of the case it was held that the building of a residential house was for family necessity. **A** RAM SINGH *v.* NARAIN LAL **326**

——— MINOR, *guardian and manager of—Alienation of minor's property—'Benefit of minor's estate', meaning of.*

An alienation by the manager of a Hindu infant's estate is justifiable not only when made owing to the necessities of the minor, but also when any benefit is caused to the estate by the alienation.

The rule is applicable not only to mortgages but also to sales.

But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular alienation is "for the benefit of the estate" within the meaning of the rule, as cases of speculative development of estates of minors are hardly intended to be included within its scope. **C** KRISTA CHANDRA *v.* RATAN RAM PAL, 20 C. W. N. 645; 23 C. L. J. 432 **673**

——MORTGAGE—*Decree absolute for sale against father—Suit by sons for possession—Right of sons to redeem—Mortgagor's right to redeem first mortgage after sale of equity of redemption in execution of decree based on second mortgage—Limitation Act (XV of 1877), Sch. II, Arts. 12, 95, applicability of.*

Where in a suit on a mortgage a decree absolute for sale has been obtained against a deceased mortgagor without substituting or mentioning his sons as his heirs and a sale has taken place, the sons cannot challenge the sale.

Sons under the Mitakshara Law have no right to redeem the self-acquired property of their father sold in execution of a mortgage-decree obtained against the latter.

In a suit for possession of property sold in execution of a decree on the basis that the sale was a nullity, it is not necessary to set aside the sale.

After an equity of redemption has been sold away in execution of a decree on a second mortgage, it is not open to the mortgagor to sue for redemption of the first mortgage.

Articles 12 and 95 of Schedule II of the Limitation Act, 1877, do not apply to a suit for redemption, as in such a suit it is not necessary to set aside the decree or the sale. **PAT** JAHNAVI PRASAD SINGH *v.* GHARBARAN DUBEY **404**

—— —— —— *by widow and the then reversioner—Decree against executants, if binds estate—Sale in execution—Auction-purchasers, title of, if defeasible by actual reversioners after death of judgment-debtors —Fraud in securing decree, effect of.*

A decree in a suit on a mortgage, executed by a Hindu widow and the then reversioner, made by a competent Court in their presence, binds the entire inheritance and as long as that decree stands and until it is set aside for good reason, the actual reversioner cannot get behind it and maintain a suit for recovery of possession of the mortgaged property from a third party auction-purchaser in execution of that decree.

Per *Mookerjee, J.*—When a mortgagee from a Hindu widow seeks to obtain a decree which would bind not

HINDU LAW—contd.

only merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit; and when so impleaded the reversioner may well be deemed a party in a representative capacity and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow.

The title of the purchaser in such a case can be defeated only after the decree, which is the root of that title, has been successfully impeached for fraud, collusion or other like reason. If this is established, the fact that the parties had gone through the form of a suit and a decree cannot prejudice the right of the actual reversioners. **C** GANGA NARAYAN DUTTA v. INDRA NARAYAN SAHA **49**

——— PARTITION, suit for—Omission to specify some of the joint properties in plaint, effect of Amendment—Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17. **370**

——— ———*Co-parcener, alienation by, of his undivided share in family property—Rights of—alienee—Alienee, whether can sue for partition—Principle underlying "partial partition".*

An alienee of a particular joint undivided share of a Hindu co-parcener is not entitled to possession of the specific parcel alienated to him. The only right he acquires is a right to compel the same general partition which his vendor might have compelled, and an equity to have the particular parcel purchased by him allotted, if possible, to his share.

Per *Crouch, A. J. C.*—When an individual member of a co-parcenary purports to sell a particular parcel of the joint estate he can only transfer such right, title and interest as is actually vested in him.

In all suits for partition, the Court considers not merely the legal rights of the plaintiff, but also the legal and equitable rights of all other parties interested, whether on record or not; and where a particular parcel has been alienated, the Court will ordinarily allot such parcel to the alienating co-parcener leaving the alienee in possession, provided that this can be done without unfairness to the other persons interested. **S** DULARAM PINIOMAL v. BADALDAS JAMIATRAI, 10 S. L. R. 34 **478**

——— ———*Presumption, rebuttable, of complete division—Separation of co-parcener, effect of—Status of non-separated members.*

The separation of one member of a joint Hindu family does not, in law, amount necessarily to a separation of the remaining members. The non-separated members continue as before as members of a joint family, and no special agreement among them is necessary to revive that status. This is so even in cases where, for the determination and allotment of the share of the member who separates, it is necessary to ascertain and set out the shares of the remaining members.

When a partition has been proved, the presumption is that the partition was complete both as regards the property and the members composing it; but the presumption may be rebutted, without proof *aliunde*, by the terms of the partition-deed, or a decree for partition, and if there is no written evidence of the separation, by the nature and mode of the separation and circumstances attending it.

Under Hindu Law, a father has power to separate one or more of his sons from himself, in which case there is no presumption of division between the father and his other sons.

A Hindu father, having incurred considerable expense for the marriage of two of his sons for which he had to sell two out of his three houses, gave them some cash and jewels and separated them from the family. They thereafter lived separately while the father and his other son lived together in the remaining family house:

Held, (1) that the transaction was a relinquishment by the separated sons of their interest in the remaining family properties;

(2) that the interest of the father, after the separation, devolved on the non-separated son by survivorship and it was not liable to attachment and sale for a decree-debt against the separated sons.

Per *Napier, J.*—The judgment of the Privy Council in *Balabux* v. *Rukhmabai*, 30 C. 725 at pp. 734, 735; 5 Bom. L. R. 469; 7 C. W. N. 642; 30 I A. 1 cannot be interpreted as laying down that, where there is a separation at the instance of one member of a joint family, an undivided status among the others can only exist by contract.

A definite declaration must be made by a father himself if he wishes to separate from his minor sons and it cannot be done by the mere separation by a son of fullage. **M** RANGASAMI NAIDU v. SUNDARARAJULU NAIDU, 31 M. L. J. 472 **52**

——— SUCCESSION — *Mitakshara* — Bandhus — *Mother's sister's son's son and mother's paternal aunt's son—Preferential heir* Sapinda.

Under the Mitakshara Law of succession the mother's paternal aunt's son is a nearer *sapinda* than the mother's sister's son's son. If they both stand in the same degree of propinquity, preference must be given to the mother's paternal aunt's son on account of his capacity to make offerings to ancestors of the deceased. **PAT** ADIT NARAYAN SINGH v. MAHABIR PROSAD TEWARI, 1 P. L. J. 324 **687**

———WIDOW—*Compromise decree against widow, effect of—Alienation—Reversioners, if bound——Test—Family settlement, doctrine of.*

A decree obtained by compromise against a Hindu widow representing the estate of her late husband, effecting an alienation of a part of her estate, binds the reversioners if it be shown to have been made for such purposes as would justify a sale by a Hindu widow.

The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding upon them, is whether the alienee derives title from the holder of the limited interest or life-tenant.

The doctrine of family settlement cannot and ought not to be extended to suits in which the parties to the litigation are not members of the same family. **A** KANHAYA LAL v. KISHORI LAL, 14 A. L. J. 881 **683**

HINDU LAW—concld.

——WIDOW—*Maintenance, right to—Alienation by husband for his maintenance during illness—Family necessity—Widow's lien or charge.*

The right of a Hindu widow to maintenance by her husband in his lifetime or to a charge upon his property must be dependent on his right to alienate the property for a family necessity.

A gift by a diseased Hindu of his property to another, who has been maintaining and nursing him, in consideration of services rendered in the past and to be rendered in the future, is an alienation for good consideration and for a family necessity and so his widow cannot claim to charge that property for her maintenance. **C** KANTA MOHINI DASI *v.* NANICHORA SOBA 566

——, whether can be restrained from alienating her estate 229

——Suit for cancellation of sale on ground of fraud dismissed—Effect of dismissal on reversioner 284

——WILL, *construction of—General canons of construction of Hindu Wills—Life-estate, creation of, with residue to persons unborn at testator's death—Legatees born before death of legatee for life, vesting of estate in—Hindu Bequests Validation Act (Mad. Act I of* 1914), *s.* 2 (2), *effect of, on antecedent Wills.*

The question of the construction of a Hindu Will has to be determined with reference to the terms of the document in each case, though, in arriving at the true meaning of the document, one must have regard to any general rules of construction that bear on this matter.

One of the elements to be taken into consideration in construing a Hindu Will is that bequests to persons not born at the date of the testator's death are void and that the testator must be presumed to have intended that only persons born at the date of his death should take.

The intervention of a life-estate before legacies to unborn persons are to take effect prevents the application of the general rule that only persons born at the death of the testator were intended to take.

A residuary legatee born after the testator's death, but before the termination of the life-estate, has a vested interest in the property bequeathed, and his heirs are entitled to his share on his death occuring during the continuance of the life-interest.

The language of clause 2 of section 2 of Madras Act I of 1914 is general and has the effect of validating dispositions which are to come into operations at a future date in accordance with the intention of the testator

The section means that if a testator intended that his disposition should take effect at a future date, and that date happened to be subsequent to the passing of the Act, then by virtue of the Act the disposition would be valid and effective. **M** KUDAPA VENKAYAMMA *v.* KAKARLA NARASAMMA, 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189 150

IKRAR MALIKAN—'Mafrūr,' meaning of 843

IMMOVEABLE PROPERTY. *See* REGISTRATION ACT, s. 2 (6).

INDEMNITY. *See* CONTRACT ACT, s. 124.

INDIAN (FOREIGN JURISDICTION) ORDER IN COUNCIL, 1902—*Government of India Notifications No.* 680 *I-B, dated* 19*th March* 1912, *and No.* 732 *D, dated March* 1913—*Criminal Procedure Code (Act V of* 1898), *ss.* 36, 443, 446, *Sch. III, cls.* (iii) *and* (v)—*District Magistrate of Civil and Military Station of Bangalore, powers of, with reference to European British subjects—'Ordinary powers,' meaning of.*

The combined effect of Notifications No. 680 I-B, dated 19th March 1912, and No. 732 D, dated March 1913, of the Government of India under the Foreign Jurisdiction Order in Council is to invest the District Magistrate of the Civil and Military Station of Bangalore, with reference to European British subjects, with all the powers exercisable under the Criminal Procedure Code by a District Magistrate not limited by the special provisions applicable to European British subjects. He, therefore, has power to try a European British subject and sentence him to a term not exceeding two years. **M** BOB DORE, *In re*, 4 L. W. 405; 17 CR L. J. 293 165

INHERITANCE. *See* BUDDHSIT LAW.

INJUNCTION, grant of, against community, whether permissible 106

Hindu widow, whether can be restrained from alienating her estate—Reversioners, when can sue for injunction.

In ordinary cases, the reversioners of the last male owner are not entitled to obtain an injunction to restrain his widow in possession of her customary estate from alienating property. An injunction is a proper form of relief only when it is found that the widow is committing or is about to commit acts of waste in the sense in which that term is used in law.

Where, therefore, in a suit by the reversionary heirs of the last male owner for an injunction to restrain his widows from alienating and wasting the property of their deceased husband, the plaintiffs failed to prove the alleged acts of waste except in two very minor particulars:

Held, that they were not entitled to an injunction. **P** TAJO *v.* ALLAH DIN, 53 P. W. R. 1916; 124 P. L. R. 1916 229

——, *perpetual—Easement—Right to water of tank declared by decree of Court—Threatened interference with right—Owner filling up tank—Specific Relief Act (I of* 1877), *s.* 54.

Where the right to the use of water in a tank has been declared in favour of a person by a decree of Court, the Court will permanently restrain the owner from interfering with such right by filling up the tank on the ground that it was overgrown with weeds, especially when the party who has acquired the easement offers to clear the weeds. **C** AUT BEHARY GUI *v.* RAMESWAR MITRA 40

——, *temporary—Executive Government, rights of—Order subsequently discharged—Contempt.*

The Executive Government is not free to dispose of money the right to which is *sub judice inter partes* and held *in medio* by the order of a Court. If there is any doubt the Executive should apply to the Court to determine the question.

INJUNCTION—concld.

An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts.

Obiter.—If a claimant to an inalienable Government pension succeeded in persuading the Court that he had a *prima facie* claim to it and obtained an interim injunction the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order.

The non-existence of any right to bring the Crown into Court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue, and it is the duty of the Executive, in cases of doubt, to ascertain the law, in order to obey it, not to disregard it. **P C** EASTERN TRUST CO. *v.* MCKENZIE, MANN & CO., LTD., 20 C. W N. 84; 84 L. J. P. C. 152 379

———, validity of, to restrain alienation and registration of document 718

INTENTION, whether should be specified in charge under s. 456, Penal Code 984

INTEREST. *See* CONTRACT ACT, s. 74.

——— between partners when allowable 48

——— on costs, whether can be included in decree 218

———, payment of, as such—Labour in lieu of interest, whether saves limitation 480

———, suit for, where mortgagee prohibited from suing before principal becomes due, whether lies 104

INTERPRETATION OF STATUTES 213, 418, 515

INTERPRETATION OF STATUTES.

The Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of parties to suits.

A right of appeal which has accrued is such a vested right.

The tribunal competent to dispose of appeals, instituted before a new Act came into force but still pending when it came into force, is the tribunal which would have been competent to dispose of them, if the appeals had been instituted after the said new Act came into force.

Where the operation of an Act is postponed, that Act is restrospective, the public being warned by the postponement in good time of the change of the law. **P** ASA RAM *v.* BUDHU MAL, 43 P. W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916 67

——— ——— ——Bengal Municipal Act, s. 155 782

——— ———Laws curtailing common law rights or imposing new obligations—Doubtful expression, effect of—Forest Act (VII of 1878) 668

——— ——— ——Mandatory or directory Statutes 305

——— ——— ——Penal Statutes 497

INTERVENER. *See* OUDH RENT ACT, s. 138.

JOINT HINDU FAMILY, absconding accused, member of, attachment of interest of 168

JOINT TRIAL, illegality of—Sessions Judge, discretion of, to try separately—High Court, jurisdiction of, to revise the committal order—Revision 801

JUDGMENT, contents of 485

——— pronounced on erroneous view of law, validity of, before reversal 339

——— written and pronounced by Judge after transfer, validity of 938

JURISDICTION. *See* PUNJAB ALIENATION OF LAND ACT, s 9 (3); WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 859), s. 1.

— to decide disputes relating to money in hands of Receiver 589

———*Decision of Revenue Court between rival tenants—Suit for ejectment as trespasser—Civil Court, jurisdiction of.*

Where in a previous suit for ejectment, the parties came to terms and a decree was passed whereby the defendant became entitled to hold the land for five years and subsequently in another suit for ejectment it was held by the Board of Revenue that the defendant was not the plaintiff's sub-tenant:

Held, in a suit by the plaintiff for ejectment of the defendant as trespasser, that the suit was cognizable by the Civil Court.

Where a dispute is between a tenant and another person who alleges himself to be a co-tenant, the Revenue Court has no jurisdiction to decide the matter finally. It can only do so in a suit between landlord and tenant. **A** TURSI *v.* MOHAN 302

——— of Executing Court—Execution, whether can be effected by temporary Court 296

——— High Court—Permission to withdraw suit with liberty to bring fresh suit on same cause of action 843

———*Land given on* mustajri*—Lessee entitled to recover rents—Suit by mortgagee to recover income from lessee, whether cognizable by Civil Courts.*

A suit by the mortgagee of a revenue paying land to recover its income on the ground that he gave the defendant, a representative of the mortgagor, a lease (*mustajri*) of the land leaving him to recover the rents, is not a suit between landlord and tenant and is cognizable by a Civil Court.

Where, therefore, such a suit was first lodged and decreed in a Civil Court, but on appeal the District Judge reversed the decree, and, holding that the Civil Court had no jurisdiction, ordered the plaint to be returned for presentation in a Revenue Court, whereupon the Assistant Collector gave the plaintiff a decree, which was reversed by the Collector, and a reference was then made by the Commissioner to the Chief Court:

Held, that the decree of the Munsif could not be restored but that the proceedings should be set aside and the plaint returned for presentation to a Civil Court. **P** SARDAR SHER SINGH *v.* MAZRULLA, 64 P. W. R. 1916; 128 P. L. R. 1916 293

———*Munsif officiating as Subordinate Judge, reverting as Munsif, and again officiating as Subordinate Judge—Authority to hear particular sort of cases given at former occasion, effect of.*

JURISDICTION—concld.

Where a Munsif acted as an officiating Subordinate Judge in a district, and it was then notified that he would have jurisdiction to hear a particular sort of cases during such time as he held the post of Subordinate Judge, but he reverted for a short time as Munsif and on being again promoted to officiate as Subordinate Judge in another district heard a case of that particular sort:

Held, that the notification published on the previous occasion gave him jurisdiction to hear the case on the subsequent occasion when he had to officiate as Subordinate Judge, in spite of the fact that he had reverted between the two officiating periods and that a similar notification was also issued later on after he had been made a permanent Subordinate Judge. **O** GUR PRASAD SINGH *v.* SANT BAKHSH SINGH, 3 O. L. J. 256 759

——— *Validity of document of title, Civil Court, whether can adjudicate upon.*

The Revenue Courts have no exclusive jurisdiction to decide finally upon the validity of a document of title; such jurisdiction rests with the Civil Courts.

A notice of ejectment having been cancelled on the strength of a document produced by the defendant, which he declared to be a *shankalap patta*, the plaintiffs, who were the under-proprietors in the village, sued for a declaration (1) that defendant had no superior right in the land in suit, (2) that the *patta* set up by defendant was null and void as against the plaintiffs and the defendant could not acquire any rights in the land under it:

Held, that it was competent for a Civil Court to adjudicate finally upon the validity of the *patta*. **O** DEBI BAKHSH *v.* RAM DHANI, 19 O. C. 58 446

JURISDICTION OF CIVIL COURT. *See* LOWER BURMA LAND AND REVENUE ACT, S. 76.

——— ———Madras Estates Land Act 121

JURISDICTION OF CIVIL AND REVENUE COURTS. *See* PUNJAB TENANCY ACT, S. 77 (3) (*d*).

JURISDICTION OF COURT OF WARDS over properties of ward outside territorial limits of Local Government 634

JURY, misdirection to, what amounts to -Heads of charge, principles applicable to preparation of- Functions of Judge and Jury 657

KANGANAM. See MADRAS ESTATES LAND ACT, S. 3.

LAMBARDAR See EJECTMENT.

LAND ACQUISITION ACT (I OF 1894), S. 3 (*a*)—*"Land," meanin of—Things attached to earth, whether within the Act.*

Though the term 'land' in section 3 (*a*) of the Land Acquisition Act is defined as including things attached to the earth, the Act does not contemplate the acquisition of things attached to the land without the land itself. It is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act. **PAT** DASARATH SAHU *v.* SECRETARY OF STATE 97

——— S. 14—*Compensation—Principles on which awarded—Probable future use.*

An owner is entitled to have the price of his land fixed in reference to its situation and the probable use to which it is likely to be put in the near future.

LAND ACQUISITION ACT—concld.

Where, therefore, the land in suit was situated near a junction of 3 roads at convenient distances from the city and the Railway station and the advent of the Railway made it a very suitable site for building purposes:

Held, that in view of the likelihood of its being used in the near future for building purposes its price must be assessed according to the rate of building sites. **P** SECRETARY OF STATE *v.* NANAK, 61 P. W. R. 1916; 126 P. L. R. 1916 283

LANDLORD AND TENANT. *See* BENGAL TENANCY ACT, S. 29; PENAL CODE, S. 424.

——— ——*Adverse possession—Acquisition of title by tenant.*

A person who enters into possession of a land in the capacity of an under-*raiyat* cannot acquire any title by adverse possession against his lessor, unless he first goes out of occupation or unless he distinctly asserts such a title to the lessor's knowledge and gives him notice of such assertion.

Failure to pay rent by a lessee to the lessor does not alone operate to create in favour of the lessee a title by adverse possession. **C** REAJUDIN BEPARI *v.* CHAND BAKSHA HAJI 28

———*Adverse possession of tank, essential elements of—Tenant's adverse possession against another tenant of same landlord, whe naffects landlord.*

A *patnidar* can, by adverse possession, acquire title to a tank covered by the *patni* of another *patnidar* under the same *zemindar*, and such title is good and valid against the *zemindar* when he acquires the *patni* interest of the latter by a private conveyance.

Per *Mookerjee, J.*—Though mere appropriation of fish from a tank may not necessarily constitute adverse possession of the tank, a very different interpretation must be placed upon acts of an obviously proprietary character, such as the sub-letting, mortgaging or re-excavation of the tank or the expenditure of large sums in clearing silt out of it. **C** BIJOY CHAND *v.* ISWAR CHANDRA DAS 60

——— ——— Denial of landlord's title—Ejectment 544

——— ——— ———Denial of landlord's title by tenant after expiry of term and before surrender, effect of 7

——— *Ejectment, suit for—Previous suit for possession dismissed on account of insufficiency of notice*—Res judicata—*Plea to be strictly construed Title by prescription—Limitation Act (IX of 1908), Sch. I, Art. 144—Evidence Act (I of 1872), s. 114, ill. (e), scope of.*

Held, (1) that the defendant's plea was not barred by the rule of *res judicata*, as the finding as to the insufficiency of notice did not necessarily involve a finding that the defendant was a *chalgeni* tenant;

(2) that in consequence of the disturbance of possession brought about by the decree of the Court below in the previous suit, the continuous possession for 12 years which the defendant was bound to have proved was broken and, therefore, he did not acquire title by prescription and was bound to be ejected.

LANDLORD AND TENANT—contd.

The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed.

Illustration (*e*) to section 114 of the Evidence Act is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business.

When once a tenant commences as a *chalgeni* tenant and then holds over, he is considered as a lessee from year to year and he can claim title by prescription as *mulgeni* tenant only from the date on which he set up that right.

Where, therefore, the tenant asserted that he was a *mulgeni* tenant in 1894, and in a suit brought to eject him in 1903 by a trustee, the latter got into possession though that decree was subsequently reversed:

Held, in a subsequent suit brought in 1909, that there was no continuous possession for twelve years by the tenant and, therefore, no acquisition of title by prescription. M. LAXMIPATHAYA *v.* RAMACHENDRA, 31 M. L. J. 311; (1916) 2 M. W. N. 133; 20 M. L. T. 228 421

——— ——— ——— *—Forfeiture caused by tenant's denial of landlord's title—Landlord's option to condone forfeiture—Subsequent act occasioning forfeiture—Suit for possession—Limitation Act (IX of 1908), Sch. I, Art. 143—Improvements— Compensation — Tenant's right to value of materials.*

It is quite open to a landlord to condone the forfeiture of his tenant's right caused by the latter's denial of his proprietary title and afterwards to bring a suit for possession within 12 years from the time when a separate and entirely distinct act occasioning forfeiture occurred

In executing a decree for ejectment of the tenant from land on which the latter has built a structure, the landlord is bound to pay the value of the materials. P. LOCHA RAM *v.* JINDWADDA KHAN, 56 P. W. R. 1916; 141 P. L. R. 1916 235

——— *Lease, execution of, to one of co-sharer landlords—Lessor, right of, to recover rent or sue in ejectment - Parties, joinder of.*

A person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue him in ejectment.

When a person sued for rent sets up the title of a third person, such third person ought not to be made a party to the case so as to convert a simple suit for arrears of rent into a suit for the determination of the title to immoveable property. L B KUNA PUNA MAHOMED EBRAHIM *v.* KABANA ENA MAHOMED, 9 BUR. L. T. 110 337

——— ——— ——— *Lease by occupancy tenant representing to betenure-holder—Suit for rent—Lessee, right of, to question landlord's title—Sub-lease—Estoppel —Bengal Tenancy Act (VIII B. C. of 1885), s. 85 (1), (2), applicability of—Precedents, value of.*

The creation of the complete relation of landlord and tenant has the effect, in law, of estopping the tenant from denying the title which he has admitted to exist in the landlord, the estoppel arising as the legal effect of carrying the contract into execution

LANDLORD AND TENANT—contd.

Two conditions are essential to the existence of the estoppel in such cases, *viz.*, possession and permission, and estoppel prevails so long as such possession continues. The parties are mutually bound by the terms of the lease, and it is not open to either of them to prove against the other facts contradictory to the allegations which form the basis of their contract, after that contract has been carried into execution and the contracting parties have enjoyed benefits thereunder.

A lease granted in contravention of section 85, clause (1), of the Bengal Tenancy Act is operative as between the grantor and the grantee.

The title of a grantee who can fall back upon prior possession as tenant or otherwise cannot be defeated by the mere proof of contravention of section 85.

The Bengal Tenancy Act is not a complete code even in respect of the law of landlord and tenant, much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants.

Each case forms a real precedent only in so far as it affirms a real principle and to follow previous authorities, in so far as they lay down principles, is essential, but to look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent.

In an action for rent on the basis of a lease wherein the plaintiffs, who were really occupancy *ryots*, were described as tenure-holders and the defendants-lessees as under-tenure holders, the defendants, who were let into possession and continued in possession till date of suit, resisted the claim on the ground that the plaintiffs were only occupancy *ryots* and that the permanent lease in their favour was void as contravening the provisions of section 85 of the Bengal Tenancy Act, and that it was really a sub-lease within the meaning of section 85, sub-section 2:

Held, (1) that the defendants were estopped from asserting that their obligations were other than those set out in the lease on the strength whereof they obtained possession from their grantors;

(2) that the case did not attract the operation of section 85 (2) of the Bengal Tenancy Act. C BAMANDAS BHATTACHARYYA *v.* NILMADHAB SAHA, 20 C. W. N. 1340 754

——— ——— ——— Removal of crops by tenant—Decision by Revenue Court, whether evidence at criminal trial—Questions of civil nature 966

——— ——— *Suit for rent against all heirs of deceased enant, if could be decreed against one of them—Contract Act (IX of 1872), s. 43, application of.*

In a suit for rent brought against all the heirs of a deceased tenant, a money-decree for the entire claim cannot be made against one of them on the ground that he alone used to pay the rent as the representative of the old tenant. The defendants must be taken as one body of registered tenants holding one single holding.

LANDLORD AND TENANT—concld.

Section 43 of the Contract Act can have no application where parties become jointly interested by operation of law in a contract made by a single person. C SHAIKH SAHED *v.* KRISHNA MOHAN BASAK, 24 C. L. J. 371 563

——— *Transfer of Property Act (IV of 1882), s.* 108 (*h*)—*Ejectment - Compensation for buildings or time to remove them after expiry of term—Estoppel.*

The erection of buildings by a tenant on leasehold land without any objection by the landlord does not change the tenant's right of tenancy into a perpetual right of occupation, though the landlord may have allowed and even recognised the tenant's right to a free sale of houses erected on the land by him and accepted purchasers of the buildings as his tenants.

Nor is the tenant or a purchaser from him entitled to any compensation for the cost of the buildings on the ground that the landlord in permitting the sale and recognising the purchaser as his tenant has encouraged the expectation on the part of the tenant that he would be entitled to compensation if suddenly ejected. To create an equitable estoppel against the landlord in such a case it is incumbent on the tenant to show that the landlord's conduct amounted by plain implication to a contract to change the right of tenancy into a perpetual right of occupation.

The rule established in India in such cases is that of section 108 (*h*) of the Transfer of Property Act, which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth, provided he leaves the property in the state in which he received it.

Semble—The Court may give the tenant reasonable time after the termination of the lease in which to remove the buildings.

For such further time the landlord is entitled to damages for use and occupation or mesne profits at a fair and reasonable rate. L B MOOLA MAHOMED *v.* P. K. EBRAHIM, 9 BUR. L. T. 101 735

LEASE. *See* MORTGAGE; TRANSFER OF PROPERTY ACT, S. 111.

———, constituted by a number of documents—Registration, whether necessary 108

———, execution of, by under-proprietor, effect of 743

———, non-delivery of portion of demised premises—Claim for damages—Cause of action—Limitation 254

——— of tank-bed lands for cultivation, whether legal 108

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 6, *interpretation of—Rules of Calcutta High Court thereunder, r.* 27, *whether* ultra vires — *General Clauses Act (I of* 1868*), s.* 2—*Pleader, enrolment of —Woman, right of, to admission as Pleader—Legal profession in British India, history of.*

Under the law as it now stands a person of the female sex (having the necessary qualifications is not entitled to be admitted to the ranks of the legal profession.

The rules of the Calcutta High Court made in pursuance of section 6 of the Legal Practitioners Act (XVIII of 1879), which clearly contemplate the admission of men only as Pleaders in the subordinate Courts, were made in accordance with and for the purpose of carrying out the intention of that Act and are not *ultra vires.*

Section 2 of the General Clauses Act, 1868, does not remove the disability on the admission of women created by Act XVIII of 1879.

History of the Legal profession in British India traced.

Per *Sanderson, C. J.*—Reading the sections of the Legal Practitioners Act relating to the admission of Pleaders without reference to the General Clauses Act of 1868, they obviously contemplate the admission of a male person only and the pre-existing disability of women to be admitted as Pleaders was not removed by that Act. The progressive character of recent legislation has only been in the direction of removing restrictions on the qualifications of men. Having regard to the constitution of the profession of Pleaders existing at the date of the passing of the 1879 Act and the fact that the whole trend of legislation for a long time had been to confine the profession to men, both the subject-matter of the legislation and the context are repugnant to a construction of the Act which would include females. It could not be intended that such a disability should be removed by a mere interpretation clause.

Per *Mookerjee, J.*—Neither the preamble nor the provisions of any of the sections of the Legal Practitioners Act afford any indication of an intention on the part of the Legislature to widen the profession of Pleaders by the admission of women into its ranks. There may, obviously, be weighty reasons why, in the University Act, words importing the masculine gender may be taken to include females, while in the Pleaders Act no such intention can be reasonably attributed to the Legislature; the subject-matters of the two Statutes and the historical antecedents thereof are entirely different.

An examination of the decisions pertaining to the subject discloses that, in favour of allowing women to practise law under old Statutes which mentioned men only, the Courts have reasoned (1) that every word importing the masculine gender only may extend to and be applied to females, (2) that Statutes, whenever they might have been passed, should be construed as if they were recently enacted and not with reference to what was in the mind of the Legislature at the time of their enactment, (3) that all Statutes are to be construed, as far as possible, in favour of equality of rights and all restrictions upon human liberty and claims for special privileges are to be regarded as having a presumption of law against them, (4) that the status of women has, in the eye of law and in popular acceptation, so changed as not only to prevent their admission to the Bar but practically to demand it. In refusing to admit women to practise law, the reasoning employed has been substantially the opposite of that which favoured their admission, (1) that words importing the masculine gender cannot be read so as to include women, unless the subject-matter and the context justify such a contention, (2) that as the Legislature never contemplated the admission of women, as indicated by the history of the profession,

words of the masculine gender in the Statute should not be interpreted to include women, (3) that an extended interpretation should not be put on Statutes, because women are generally unfitted for the duties of the legal profession, (4) that, if the status of women has altered in the eyes of law and popular acceptation, the proper remedy is legislation and not an alteration of the law in the guise of judicial exposition of the existing law.

English and American decisions reviewed.

No trace of women legal practitioners can be found in Hindu or Buddhistic times or during the Muhammadan period. When in 1793, for reasons assigned in the preamble to Regulation VII, the profession was re-organized and given a legal status, the Legislature contemplated men alone as members of the profession. There has never been a departure from that policy. There is no possible escape from the conclusion that, on the law as it stands, women are not entitled to be admitted to the ranks of the legal profession.

Per *Chitty, J.*—The Legal Practitioners Act was not framed to create a new profession but to regulate one which had been in existence for many years, during which no woman was enrolled or applied to be enrolled as a Pleader. To read the Legal Practitioners Act to include females would certainly be repugnant to the subject.

It is doubtful whether the General Clauses Act can apply to rules framed by the Calcutta High Court, though, in framing such rules under an Act of the Legislature, the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. **C** REGINA GUHA, *In the matter of*, 24 C. L. J. 382; 21 C. W. N. 74 925

LEGAL REPRESENTATIVE, decree against, as such—Duty to account for assets 224

LESSEE. *See* PARTITION.

LESSOR. *See* LANDLORD AND TENANT.

LETTERS PATENT (MADRAS), CL. 21 92

LETTERS PATENT (PATNA), cl. 10 888

LIMITATION. *See* BENGAL TENANCY ACT, s. 111; SCH. III, ART. 3; EXECUTION; LOWER BURMA COURTS ACT (VI OF 1900), s. 27 (2); MORTGAGE; SETTLEMENT DECREE.

LIMITATION ACT (XV OF 1877), applicability of, to applications asking Court to do what it has no discretion to refuse 950

——— S. 6 438

——— SCH. II, ARTS. 12, 95 404

——— SCH. II, ART. 175A 438

LIMITATION ACT (IX OF 1908)—*Applicability to rights set up in defence—Bar of claim to enforce rights.*

The provisions of the Limitation Act prescribing a limit of time for enforcement of rights and remedies apply only to actions brought by the plaintiff, and not to rights set up in defence. A defendant will not be precluded from setting up a right by way of defence even if he could not have done so under the Limitation Act as plaintiff by way of substantive claim.

In a suit for declaration of title to and recovery of possession of a property from the defendants on the basis of a document, it is open to the defendants to impugn the document, even though their right to get the document set aside or modified by a suit has been barred by limitation. **C** DEODHARI *v.* DAYANAND 610

——— Ss. 4, 14—*Suit filed in wrong Court—Computation of time.*

The last day of limitation for a suit on a promissory note being a Sunday (31st June 1913) the suit was filed on 2nd June in the Court of the Subordinate Judge at Agra. On 21st January 1914, the plaint was returned to be filed in the Court of the Subordinate Judge at Aligarh, as the Agra Court had no jurisdiction. The suit was dismissed as barred by limitation:

Held, that, even allowing the days during which the suit was pending in the wrong Court, the suit was barred by time as the plaintiffs were not entitled to exclusion of the extra day from 1st June 1913 to 2nd June 1913. **A** MAKUND RAM *v.* RAMRAJ, 14 A. L. J. 310 292

——— S. 5 651

——— S. 5—"*Sufficient cause*," *whether question of fact—Punjab Courts Act (III of 1914), whether retrospective.*

The decree of the 1st Court was given in a case on the 8th June 1914 by a Munsif, and under the law then in force the plaintiff had sixty days within which to appeal to the Divisional Judge. The new Punjab Courts Act came into force on the 1st August 1914. On that date an appeal was filed in the Court of the District Judge, but was dismissed as time-barred as the new Act only allowed 30 days. The District Judge declined to allow any extension under section 5 of the Limitation Act holding that ignorance of law was not a sufficient cause. On second appeal:

Held, (1) that the question of "sufficient cause" was a question of fact and, therefore, the second appeal was not competent;

(2) that inasmuch as the Act had been passed in January, assented to by the Viceroy in April, and published in the *Gazette* in May, all before the decree appealed against had even been passed, the appellant must or should have known that the limitation had been cut down and ought to have filed his appeal within time. **P** ASA RAM *v.* BUDHU MAL, 43 P. W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916 67

——— Ss. 5, 12—*Expiry of time allowed for appeal on a holiday—Application for copies made on reopening of Court Time spent in obtaining copies, whether excluded Indulgence on ground of mistake, when allowed.*

Indulgence under section 5 of the Limitation Act on the ground of mistake is only allowed where it is shown that the appellant has acted with due care and diligence.

In computing the period prescribed for an appeal, the time requisite for obtaining copies is excluded only if the application for copies is made while the right of appeal subsists, and an appellant cannot be allowed to let the whole of the period allowed for appeal to expire and then take advantage of the holiday which happens to occur towards the end of that period.

Where, therefore, the last day of limitation expired on a holiday and the appellant applied for copies on the re-opening of the Court and filed his appeal as soon as he got them:

Held, (1) that even deducting the time spent in obtaining copies the appeal was time-barred;

(2) that as the appellant had not shown due care and diligence he was not entitled to any indulgence. **P** GURAN RAKHA *v.* BINDRABAN, 55 P. W. R. 1916; 79 P. R. 1916; 125 P. L. R. 1916 **233**

——— Ss. 5, 12—*"Sufficient cause," finding as to, when not to be interfered with—Time requisite for obtaining copies, how to be determined.*

Where a lower Appellate Court, after considering all the circumstances of a case, has come to the conclusion that "sufficient cause" has or has not been established for not filing an appeal within time, a High Court in second appeal will not interfere.

There is no hard and fast rule which determines exactly for all classes of cases the amount of time requisite for obtaining copies within the meaning of section 12 of the Limitation Act. The question in each case is, what on the facts of that case was the time requisite for obtaining copies.

The words of section 12 of the Limitation Act do not lay down that the time requisite for obtaining a copy must be continuous.

A decree in a Court of a Munsif was passed, prepared and signed on September 27th. From September 28th to October 31st (both days included) the Court was closed for annual vacation and it re-opened on 1st November. An application for a copy of the judgment was made on November 3rd and for a copy of the decree on November 13th. Both copies were ready and delivered on November 21st and an appeal was filed on November 28th:

Held, that as 27th September, the day on which the judgment was pronounced and the decree signed, was excluded and as from 28th September to 31st October, the Court was closed and an application for copies could not be made, the whole of the time from 27th September to 31st October was part of the time requisite for obtaining copies, whether they were applied for on the day on which the Court re-opened or on some later date. **PAT** DEBI CHARAN LAL *v.* MEHDI HUSSAIN, 20 C. W. N. 1303 **888**

——— Ss. 9, 19—*Conditional acknowledgment of liability, when operative—Agreement to refer to arbitration, effect of—Promise not to plead limitation—Contract Act (IX of 1872), s. 23.*

In cases of conditional acknowledgment of liability, where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled.

To operate as an acknowledgment a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration, which

prima facie is only a mode of settling disputes and not an admission of any liability by the parties, does not import any such relationship.

A promise by the defendant not to raise the plea of limitation, should a suit have to be filed, is in effect a covenant to defeat the provisions of the Limitation Act and consequently void under section 23 of the Contract Act.

Parties to a suit cannot estop themselves from pleading the provisions of a Statute.

Where in a suit brought in 1912 for damages for breach of a contract, of which the performance was due before the 20th September 1906, the plaintiff relied upon a letter dated 20th September 1909 written by the defendant, saying that as a suit was threatened he (the defendant) agreed to refer matters to arbitration and to pay whatever was found due from him, and further agreed that he would not raise the bar of limitation to any suit brought by the plaintiff:

Held, (1) that inasmuch as the letter was a mere submission to arbitration containing a promise to pay whatever amount the arbitrators awarded against the defendant, it was not available as an acknowledgment within the meaning of section 19 of the Limitation Act in the event of the arbitration proving abortive;

(2) that inasmuch as the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run, it could not be stopped by anything that happened subsequently. **M** BOLLAPRAGADA RAMAMURTHY *v.* THAMMANNA GOPAYYA, 4 L. W. 48; 20 M. L. T. 129; 31 M. L. J. 231 **575**

——— S. 11—*Limitation, law of, whether* lex fori *or* lex loci contractus.

The law of limitation is a law relating to procedure, having reference only to the *lex fori* and, therefore, the judgment of a competent English Court cannot be objected to on the ground that if the suit had been tried in India it would have been barred by limitation.

A claim that would be time-barred in British India cannot be said to be a claim founded on a breach of any law in force in British India. **L B** S. KING *v.* D. J. BUCHANAN, 9 BUR. L. T. 103 **741**

——— S. 12 **233, 888**

——— S. 12, *applicability of.*

Section 12 of the Limitation Act applies to an application for review of judgment, and the period of limitation in regard to such application will not commence to run until, at all events, the day on which the decree was signed, even though it is not necessary to attach the decree to the application. **C** GANGADHAR KARMAKAR *v.* SHEKARBASINI DASYA, 20 C. W. N. 967; 24 C. L. J. 235 **348**

——— S. 12—*Exclusion of time—Practice—Time requisite for obtaining copies—Folios not deposited owing to dilatoriness of applicant, effect of—Time to run from signing of decree.*

In appeals the period of limitation should be calculated from the date on which the decree was actually signed.

An applicant for a copy should deposit the required number of folios not later than the first day on which

LIMITATION ACT—(1908)—contd.

the office of the Court is open after that on which the number of folios was notified to him, and in calculating the time required for obtaining a copy the applicant is not entitled to deduct the days during which the preparation of the copy was delayed by his own neglect to furnish the folios. In other words, the length of time requisite for obtaining a copy within the meaning of section 12 of the Limitation Act ought not to vary with the dilatoriness of the applicant in supplying the required number of folios. **PAT** RAM ASRAY SINGH *v.* SHEONANDAN SINGH 868

——— S. 14 292

——— S. 14, EXP. (1) 595

——— S. 15, SCH. I, ART. 182—*Execution application presented more than three years after dismissal of last application, whether barred—Application in continuation of former application.*

Where the execution of a decree has not been stayed by injunction or order, and the decree-holder has not been prevented by force or fraud from executing it, an application for execution presented more than three years after the dismissal of the last application is barred by time.

The principle that the Court may treat an application *prima facie* barred by limitation as an application made in continuation of an application which has been dismissed, can be applied only to those cases where the decree-holder has not been remiss. **PAT** MAHADEO PRASAD SAHU *v.* RAM CHANDAR NARAIN SINGH 579

——— S. 19 254, 575

——— S. 19, SCH. I, ARTS. 115, 116—*Lease—Non-delivery of portion of demised premises—Claim for damages—Cause of action—Limitation—Covenant for quiet enjoyment—Transfer of Property Act (IV of 1882), s. 108 (b)—Grants by Crown, construction of—Continuing breach—Master and servant—Admission of legal liability, whether Tahsildar or Collector can make on behalf of Government.*

An action by a lessee for damages caused by the lessor's failure to deliver to him a portion of the demised premises should be brought within the period prescribed by Article 115 or 116 of Schedule I of the Limitation Act, commencing from the time when the lessee became entitled to possession under the terms of the contract.

Such a contract is broken completely as soon as the lessor declines or is unable to put the lessee in possession, and the cause of action for the plaintiffs' suit arises on the date of such breach, whether the suit is construed as one for breach of a covenant to give possession or of one for quiet enjoyment.

Though the provisions of the Transfer of Property Act do not apply to Crown grants, the principles laid down in section 108 (*b*) of the Act may be referred to for construing them.

A lessee was entitled under a lease, dated March 1896, to get possession of 777 acres of land. On 11th March 1903 he sued the lessor for damages for breach of covenant for quiet enjoyment in respect of 109 acres, an area of which he failed to get possession owing to adverse title set up by a third person. The refusal on the part of the lessor was communicated to him on 2nd July 1896 and he brought a suit for damages on 11th March 1903:

LIMITATION ACT—(1908)—contd.

Held, that the obligation to put the lessee in possession of the property was broken as regards the 109 acres in July 1896, that the breach, so far as concerned the land in dispute, was not a continuing one, but was complete and final at the date when possession was demanded and refused, and that the suit was, therefore, barred under Article 116, Schedule I of Limitation Act.

Per *Coutts Trotter, J.*—The nature of the remedy available to a tenant under the covenant or contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous or not is this: If the plaintiff sues in damages, can he only sue for the damage actually accrued up to the date of suit, or may he sue for the whole of the damages accrued and prospective, that the breach will cause to him. In the former case the breach is continuing, in the latter it is single and final.

The failure on the part of the lessor to give possession of the demised lands to his lessee goes to the very root of the contract, and is so fundamental a breach of it as to entitle the lessee to treat that breach as final and bring an action forthwith for the whole of his prospective damages.

Obiter.—A breach of a covenant for title is not a continuing breach.

Semble.—It is extremely doubtful if a Tahsildar or a Collector is competent to make admissions of legal liability on behalf of Government within the meaning of section 19 of the Limitation Act. **M** SECRETARY OF STATE *v.* PEMMARAJU VENKAYYA GARU, 19 M. L. T. 318; 3 L. W. 443; (1916) 2 M. W. N. 342; 30 M. L. J. 575 254

——— S. 20—*Entry of payment—Signature of party—Contract Act (IX of 1872), ss. 60, 61—Appropriation of payments by Court.*

In order to save limitation under section 20 of the Limitation Act the person who made the payment should be the person who should sign the writing as evidence of payment.

If the debtor does not appropriate payments of debt, then the creditor may appropriate such payments to any particular debt or to any particular portion of a running account. But if neither party appropriates, the Court is entitled under section 61 of the Contract Act to declare that such payment shall be appropriated in discharge of the debts in order of time. **PAT** BISHUN PERKASH NARAIN SINGH *v.* MUHAMMAD SADIQUE, 1 P. L. J. 474 375

——— S. 20—*Interest, not expressly paid as such, if could be taken as payment of principal—Payment in handwriting of debtor—Presumption.*

A payment on a mortgage-bond, which cannot be taken as payment of interest under section 20 of the Limitation Act by reason of not being proved to have been expressly made as such, will be considered as payment towards the principal under the section (so as to give a fresh start to limitation), if the fact of the payment appears from a document in the handwriting of the debtor making the same. **C** HEM CHANDRA BISWAS *v.* PURAN CHANDRA MOOKERJEE 638

LIMITATION ACT—(1908)—contd.

——— S. 20—*Interest, payment of, as such—Labour in lieu of interest, whether saves limitation.*

Where the plaintiff proves that he received interest through the labour of the defendants till within three years before suit, the claim is not barred by limitation.

Where, therefore, plaintiff made such an allegation in the plaint:

Held, that his suit ought not to have been dismissed as time-barred, but that he should have been given an opportunity to prove that allegation. **M** SWAMINATHA PILLAI *v.* MONDAIYAN, 3 L. W. 552 **480**

——— S. 20—*Payment of a sum on decree for money not bearing interest, effect of—Application to certify payment under decree, if controls s.* 20.

The provisions of section 20 of the Indian Limitation Act are in no way affected by the decree-holder making an application to certify payment under a decree.

A payment by the judgment-debtor of a certain sum on a decree for money which does not bear interest, cannot operate to give a fresh start to the period of limitation under section 20 of the Limitation Act, even if the decree-holder in his application for execution certifies that payment as payment of interest, unless that payment appears in the handwriting of the judgment-debtor or his agent duly authorized in that behalf, so that it might be taken as having been made in part payment of the principal under that section. **C** HERENDRA CHANDRA BHATTACHARJEE *v.* GAGAN CHANDRA DAS **177**

——— S. 20, SCH. I, ART. 85—*Loan transaction—Payments of part without mentioning whether paid as principal or interest as such, effect of—Acknowledgment—Deposition of debtor, if amounts to acknowledgment to save limitation.*

The defendant opened dealings with the plaintiff Bank by borrowing Rs. 500 from it on the 15th of October 1909 and borrowed further sums till the 23rd of December 1910. On various dates during the period of the account certain sums were paid in by the defendant, the last item being paid in on the 25th November 1912. These were all credited to the account and set off against the pre-existing debt. Interest was calculated every half year and the balance was carried on to the following half year. The plaintiff sued on the 24th of November 1913 for the balance of the money with interest. The defendant pleaded *inter alia* limitation:

Held, that it was not a mutual account within the meaning of Article 85 of Schedule I of the Limitation Act and that, therefore, the suit was barred by limitation, inasmuch as it was not established that any payment made as payment of the principal appeared in the handwriting of the defendant-debtor, nor did it appear that any payment was made on account of interest as such;

that the deposition of the debtor made in the suit and signed by him did not constitute evidence of part payment so as to save limitation. **A** BANK OF MULTAN, LTD. *v.* KAMTA PRASAD, 14 A. L. J. 949 **199**

LIMITATION ACT—(1908)—contd.

——— S. 22—*Joinder of parties after institution of suit, how far involves bar of limitation.*

The joinder of parties subsequent to the institution of a suit does not necessarily involve a bar of limitation under section 22 of the Limitation Act. Such a result depends upon the fact whether the joinder was necessary to enable the Court to award such relief as may be given on the suit as framed. **S** GEHIMAL DYALMAL *v.* KARMOOMAL SIROOMAL, 10 S. L. R. 38 **551**

——— S. 26 **394**

——— SCH. I, ART. 10—*Suit for pre-emption—Deed of sale wrongly describing property sold—Subsequent rectification—Starting point of limitation.*

A sale-deed wrongly described the land sold, but at mutation the parties admitted the mistake and agreed that other *khasra* numbers had been intended to be sold and mutation was accordingly granted as regards the land comprised in these numbers. Plaintiff then sued to pre-empt the sale alleged by him to have taken place on the date when the order sanctioning mutation was passed:

Held, (1) that the mere fact that the subject-matter of the sale was by an error of the *patwari* stated differently in the deed could not alter the true nature of the transaction;

(2) that limitation began to run from the date of the sale-deed itself and not from the date of the mutation. **P** GANGA RAM *v.* SARDARA, 60 P. W. R. 1916; 64 P. L. R. 1916 **278**

——— SCH. I, ART. 11 **321**

——— SCH. I, ART. 29 **86, 98**

——— SCH. I, ART. 36 **430**

——— SCH. I, ARTS. 36, 29, 42, 46, 62, 120—*Injunction—Compensation, suit for—Civil Procedure Code (Act V of 1908), O. XXI, r. 46—Wrongful seizure of moveables—Attachment of moveables by issue of prohibitory order.*

A suit for compensation for wrongful seizure of moveables is governed by Article 29 of Schedule I of the Limitation Act.

A suit for compensation for wrongful attachment of moveables by the issue of a prohibitory order is governed by Article 36 and not by Article 42, 46, 62 or 120.

An attachment by a prohibitory order is not an injunction within the meaning of Article 42.

Article 36 of Schedule I of the Limitation Act is a general Article for suits for compensation for all possible acts and omissions commonly known as torts, that is, wrongs independent of contract and which are not provided for by other Articles. **M** PANDIRI VEERAMMA *v.* MANDAVILI SUBBA RAO, 31 M. L. J. 257 **98**

——— SCH. I, ARTS. 42, 46 **98**

——— SCH. I, ARTS. 57, 64, 85—*Punjab Loans Limitation Act (I of 1904), Sch. I, S. Nos. 3, 7—Account stated—Closed account—Open and current account—Balance—Interest, rate of—Presumption.*

An account is said to be stated only when there have been cross-demands between the parties and

LIMITATION ACT—(1908)—contd.

the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract and is a substantive cause of action.

When in striking the balance of an account interest at a certain rate is charged, it must be presumed that the same rate is to be chargeable till payment.

Plaintiff advanced loans to defendant from time to time, and in re-payment defendant occasionally passed grain to plaintiff, which the latter sold and credited to the former's account. After some months the accounts were examined and a balance struck in plaintiff's favour. Subsequently defendant borrowed more money from plaintiff and overpaid him in this latter account. Plaintiff, after giving credit in the previous account of this overpayment in the subsequent open account, claimed the balance under the former account averring an oral agreement for re-payment of balance with interest:

Held, that plaintiff's suit was on a closed account and not on an open account and that it was governed by Article 64 or by Article 57 of the Limitation Act as amended by the Punjab Loans Limitation Act and not by Article 85 of the Limitation Act. **P** ISHAR DAS *v.* HARKISHAN DAS, 148 P. W. R. 1916 577

——— SCH. I, ART. 62 98

——— SCH. I, ARTS. 62, 29 — *Compensation for wrongful seizure, suit for, nature of—Damages for tort in detinue or trespass - Proof, necessity of—Money had and received, suit for.*

Compensation for wrongful seizure is another way of saying damages for tort in detinue or trespass. There can only be wrongful seizure when the property was in the possession of the person who is setting up the wrong. An action for detinue involves proof of right to actual possession and of deprivation of possession.

Therefore, a suit to recover from the defendant certain money which has been received by the defendant in the form of rent paid to the defendant through the Court under a decree entitling the defendant to receive such rent as against tenants, but in respect of property of which the plaintiff was entitled to possession and also to receipt of rent, is not an action for compensation for wrongful seizure of moveable property under legal process within the meaning of Article 29 of Schedule I of the Limitation Act, 1908, but is an action for money had and received by the defendant for the use of the plaintiff and is governed by Article 62 of Schedule I of the Act. **A** NIADER SINGH *v.* GANGA DEI, 14 A. L. J. 728 86

——— SCH. I, ART. 64 577
——— SCH. I, ART. 85 199, 577
——— SCH. I, ART. 112 159
——— SCH. I, ART. 115 430
——— SCH. I, ART. 120 98

——— SCH. I, ART. 120—*Vendee's mortgagees in possession—Vendor's widow's name recorded in revenue papers—Declaratory suit—Limitation.*

One *K* obtained a pre-emption decree against *G* on the 2nd of November 1887 and obtained possession on the 2nd of April 1888. He then executed a mortgage with possession in favour of certain persons who were tenants of the land. *G's* name remained recorded in the village papers till his death, when his widow's name was entered. The mortgagees then sued for and obtained a declaration of their title as mortgagees. The plaintiff, who claimed through *K*, applied for mutation of names, but was successfully opposed by *G's* widow. He then brought the present suit for a declaration of his proprietary right three years after the death of *G* but more than six years after the date of *K's* obtaining possession:

Held, that the suit was not barred by the six years' rule of limitation. **A** RAMANANDI *v.* CHHAJJU SINGH 241

——— SCH. I, ARTS. 120, 33, 115—*Co-sharer, action as between for profits of ferry.*

A suit by one co-sharer against another to recover his share in the profits of a ferry is governed by Article 120 and not by Article 36 or 115 of the Limitation Act. **PAT** KISHUN DEYAL SINGH *v.* KISHUN DEO JHA, 1 P. L. J. 69 430

——— SCH. I, ARTS. 120, 124, 131, 144—*Suit by Temple Committee for declaration of their right of supervision, nature of—Accounts, claim to enforce production of, whether maintainable when suit for declaration time-barred—Office of member of Temple Committee, whether hereditary—Religious Endowments Act (XX of 1863), s. 13.*

Where the members of a *Devasthanam* Committee appointed under Act XX of 1863 sued for a declaration that the suit temple was subject to the control of the Committee and for an injunction directing defendant to produce for their inspection all the temple properties and accounts:

Held, (1) that the suit was not one for possession of a hereditary office, as the office of a member of a *Devasthanam* Committee is not hereditary and, therefore, Article 124 of the Limitation Act did not apply;

(2) that Article 144 of the Limitation Act also could not be applied, as there was no prayer for possession of any immoveable property or any interest therein;

(3) that the suit, as framed, fell under Article 120 of the Limitation Act and was time-barred;

(4) that the right to enforce production of accounts could not be severed from the right of supervision vested in the Committee and since the supervision had not been exercised and the suit to declare it was time-barred, plaintiffs could not rely upon Article 131 of the Limitation Act and enforce their "periodically recurring right" of production of accounts. **M** CHARAPATTADA SIDDALINGA SWAMULU *v.* SONDUR RAMACHANDRA CHARLU, 4 L. W. 186; 31 M. L. J. 857 646

——— SCH. I, ART. 124 646

——— SCH. I, ART. 127 549

——— SCH. I, ART. 131 646

——— SCH. I, ART. 132—*Suit on mortgage — Deed providing for payment of principal on fixed date and annual payment of interest—Further stipulation for payment of principal and interest in case of default — Right of action, when accrues—Debtor, whether can avail himself of benefit secured to creditor—Interpretation of Statutes.*

LIMITATION ACT—(1908)—contd.

In a suit by the assignee of a widow on a mortgage executed in her favour, it was found that the widow could assign away the interest that remained due on the date of the assignment and not the principal of the mortgage debt. The mortgage which was dated the 1st November 1888, provided for the payment of principal on the 1st November 1899 and for the annual payment of interest at 6¼ per cent. per annum. There was a further stipulation for the payment of the principal together with interest at 12 per cent. per annum from the date of default in the payment of interest "without raising the plea of future instalment on the liability of the mortgage property." Interest not having been paid as provided for, it was contended that the suit was barred by limitation:

Held, (1) that the mortgagee was not bound to take advantage of the default clause, and that the right of action did not accrue until the date provided for the payment of the principal arrived;

(2) that the suit was governed by Article 132 of the Limitation Act and was not time-barred.

No one is obliged to take advantage of a forfeiture clause and a benefit secured to a creditor should not be availed of by a debtor when the creditor does not want it.

It would not be in consonance with the ordinary rule of interpretation of Statutes to regard a specific provision in one of the Articles of an Act as containing a general rule of law applicable to claims under other Articles. The proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other Articles in their natural sense. **M** NARNA *v.* AMMANI AMMA, 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J. 269 **418**

——— SCH. I, ART. 137—*Adverse possession—Limitation, running of—Auction-purchaser, subsequent, suit by, against prior auction-purchaser.*

A share of a property was mortgaged without possession, and subsequently a grove forming part of that property was similarly mortgaged separately. In 1899 the defendant purchased the grove at a sale in execution of a decree obtained by the subsequent mortgagee against the mortgagor alone; and in August 1902 the plaintiff purchased the mortgaged share of the property at a sale in execution of a decree obtained by the prior mortgagee against both the mortgagor and the subsequent mortgagee. In June 1914, the plaintiff sued the defendant for actual physical possession of a proportionate share in the grove. The defendant pleaded adverse possession from the date of his purchase, and relied upon Article 137, Schedule I, of the Limitation Act:

Held, (1) that as the property was subject to the prior mortgage at the time the defendant purchased it and as the defendant by his auction-purchase only acquired a right to redeem the earlier mortgage, he could not set up a plea of adverse possession from the date of his purchase;

(2) that the plaintiff's right to possession of the property came into existence at the date of *his* purchase, *i.e.*, 16th August 1902, and there could be no adverse possession running against him prior to that date, and that, inasmuch as the suit had been brought within twelve years of that date, no question of limitation could arise;

(3) that Article 137 of the Limitation Act had no application to this case. **O** BHAWANI DIN *v.* JHAMMAN, 3 O. L. J. 252 **753**

——— SCH. I, ART. 138 **87**

——— SCH. I, ART. 142 **549**

——— SCH. I, ART. 142—*Presumption of possession from title—Both sides' evidence unworthy of credit—Arable land—Suit for possession—Limitation—Burden of proof.*

The presumption of possession from title arises only in cases where the evidence of possession is equally strong on both sides. This principle does not apply to cases in which the evidence is equally unworthy of credit on both sides except in respect of land of a special character, such as waste, jungle or land under water. In case of arable land, in the absence of evidence on either side as to possession, the presumption arising from title does not save limitation under section 142 of the Limitation Act. **PAT** FAKIRA LAL SAHU *v.* RAM CHARAN LAL, 1 P. L. J. 146 **554**

——— SCH. I, ARTS. 142, 144—*Suit for possession based on title—Adverse possession, plea of—Burden of proof—Entry in revenue map, value of, in proving title—Evidence Act (I of 1872), s.* 102.

In a suit for possession of immoveable property based on title, in which the plaintiff does not allege dispossession, the plaintiff must first prove his title, and the defendant cannot be required to prove adverse possession until the plaintiff has proved his title.

An entry in a revenue map is not sufficient to establish title to immoveable property. **L B** AUNG HLA *v.* TON GYI, 8 L. B. R. 264 **432**

——— SCH. I, ART. 143 **235**

——— SCH. I, ART. 144 **87, 421, 432, 646**

——— SCH. I, ART 173 **651**

——— SCH. I, ART. 176 **438**

——— SCH. I, ART. 182 **110, 579, 876**

——— SCH. I, ART. 182—*Application for execution—Relief asked for not allowed by decree Application, whether step-in-aid of execution—Execution petition, error in, effect of.*

Any mistake or error in an execution petition does not necessarily render such an application a nulity.

An execution petition may give a fresh starting point of limitation even though the relief asked for is not allowed by the decree sought to be executed.

Where the decree-holder prayed for the arrest of the judgment-debtor in spite of the fact that the decree to be executed did not make the judgment-debtor personally liable:

Held, that this was a step-in-aid of execution and operated to save limitation. **M** RAMACHANDRA NAIDU *v.* TIRUPATHI NAIDU, (1916) 2 M. W. N. 128 **614**

——— SCH. I, ART. 182—*Execution—Dismissal of first application for non-payment of* batta—*Second application made more than* 3 *years after—Interval spent in contesting suit by third party—Second application, whether revival of first.*

Where the first application for execution, dated 27th April 1907, was dismissed for non-payment of

batta and the plaintiff applied again on 22nd October 1912 and in the interval the decree-holder's right to attach the property was contested in a suit by a third party which was finally decided in the decree-holder's favour on 11th August 1911:

Held, that, as the dismissal of the first application had nothing to do with the suit brought by the third party, it could not be treated as pending during the time taken in that litigation and the second application having been made out of time was liable to be dismissed. M YELLAMPALLE VENKATAPPA *v.* MATAM NANJAPPA, 4 L. W. 112 594

——— SCH. I, ART. 182—*Execution — Step-in-aid of execution—Application by decree-holder for extension of time to find out judgment-debtor's whereabouts, if saves limitation.*

An application by a decree-holder, during the course of execution proceedings, to extend the time for service of process on defendant to enable him to make further enquiries as to his whereabouts is a step-in-aid of execution of his decree and saves limitation, unless it is shown to be *mala fide*. A BHAIRON PRASAD *v.* AMINA BEGAM, 14 A. L. J. 890 693

——— SCH. I, ART. 182 (5)—*"Proper Court", meaning of—Step-in-aid of execution, when will save limitation—Decree for possession, and for mesne profits and costs—Subsequent transfer of jurisdiction—Petition for execution—Jurisdiction.*

A petition, although it is a step-in-aid of execution, will not save limitation, unless it is presented to the proper Court.

Where the Court which passed a decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which, at the time of making the application for execution, would have jurisdiction to try the suit in which the decree sought to be executed was passed.

In 1903 a decree for possession and mesne profits and costs was passed by the Rajahmundry Munsif's Court. The jurisdiction over the village of Tadimella, where the suit property was situated, was in 1905 transferred to the Tanuku Munsif's Court and again to the Kovvur Munsif's Court in May 1912. In 1908 the decree, so far as the delivery of property was concerned, was executed in the Tanuku Munsif's Court. In 1909 an application for execution of the decree for mesne profits was presented to the Tanuku Munsif's Court and it was dismissed on 4th January 1910. The decree-holder and his heirs then presented two different applications to the Rajahmundry Munsif's Court on 20th September 1912 and 1st August 1913 respectively in respect of the unsatisfied portion of the decree for mesne profits and costs. The judgment-debtors did not reside within the jurisdiction of the Rajahmundry Court nor was their property situated within it. The present application for execution was then presented to the Kovvur Munsif's Court on 13th November 1913:

Held, that the execution petitions of 20th September 1912 and 1st August 1913, having been presented to the Rajahmundry Court, were not presented to the "proper Court" within the meaning of Article 182 of the Limitation Act and did not, therefore, save limitation. M PENUGONDA RATTAM *v.* KORASIRA THATHA, 31 M. L. J. 90; 20 M. L. T. 327 237

LOWER BURMA COURTS ACT (VI OF 1900), S. 27 (2)—*Appeal—Amendment, formal, in decree—Computation of time—Limitation.*

Where an appeal is directed against a decree which is not substantially altered by an amendment made in it at the appellant's instance and which is wholly in the appellant's favour, the appellant cannot claim to compute the time for his appeal from the date of the amendment. L B WOR LON *v.* G. RAINEY 347

LOWER BURMA LAND AND REVENUE ACT (II OF 1876), Ss. 56, 55B—*'Claims', 'disputes', meaning of—Dispute between cultivators regarding land occupied for purposes of cultivation—Jurisdiction of Civil Court.*

The word 'claims' in section 55B of the Lower Burma Land and Revenue Act relates only to claims against Government and the word 'disputes' in the said section does not include disputes between one cultivator and another in regard to land occupied for purposes of cultivation. With regard to such suits, therefore, the jurisdiction of the Civil Court is not ousted by section 56 of the Act. L B MAUNG PO KYAING *v.* MAUNG PYI 277

LUNATIC, decree against—Not properly represented in suit—Execution—Objections to validity of decree, sustainability of—Enforceability or otherwise of decree, whether a question under s. 47, Civil Procedure Code 856

MADRAS CITY MUNICIPAL ACT (III OF 1904), S. 130 (1)—*"Gross value," meaning of—Stipulation by tenant to pay enhanced rent in case of failure to water garden, effect of.*

"Gross rent" is the annual rent which a tenant might reasonably be expected to pay for an hereditament if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent.

Where according to the terms of a lease, the tenant was to pay Rs. 20 per mensem and keep the garden properly watered, and if he did not want to water the garden or failed to do so, the landlord was to arrange for the watering and the tenant was to pay Rs. 50, and where the tenant chose the latter course:

Held, that the gross value of the garden was the annual rent at Rs. 50 per mensem, the amount received by the landlord for maintaining the garden in a proper state. M VEERABHADRAH IYER *v.* PRESIDENT, CORPORATION OF MADRAS, 31 M. L. J. 315; (1916) 2 M. W. N. 130 589

——— Ss. 150, 151 (f)—*Vehicle kept under repair—Liability for being taxed—'Kept,' 'let out for hire,' 'used', meaning of.*

The possession of a vehicle without use brings the possessor within the scope of section 150 of the Madras City Municipal Act. Therefore a motor car kept under repair is liable to taxation.

Under section 150, the car need not be in the possession of the owner.

The three phrases "kept," "let out for hire", and "used" in section 150 of the Madras City Municipal Act are employed distinctively and the word 'kept' is not qualified by the words "for hire." M KRISHNA ROW *v.* PRESIDENT OF THE CORPORATION OF MADRAS 581

——— S. 151 (f) 561

MADRAS ESTATES LAND ACT (I of 1908), Ss. 2 (15), (16) (b), 6 (2), (4), 45, 153, 157, 163 (1)—*'Old waste'—Presumption—Admission of tenant to 'old waste'—Cultivation without landlord's permission—Subsequent acceptance of* sivaijama *from tenant, effect of—Eviction—Jurisdiction of Civil Court.*

The defendants cultivated land in an estate classed as old waste without the permission of the landlord. The land was in a village and it was cultivated from 1905 to 1908. The defendants applied for *pattas* in *Faslis* 1318 and 1320. The plaintiff-landlord agreed to their remaining upon the lands as *sivaijama* tenants paying the usual rent, but did not issue *pattas*. He refused to give them occupancy rights and reserved to himself the right to eject them at the end of each agricultural year if he did not renew the *sivaijama* tenancy for the next year. In a suit for eviction of the defendants, the plaintiff wishing to reserve the lands for forest purposes:

Held, (1) that there was a presumption that the suit land was 'old waste *ryoti* land' within the meaning of section 2 (3) of the Madras Estates Land Act;

(2) that defendants were 'admitted to possession' of the land and were 'ryots';

(3) that the defendants were not liable to be ejected as trespassers under section 163 (1) of the Madras Estates Land Act, but that the suit was governed by sections 153 and 157 and should have been brought in the Revenue Court.

Per *Oldfield, J.*—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish his right to do so.

The burden of proving that a land comes within the exemptions in section 2 (16) (*b*) or 6 (4) of the Madras Estates Land Act lies on the party asserting it.

A landholder who has received the payment due under section 45 in respect of a person's occupation of old waste must be deemed to have admitted such person into possession of the old waste.

Section 163 confers a right of suit in a Civil Court only against those who are liable under section 45, but have made no payment, those who have made such payments being treated as having been admitted.

Persons who continue to hold after making the payment referred to in section 45 voluntarily and in consequence of the Collector's decision must be treated as holding on condition of making such payment and are, therefore, within the definition of 'ryot' in section 2 (15). Suits to eject them will, therefore, lie under section 153 in the Revenue Court.

The provisions of section 153 are not exhaustive of all possible cases of eviction.

Per *Sadasiva Aiyar, J.*—Actual cultivation by a tenant without his having been obliged to incur any extraordinary expense or trouble in bringing the land under cultivation is almost conclusive evidence that the land is cultivable land. The whole policy of the Madras Estates Land Act is in favour of raising a presumption that a land in an estate is *ryoti* land.

Sivaijama rent paid by a tenant is not in the eye of the law merely damages agreed upon between the landowner and the trespasser. It is rent payable by persons who are really entitled to be called tenants'. M PRESIDENT, DISTRICT BOARD, TANJORE *v.* KANNUSWAMI THONDAMAN 121

MADRAS ESTATES LAND ACT—contd.

——— Ss. 3, 4, 77, 143—Kanganam, *meaning of—When can* Kanganam *be properly levied*—Zamindar's *right of entry—Tenant's liability to rent*—Kulam korvai *lands—Obstruction to free flow of water*—Sarasari, zamindar's *right to—Liability for wet rates.*

Kanganam fee, which is a contribution paid by the tenant to re-imburse the landlord for the cost of the supervision of harvest out of which *melvaram* has to be delivered to the landlord, falls under section 3 (*ii*), clause (*a*), of the Estates Land Act and is not an illegal cess within the meaning of section 143 of the Act. Consequently a term in a *pattah* providing for the payment of the fee is not improper.

The claim of the *zemindar* to enter upon a holding for the purpose of forming an estimate of the outturn is opposed to section 73 of the Act and cannot be allowed.

The Act does not cast on a tenant any liability for *panchamati*, or compensation to the landlord for loss caused to the crop by cattle, theft or clandestine removal.

Where it is proved that by custom only cultivated extents are charged with rent and not lands left uncultivated, no rent can be charged in respect of the uncultivated portion.

The liability of the *ryot* to pay rent under section 4 of the Estates Land Act is subject to any custom or contract to the contrary that may be established.

In the case of *kulam korvai* lands, *i.e.*, lands in a tank bed, in the absence of proof of any custom by tenants to put up ridges on the land, the landlord has got the right to prevent tenants from putting up ridges so as to prevent the tanks having the full benefit of the rain water flowing into them. Therefore, tenants are bound to pay *sarasari* if they should put up ridges and cultivate *kulam korvai* lands.

Tenants are liable to pay *sarasari* wet rates if they raise dry crops on *nanja* land while they could have raised wet crops, but to pay the usual dry rates if they raise dry crops owing to insufficiency of water. M ARUNACHALLAM CHETTIAR *v.* MANGALAM, 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168 329

——— Ss. 3 (7), CL. (*i*), 6—*Main principle of Act—Old waste, what is—"At the time of letting," meaning of—Interpretation of Statutes.*

Where land which had been uncultivated for 10 years prior to 1900 was let in that year and was re-let to the defendants at the expiry of the lease and was in their occupation at the time of the passing of the Estates Land Act and a suit for ejectment was brought by the landholder:

Held, that the land in suit did not fall within the definition of old waste in the Act;

(2) that the period of 10 years mentioned in section 3 (7), clause (*i*), must be immediately prior to the letting to the defendants and the plaintiff could not eject them but was entitled to the stipulated rent.

Per *Wallis, C. J.*—(1) The main principle of the Estates Land Act is that every one in occupation of *ryoti* land at the passing of the Act or thereafter admitted to occupation acquires an occupancy right;

MADRAS ESTATES LAND ACT—concld.

(2) old waste means *ryoti* land admission to which is not to confer a right of occupancy.

Per *Abdur Rahim, J*—Of two possible constructions the one which gives a consistent meaning to the different parts of an enactment should be preferred.

Per *Srinivasa Aiyangar, J.*—The words "at the time of letting" refer not to the first letting but to the letting which is the subject of dispute. M SUNKARA VENKATARATNAM *v.* VARADARAJAH APPA RAO, (1916) 2 M. W. N. 7; 3 L. W. 592; 31 M. L. J. 123; 20 M. L. T. 118 213

——— S. 4 329

——— S. 6 213

——— Ss. 6 (2) (4), 45 121

——— Ss. 73, 74, 75—*Order under s.* 75 (7), *nature of—Subsequent suit for rent for period covered by order, if barred.*

An order passed under section 75 (7) of the Madras Estates Land Act by an officer having jurisdiction is binding on the parties and settles the rent payable for the *fasli*. It has the effect of a 'decree' for arrears of rent for the period covered by the order.

Such an order bars a subsequent suit for rent for the same *fasli* under section 77, even if the order is incorrect or is vitiated by a defect in procedure. The only remedy of the aggrieved party is to file objections to the division made by the Government Officer within a week or to apply in revision under section 205 of the Act to the Collector or the Revenue Board. M RAMACHENDRA MARDA *v.* MULI PEDHANO, 4 L. W. 278 640

——— Ss. 74, 75 640

——— S. 77 329

——— S. 90 966

——— Ss. 131, 205—*Application to set aside sale—Deposit of smaller amount than required—Mistake—Information as to precise amount not available—Defect, whether fatal.*

Where a deposit of a sum approaching to but not being the exact amount required to set aside a sale was made under section 131 (1) of the Estates Land Act, and under circumstances that the depositor could not ascertain the precise amount:

Held, that the depositor was entitled to an order that the sale be set aside, and an order to that effect should have been passed under section 131 (2) of the Estates Land Act. MAD B R PENTACOTA GAREEBU *v.* PENTAKOTA PEDDARAYUDU 153

——— S. 143 329

——— Ss. 153, 157, 163 (1) 121

——— S. 205 153

——— S. 212 966

MADRAS FOREST ACT (MAD. V OF 1882), Ss. 3, 4, 8, 10 902

MADRAS HINDU BEQUESTS VALIDATION ACT (MAD. I OF 1914), S. 2 (2), effect of, on antecedent Wills 150

MADRAS REGULATION XXV OF 1802, Ss. 4, 12, 13, *scope and applicability of*—Sannad *granted to* zemindar *at time of Permanent Settlement—Liability to pay permanent* peishcush—Zemindar, *right of—Government, whether can resume* inams *or levy fresh assessment—Decision in previous suit proceeding on two grounds*—Res judicata—*Error in law, effect of.*

Section 4 of Regulation XXV of 1802 is not intended to restrict the full power of alienating all classes of land revenue which Government has obtained under various treaties. It is largely declaratory and explanatory of the position which *zemindars* were to occupy under the *sannads* that were to be granted to them.

The provisions of sections 12 and 13 of the Regulation, prohibiting a *zemindar* from resuming or fixing a new assessment on certain classes of *inams* without the consent of Government and providing for the imposition of a fresh assessment on the *zemindari* where such assent was granted, must be construed as confined to cases in which, pursuant to the policy enunciated in section 4, these *inams* had been reserved and not taken into account at the settlement of the land tax.

When the matter in issue in a subsequent suit was directly and substantially in issue in a previous suit and was finally heard and decided between the parties, the subsequent suit is barred by *res judicata* notwithstanding the fact that the decision in the previous suit proceeded on two grounds.

The decision of a competent Court on a question of mixed law and fact cannot be ignored as *res judicata* on the ground that it is erroneous in law.

The Permanent Settlement *sannad* granted to the *Zemindar* of Venkatagiri fixed the annual contribution of the *zemindar*, which was declared never to be liable to changes under any circumstances and to be "the permanent annual demand of Government on your *zemindari*". The permanent *peishcush* was declared to be "exclusive of all lands and *russums* heretofore appropriated to the cost of the Police establishment." Further, the grantee, his heirs, successors and assigns continuing to perform the requisite stipulations and to fulfil the duty of allegiance were authorised to hold the *zemindari* at the permanent assessment mentioned in the *sannad*. On the *zemindar* suing for a declaration that the Secretary of State for India in Council had no right to resume or assess to public revenue *inams* or *lakhiraj* lands situated within the *zemindari*:

Held, that subject to the rights of the *inamdars*, the *zemindar* was entitled to hold the *inam* lands under the terms of the grant subject to the payment of the permanent *peishcush* and that Government had no right to levy any fresh assessment in respect of them. M SECRETARY OF STATE *v.* RAJAH OF VENKATAGIRI, 31 M. L. J. 97; (1916) 2 M. W. N. 26; 4 L. W. 133; 20 M. L. T. 284 266

——— — Ss. 12, 13 266

MAINTENANCE. *See* CRIMINAL PROCEDURE CODE, S. 488; HINDU LAW.

——— GRANT. *See* GRANT.

——— claim for, whether a debt proveable in insolvency 541

MANAGER. *See* COMPANIES ACT (VI OF 1882), S. 74.

MARITIMA INCREMENTA or increase of land by sea—Crown, rights of—Adverse possession, claim by—Burden of proof—Madras Forest Act (Mad. V of 1882), ss. 3, 4, 8, 10—*Afforestation proceedings—Decision by District Court—Appeal, maintainability of.*

The ownership of the bed of the sea and the beds of tidal navigable rivers is in the Crown, including the *maritima incrementa* or increase by islands arising *de novo* in the King's seas. It is a beneficial

MARITIMA INCREMENTA—concld.

ownership which, subject to the public right of navigation, is capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted.

The same is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire. The ownership of the bed of the sea within the three miles' limit vests in it.

The onus of proving affirmatively adverse possession for 60 years of islands formed at the mouth of a river, which the Government has notified as reserved under the Forest Act, is on the party asserting such possession. Objectors to afforestation, preferring claims under section 6 of the Forest Act, are in law in the same position as persons bringing a suit in an ordinary Court of Justice for a declaration of right, and the onus of establishing possession for the requisite period, *i. e.*, 60 years under Article 149 of the Limitation Act is on the claimants plaintiffs.

It is an erroneous view of the law to hold that, on proof of possession by the claimants within 20 years prior to the notification under the Forest Act, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i. e.*, within sixty years before the notification. With regard to proof of subsisting title nothing further is needed than the acknowledgment of the undisputed fact that islands formed in the sea or in the mouth of a river belong to the Crown, and it is contrary to all legal principles to permit a squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

An appeal lies to the High Court against the decision of the District Court in claim proceedings under the Forest Act. When proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply. **P C** SECRETARY OF STATE *v.* CHELIKANI RAMA RAO, 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 BOM. L. R. 1007 **902**

MASTER AND SERVANT—Admission of legal liability, whether Tahsildar or Collector can make on behalf of Government **254**

MAXIMS—"Delay defeats equity" **243**

MEDICAL EVIDENCE. *See* WILL.

MERCHANDISE MARKS ACT (IV OF 1889), s. 15—Using false trade mark—Limitation for criminal prosecution—"First offence," meaning of **671**

MERGER. *See* EJECTMENT.

MESNE PROFITS—*Sale by Hindu father set aside by sons—Purchaser, liability of, for mesne profits, from what date—Repudiation—Practice—Procedure.*

Where a sale has been made by a father and manager of a joint Hindu family without legal necessity, and the sons afterwards repudiate it and set the transaction aside, the purchaser is accountable for mesne profits from the date of the repudiation by the sons by the institution of the suit, inasmuch as from that moment the purchaser continues in possession and disputes the claim at his own risk.

The procedure of permitting separate suits for mesne profits discountenanced. **A** BHIRGEE NATH *v.* NARSING TEWARI, 14 A. L. J. 1161 **475**

MINOR. *See* HINDU LAW; MUHAMMADAN LAW.

——— Compromise by guardian, when binding on minor—Leave of Court **675**

——— *Contract—Sale in favour of minor through guardian—Suit for possession, maintainability of——Specific performance, suit for—Transfer of Property Act (IV of 1882), ss. 54, 55.*

A minor can acquire and hold property, inasmuch as there is nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immoveable property, and is also entitled to maintain a suit for possession of the property purchased, on the ground that he has acquired a title to it by virtue of the sale-deed. Such a suit by a minor is not a suit for the specific performance of a contract as no question of mutuality arises.

No contractual obligations are undertaken by a minor in a case in which a contract is entered into with his father and guardian. Any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor. **A** NARAIN DAS *v.* DHANIA, 14 A. L. J. 65; 38 A. 154 **23**

———, decree against, when can be set aside **63**

——— *Guardian's agreement to pay enhanced rent, if binding upon minor.*

The mere fact that infants tenants would avoid litigation with the landlord is not sufficient by itself to entitle their guardian to enter into a fresh lease agreeing, on behalf of the infants, to pay enhanced rent. **C** DANPATI MAHTO *v.* MIDNAPUR ZAMINDARY CO., LTD. **582**

MORTGAGE. *See* BENAMIDAR; CIVIL PROCEDURE CODE, S. 52, O. XXXIV, R. 6; CUSTOM; HINDU LAW; LIMITATION ACT, 1908, ART. 132; PUNJAB ALIENATION OF LAND ACT, S. 19; PRE-EMPTION; REGISTRATION ACT, S. 2 (6); TRANSFER OF PROPERTY ACT, S. 59.

——— *Cause of action—Lease of mortgaged property to mortgagors—Division among mortgagors—Default by some mortgagors to pay Government Revenue—Payment by other mortgagor—Payment by mortgagee of all dues—Suit against all mortgagees, if maintainable—Contract Act (IX of 1872), s. 69.*

A mortgagee leased the mortgaged property to his mortgagors who divided the property among themselves. The rent payable under the lease not having been paid suits were brought and compromised, whereby it was agreed that the amount due upon the mortgage was to be paid with interest in five years and the interest was to be paid in half yearly instalments and in the event of failure to pay the interest the mortgagee was to take possession or bring the property to sale. The default was made and the mortgagee took possession. However,

MORTGAGE — cont l.

before he took possession, two mortgagors P and B had made default in the payment of Government revenue and another mortgagor K had paid off the amount. The Government again attached the shares of P and B for further arrears. The plaintiff (mortgagee) paid the amount due to Government as well as the amount which K had paid and sued P, B and K to recover these amounts:

Held, that the plaintiff had no cause of action against K. A PRAG NARAIN *v.* PRAG NARAIN, 14 A. L. J. 605 198

——— *Consideration, presumption as to — Burden of proof.*

Where it is pleaded that no consideration passed for a mortgage, the burden of proof is on the mortgagor to establish it. Where the mortgagor makes a statement of fact which renders it probable that he executed the document without consideration, the onus is shifted on to the other side. The initial presumption, however, where the document is in the hands of the mortgagee, is that consideration passed for it. PAT EBADUT ALI *v.* MUHAMMAD FAREED 55

——— *Consideration, want of, effect of — Suit by puisne mortgagee contested by stranger — Defendant, whether can raise question of consideration — Burden of proof — Evidence Act (I of 1872), s. 106.*

When a suit upon a mortgage is contested by a stranger who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case.

Per *Spencer, J.*—A mortgage without consideration is a nullity, and so inoperative, and it creates no charge on the property as against a subsequent purchaser.

Per *Kumaraswami Sastri, J.*—In cases of sales and assignments, mere non-payment of purchase-money would not vitiate the transaction, and in such cases, it is no concern of a person, who was no party to the transaction, to call in question the non-payment of consideration. Where the transfer itself is impeached on the ground of its being a colourable transaction or of its being otherwise invalid in law different considerations will prevail.

A mortgage is *prima facie* security for a debt, and, where the debt does not exist, the security cannot be enforced. Where, therefore, a puisne incumbrancer or a person in possession of mortgaged property and claiming title thereto succeeds in showing that there was no debt, the property cannot be ordered to be sold. M KUMARAPPAN CHETTIAR *v.* NARAYANAN CHETTIAR 455

———, construction of. *See* TRANSFER OF PROPERTY ACT, s. 67.

———, construction of 104

——— *Debt payable by instalments — Provision in deed enabling mortgagee to call up whole amount — Failure of mortgagor to pay first instalment — Mortgagee, whether can claim re-payment of whole debt.*

On the 14th November 1912 defendant mortgaged a house to plaintiff for Rs. 15,000, which amount was to be re-paid in 5 annual instalments of Rs. 3,000 each beginning on the 1st January 1914. The deed

MORTGAGE — contd.

contained a provision that the mortgagor will, 90 days after demand, pay to the mortgagee Bank or its assigns the amount for the time being owing by the mortgagor to the Bank in account current to be made up with interest and all other lawful charges. Defendant having failed to pay the first instalment, the plaintiff Bank sued to recover the whole sum then due on the footing of the mortgage with interest at the same rate until realisation:

Held, (1) that the Bank was fully entitled to sue for the amount of each unpaid instalment as soon as it fell due, and that the provision in the deed conferred on the Bank the further right to call up the whole amount of the debt whenever it thought fit and whether or no there had been any default on the part of the mortgagor 90 days after demand;

(2) that as no final demand had been made for the payment of the whole debt 90 days before the institution of the suit, the terms of the deed had not been complied with and the plaintiff Bank was only entitled to claim the amount of the first instalment *plus* the interest due on the whole debt up to the date of the institution of the suit. P KANHAYA LAL *v.* ALLIANCE BANK OF SIMLA, LTD., 62 P. R. 1916; 162 P. W. R. 1916 564

——— *Decree for sale obtained by prior mortgagee without impleading puisne mortgagee — Subsequent suit for redemption by puisne mortgagee — Adjustment of accounts — Proper procedure.*

In cases where the correctness of the account contained in a previous decree, to which the person seeking redemption was not a party, is impugned the proper course is to proceed on the basis of the mortgage to find out whether the amount then declared to be due to the mortgagee was excessive and if it was, to re-adjust the account, as if no such decree had been obtained.

A person who was not made a party to a decree cannot be held bound by an account made therein, and if the account embodied in the decree is shown to be mistaken, he can fall back on the mortgage-deed and repudiate his liability for anything beyond what is actually due on the mortgage.

Where, therefore, in a suit for redemption of a prior mortgage brought by a puisne mortgagee it appeared that the prior mortgagee had obtained a decree for sale on the basis of his mortgage without impleading the puisne mortgagee:

Held, that the puisne mortgagee was entitled to have the accounts adjusted on the basis of the original mortgage. O GOURI SHANKAR SINGH *v.* BAJRANGI BAHADUR SINGH, 19 O. C. 39 434

——— ———, equitable — Deposit of title-deeds, when creates mortgage — Letter accompanying deposit, when requires to be stamped and registered — Mortgage, creation of — Oral evidence, admissibility of 864

——— *Equitable mortgage — Written agreement along with deposit of title-deeds — Construction — Scope of security — Burden of proof.*

Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where, however, titles are handed over accompanied by a bargain, the bargain

must rule. When the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security.

It is for persons who hold security to satisfy the Court of the true scope thereof. The use of the singular term "grant of land" cannot ordinarily include the subject of three other plots of land.

The maker of a promissory note deposited title-deeds of certain properties with the holder, who, in a suit to enforce the equitable mortgage thus created, claimed priority over a subsequent purchaser for value by virtue of a notandum on the back of the pro-note mentioning a house by way of security. The endorsement was afterwards altered by an interlineation, the effect of which was to add other properties as security:

Held, that the security was by the written contract limited and its scope could not be extended to include other properties added to by interlineation, inasmuch as the well-established rule of equity that a deposit of title-deeds without more, without writing or without word of mouth created in equity a charge upon the property in question, did not apply to a deposit accompanied by a contract in writing, in which case the written contract alone determined the scope of the security.

Held, further, that it was the duty of a mortgagee to establish the identity of the mortgaged property and that a word in the singular could not be extended to cover other properties which the same word in the plural might include.

Quære:—Whether, where an alteration in a written contract has been made, any rights in law could be founded upon that document. **P C** PRANJIVANDAS JAGJIVANDAS MEHTA *v.* CHAN MAH PHEE, (1916) 1 M. W. N. 443; 31 M. L. J. 155; 4 L. W. 69; 14 A. L. J. 638; 20 C. W. N. 925; 18 BOM. L. R. 664; 20 M. L. T. 242; 9 BUR. L. T. 125; 43 C. 895; 24 C. L. J. 314 **190**

——*Equity of redemption, purchaser of—Partial discharge of prior incumbrance, effect of—Subrogation—Purchaser, if entitled to stand in shoe of prior incumbrancer.*

If a purchaser of an equity of redemption discharges a prior incumbrance, he is entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer, inasmuch as by payment of the prior incumbrance the purchaser of the equity of redemption enhances the security of the puisne incumbrancer and relieves him of the obligation to discharge the prior incumbrance or to be obliged to sell the property subject thereto.

Therefore, a purchaser of an equity of redemption is entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer even partially discharged the liability. **A** UDIT NARAIN MISIR *v.* ASHARFI LAL, 14 A. L. J. 662; 38 A. 502 **732**

—— by Hindu father—Suit by mortgagee against father and minor sons—Father appointed guardian *ad litem*—Minors, whether properly represented **707**

——*Lease—Rent in cash and in kind*—Rasum zemindari—*Cess.*

A usufructuary mortgagee of certain *zemindari* property made a letting of the property to the defendants on the terms that the defendants should pay a certain sum in cash and in addition to this a certain amount in *bhusa*, *chari*, grain and sugarcane. In the *kabuliat*, however, the expression *rasum zemindari* was used. On a suit for rent:

Held, on the construction of the *kabuliat*, that the defendants had agreed to deliver the produce as part of the rent. **A** RANGI LAL *v.* JASSA, 14 A. L. J. 393; 38 A. 286 **208**

——*Mortgagee purchasing property in execution of mortgage-decree—Purchaser of property sold for arrears of revenue—Suit for possession by mortgagee-purchaser—Decree, nature of, to be given.*

A mortgagee purchased the mortgaged property in execution of the decree upon his mortgage. In the meantime the property had been sold off for arrears of revenue. The mortgagee-purchaser sued the purchaser at the revenue sale for possession:

Held, that the plaintiff was not entitled to possession, but was entitled to put the property to sale if the defendant did not redeem him within the specified period. **PAT** BALLI SINGH *v.* BINDESWARI TEWARI, 1 P. L. J. 133 **532**

——*of occupancy holding—Covenant, personal, to pay—Suit for money, maintainability of.*

A mortgage-deed provided for the payment of the mortgage-money by certain instalments and in the event of non-payment of the instalments the mortgagee was entitled to recover possession of a certain cultivatory holding in which the mortgagors had rights of occupancy. Certain instalments remaining unpaid, the plaintiff sued to recover the same. The defendants pleaded that the mortgage was void in law and the plaintiff could not recover:

Held, that the document, in so far as it involved a mortgage of the occupancy-holding, was invalid but that in so far as it contained a personal covenant on the part of the debtors to pay the amount, it was enforcible at law. **A** MOHAMMAD SHAKUR *v.* GOPI **202**

——Payment of mortgage amount by stranger—Subrogation **794**

——, preliminary decree on account in adjustment of **95**

——*Prior mortgages—Subsequent mortgage to discharge an obligation on property, if can have priority—Salvage, doctrine of—Subrogation, doctrine of.*

A Hindu widow obtained a decree for possession of her husband's estate on payment of a certain sum of money, which had been spent in the discharge of debts which were binding on the estate. She raised the money by a mortgage executed in favour of one *U* and obtained possession. She had previous to this executed two other mortgages in favour of one *K* and one *M* to enable her to prosecute the suit. *U* sued on his mortgage and claimed priority over the mortgages of *K* and *M* on the principles of subrogation and salvage:

Held, that under the circumstances of the case the principles of salvage and subrogation did not apply to the case and that *U*'s mortgage could not have priority over the mortgages in favour of *K* and *M*.

Subrogation is the right of one creditor to stand in the shoes of another and to avail himself of the latter's security; but before the right can arise in favour of the subsequent creditor, there must have been an earlier creditor whose rights devolve upon the later creditor after the latter's debt has been discharged.

MORTGAGE—contd.

The mere fact that money is borrowed and is used for the purpose of paying off a previous charge, does not entitle the lender to the benefit of the discharged security. The right to that benefit depends upon the existence of an agreement between the borrower and the lender, an agreement which in certain cases may be presumed, having regard to the circumstances of the transaction, and which must provide that the subsequent lender shall be substituted for the earlier creditor.

The doctrines of salvage and subrogation discussed. **A** UMRAI LAL *v.* RUKMIN KUAR, 14 A. L. J. 953 647

———*Prior and puisne encumbrances—Puisne mortgagee in possession under his mortgage-decree—Subsequent decree by prior mortgagee and purchase in execution sale—Ejectment of puisne mortgagee, suit for—Redemption—Limitation Act (IX of 1908), Sch. I, Arts.* 137, 138, 144.

A property which was subject to two several mortgages, the first usufructuary and the second simple, was purchased by the puisne mortgagee in execution of a decree for sale obtained by him in January 1898. The prior mortgagee sued on his mortgage without impleading the puisne mortgagee, brought the property to sale in 1898, and got symbolical possession on 2nd August 1901. The sale was confirmed on 31st August 1901. He sued to eject the puisne mortgagee on 20th February 1911:

Held, (1) that the plaintiff could not eject the defendant, if the latter was willing to redeem;

(2) that Article 144 of the Limitation Act applied to the suit and not Article 137 or 138.

Articles 137 and 138 of the Limitation Act do not apply where possession has already been delivered by Court. **PAT** BISWAMBHAR LAL *v.* JHULAN RAM TEWARI 87

———*Redemption—Civil Procedure Code (Act V of 1908), O. XXXIV, rr.* 7, 8*—Payment of money—Possession—Oudh Rent Act (XXII of 1886), s.* 108 (15)*—Suit for profits accrued between date of deposit of mortgage money and delivery of possession, maintainability of.*

Where certain co-sharers, who had mortgaged with possession their share of the property to a *lambardar*, got back its possession by virtue of a redemption decree and then sued the *lambardar* in the Rent Court for their share of the profits, which arose out of the collections of rents made by the *lambardar* during the period intervening between the dates of the deposit of money mentioned in the preliminary decree and the delivery of possession as directed by the final decree, and about which there had been no accounting in the redemption suit:

Held, that the co-sharers were entitled to the profits claimed by them, inasmuch as their right to the profits accrued from the date on which they deposited the money for redemption in Court, and not from the date on which they obtained possession of the mortgaged share. **O** RAM KARAN *v.* ACHAL SINGH, 3 O. L. J. 271; 19 O. C. 161 799

———Redemption—Revenue Court proceedings—Ejectment of mortgagor, fraudulent—Suit for redemption, maintainability of 252

MORTGAGE—concld.

———*Sale and agreement for re-purchase, when amounts to mortgage—Burden of proof.*

A sale of property followed by an agreement for its re-purchase within a specified time may be a species of mortgage, but the onus of proving that the transaction is a mortgage lies on the party asserting it. **L B** MAUNG KYA HNIN *v.* MAUNG KO KYAW 336

———*Sale of mortgaged property under Revenue Sale Act—Extinction of mortgage right—Personal covenant, right to sue on—Limitation—Subsequent letting by purchaser to mortgagee, whether operates as graft on prior interest—Right to proceed against surplus proceeds.*

A usufructuary mortgage was executed in 1891 in favour of the plaintiff. The mortgaged property was sold under the provisions of the Revenue Sale Act on 25th August 1905. The purchaser got actual physical possession on the 22nd of March 1906, and on 16th July 1908 transferred it by way of gift to a third person. The donee in his turn, on the 16th of July 1908, let a portion of the mortgaged property to the plaintiff who was the mortgagee under the deed of 1891. On August 26th, 1911, the plaintiff brought a suit on the basis of his mortgage for a personal decree against the mortgagors:

Held, (1), that the suit was not barred by limitation as the cause of action accrued to plaintiff on 22nd March 1906 when he was ousted from the property;

(2) that the mortgage security having been completely extinguished under the provisions of the Revenue Sale Act in 1905, the subsequent re-letting to the plaintiff had not the effect of operating as a graft upon the prior interest of the mortgagor;

(3) that the possession of the mortgagee by virtue of the property being let out to him was not *qua* mortgagee and consequently his suit for a decree for money against his mortgagor was not barred. **PAT** RAJA RAM LAL *v.* HANUMAN UPADHYA 43

MUHAMMADAN LAW—*Hajr*, rule of 718

———ALIENATION *by mother as guardian of minor—Benefit of minor—Burden of proof—Alienation for paying off separate debt of minor's brother, validity of.*

Where a Muhammadan mother, as *de facto* guardian of her minor son, undertakes to alienate or encumber his property, the burden of proof is on the alienee or mortgagee to prove that the transaction was for the benefit of the minor. The discharge of a debt of the minor's brother, who had no interest in the minor's properties, is not for the minor's benefit and an alienation effected for such a purpose is void as against the minor, unless accepted by him on his attaining majority. **PAT** EBADAT ALI *v.* MUHAMMAD FAREED 56

———GIFT 14

———GUARDIAN, de facto, *release by, when to be set aside or upheld—Family settlements, when not binding on minor—Tests—Mother, power of, as* de facto *guardian—'Delay defeats equities', limitations to the maxim—Laches and inconvenience, when no bar to re-opening of settled matters—Existence of debts proved* prima facie *by acceptance by major members—Compromise, views of parties as to, if absolute.*

MUHAMMADAN LAW—contd.

A conveyance by a *de facto* guardian of a Muhammadan minor need not be set aside by the latter after attaining majority, if the document is not binding on him.

A release deed executed by a Muhammadan mother as the *de facto* guardian of her minor son will not be upheld, unless it is shown to have been beneficial to the minor so as to justify the mother in entering into it as the *de facto* guardian.

Per *Seghagiri Aiyar, J.*—If in pursuance of a general purpose of settling family affairs and of bringing peace among the members of the family, separate releases are executed by the members of the various branches of the family in favour of the sole senior member of one branch, each of such releases will be valid and binding as one of a series of transactions by which the family arrangement was secured.

Under the Muhammadan Law, a mother is not the *de jure* guardian of her infant son, and as a *de facto* guardian her powers of binding her son's interests are very limited.

It is well established that, under the Muhammadan Law, a transaction will not be upheld against a minor unless it is found to be to his manifest advantage or for necessity.

When a major member of a family executes a release deed on the footing that certain debts exist, the deed is *prima facie* evidence of the existence of such debts.

A person to whom great inconvenience will be caused by re-opening certain matters, cannot complain that the other party should have acted more promptly, if his own conduct has not been above board.

The maxim that delay defeats equities should not be applied to a case where want of fair dealing and inequality have been proved to exist.

The tests to be satisfied before transactions by way of family compromises, entered into on behalf of infants, can be upheld are:—

(1) In forming the agreement of compromise there must have been a full disclosure of all material circumstances in the knowledge of the parties thereto. It is immaterial whether the information withheld was asked for by the other contracting parties or not;

(2) all the members of the family should have been treated impartially;

(3) if the parties are not on equal terms but one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support the compromise.

A family arrangement will not bind a minor if it is unconscionable in any way.

The proposition that a compromise should be judged, not by what the Court concludes to be the rights of the parties, but by what was regarded as just and proper by those who entered into the transaction, is subject to the proviso that the transaction should have been entered into honestly.

MUHAMMADAN LAW—contd.

and with a view to secure full justice to the various parties to the instrument; that although mistakes in calculation or in the ascertainment of rights might exist there was no undue advantage taken by one of the members of the family and that there was an honest desire to put an end to litigation and secure family peace. **M** ABDUL HUSSAIN *v.* MAHOMAD IBRAHIM, 3 L. W. 379; 19 M. L. T. 346 **243**

——PRE-EMPTION—*Applicability to Hindus of Godhra—Suit to pre-empt fraction of property, maintainability of.*

The Hindus of Godhra are governed by the Muhammadan Law of pre-emption.

The right of pre-emption cannot be exercised in fractions and a suit to pre-empt a portion of the property sold cannot be maintained. **B** GOKALDAS MOTIRAM SURTI *v.* PARTAB KABHAI BAROT, 18 BOM. L. R. 693 **871**

——— Talab-i-istishhad, *necessity of.*

Under the Muhammadan Law it is absolutely necessary for the success of a pre-emptor that he should have made the second demand (*talab-i-istishhad*). **A** MUHAMMAD AHMAD SAID KHAN *v.* MADHO PRASAD, 14 A. L. J. 1141 **911**

——SETTLEMENT—*Charity, dedication to—Transaction impugned as sham—Fraud on creditors—Burden of proof—Registered document, evidentiary value of—Non-solvency of settlor—Subsequent user of property—Presumption—Dedication to take effect after grantor's death, effect of—Revocation, right of.*

In cases where dedication to a charity is impugned as a sham transaction the production of a registered document in writing making a transfer of the property would no doubt be strong *prima facie* evidence of such dedication. But it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. The use of the property subsequent to the alleged dedication is always excellent evidence of the reality or otherwise of the transaction.

The non-solvent condition of the settlor at the date of the grant and his subsequent alienation of the property are proof that the dedication was intended to defraud his creditors and the instrument will, therefore, be void as against them.

If the dedication was intended to defeat creditors, it makes no difference whether the grantor intended it to be a real or a sham transaction.

Where the grant is to take effect after the grantor's death it is open to the grantor to revoke the same during his lifetime and deal with the dedicated property as his private property.

On 27th January 1910, the deceased father of defendants Nos. 1 to 7 executed a document, described as *wakf* deed, by which he purported to make a *wakf* of certain properties specified in it, to take effect after his death for purposes which were *prima facie* charitable. The grantor was then deeply indebted. He effected two mortgages of some of those properties on 16th July 1910 and 19th September 1910 respectively to plaintiff. In a suit on the mortgages it was pleaded in defence that as the properties were dedicated to charity the mortgages were invalid;

Held, that the *wakf* deed was brought about to defraud creditors and was, therefore, void. Moreover as it was intended to take effect after the settlor's death and was revoked by him it was inoperative and the mortgages were valid and binding. M MULLA VEETTIL USSAIN *v.* SUBRAMANIA AYYAR, 31 M. L. J. 431 877

—— —— WAQF—*Appointment of* co-mutawalli *by subsequent* trusteenamah — *Registration Act* (*XVI of* 1908), *s* 17—*Civil Procedure Code* (*Act V of* 1908), *O XXXIX*, *r.* 1—*Punjab Court of Wards Act* (*II of* 1903), *ss.* 11, 12, *action by Deputy Commissioner under—Authority to register—Sub-Registrar trustee of beneficiary, effect of—Validity of injunction to restrain alienation and registration of document—U. P. Registration Rules*, *r.* 174—Hajr—*Injunction—Direction as to payment of debts—Request to poor—Construction of* waqf—Waqif, *if can be* mutawalli.

One *R* created a *waqf* of a portion of his property on the 25th of August 1908. He appointed himself the first *mutawalli* and remained in possession till his death. The M A. O. College, Aligarh, was one of the beneficiaries. The deed was registered by a Sub-Registrar, who happened to be a trustee of the said College. Prior to the execution of the deed, the legal heirs of *R* induced the Deputy Commissioner of Karnal, where a portion of the property was situate, to take action under the provisions of section 11 of the Punjab Court of Wards Act. Possession was taken of the property under section 12, but the Commissioner set aside the proceedings. On the 30th of August 1908, the Deputy Commissioner issued an injunction, restraining *R* from alienating his property pending inquiry under section 11. *R*, however, executed a *trusteenamah* whereby he appointed certain persons to succeed to him as trustees. He framed certain rules for the management of the property and appointed one *Q* as *co-mutawalli*. This deed was not registered and on *R*'s death, the defendants took possession of the property. Thereupon the plaintiffs, who had been appointed trustees under the *trusteenamah* brought the present suit:

Held, (1) that the *trusteenamah* was not compulsorily registrable;

(2) that the action of the Deputy Commissioner in restraining *R* from alienating his property was *ultra vires*;

(3) that section 492 of the old Code of Civil Procedure, Order XXXIX, rule 1, of Act V of 1908, did not apply, as there was no proceeding in which the property was liable to be wasted or alienated;

(4) that rule 174 of the Registration Rules did not make the registration of the deed invalid simply because the Sub-Registrar was a trustee of the Aligarh College;

(5) that the rule of *hajr* was inapplicable to the facts of the case.

(6) that a *waqf* subject to a mortgage was valid and a condition as to the payment of the mortgage did not amount to a suspension of the *waqf* for an indefinite time;

(7) that the *waqf* did not fail by the fact of the non-establishment of the Islamia School but it continued for the benefit of the poor and that the doctrine of *cy-pres* was applicable;

(8) that a *waqif* could appoint himself a *mutawalli* of the *waqf* property. A MUHAMMAD RUSTAM ALI KHAN *v.* MUHAMMAD MUSHTAQ HUSAIN, 14 A. L. J. 554 718

—— —— —— WAQF—*Trusts, public—Mosque—Scheme, settlement of, for management—Trustees, appointment of—Power of Court—Founder's intentions, enforcement of.*

The Mussulman Law, like the English Law, draws a wide distinction between public and private trusts. Generally speaking, in case of a *waqf* or trust created for specific individuals or a determinate body of individuals, the *Kazi*, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the *Kazi's* discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution. P C MAHOMED ISMAIL ARIFF *v.* AHMED MOOLA DAWOOD, 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 BOM. L. R. 611; 31 M. L. J. 240; 24 C. L. J. 198; 4 L. W. 269; 9 BUR. L. T. 141 30

MUKARRARI PATTA—Notice by tenant to landlord to perform certain acts in terms of *patta*—Ratification—Undue influence 437

MUTAWALLI. *See* MUHAMMADAN LAW; *Waqf*.

NECESSITY. *See* CUSTOM.

—— —— Money paid validly to prior mortgagee in excess of sum mentioned in sale-deed 892

NEGLIGENCE. *See* ADMIRALTY.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), Ss. 9, 10, 60, 80—*Promissory note, endorsement on—Presumption of demand—Negotiation—Prior discharge—Rights of endorsee—Action, right of.*

The endorsement of some payments on the back of a promissory note is not evidence of full discharge of the note and of a previous demand for the return of the note.

Payments by the maker of a promissory note to the payee is no defence against a holder in due course, and the discharge of the note before its negotiation by the payee does not affect the right of the endorsee to recover on it, as the maker cannot be said to have acted 'in good faith and without negligence' in not securing the note after its discharge under section 10 of the Negotiable Instruments Act.

Dubitante.—Whether, after the passing of the Negotiable Instruments Act, knowledge on the part of the endorsee of a demand by the payee would subject him to the equities subsisting between the latter and the maker. M MUTHU REDDI *v.* VELU ASARI, 4 L. W. 34; (1916) 1 M. W. N. 107 591

NEGOTIABLE INSTRUMENTS ACT—concld.

——— Ss. 10, 60 591

——— S. 76—*Bill of exchange—Acceptance—Set-off, right to, by acceptor on due date as against payee—Tender of balance after due date—Discharge of drawer after tender—Notice of dishonour—Drawer, nature of, liability of.*

The acceptor of a bill of exchange is entitled to set off on the due date as against the bill any amount due to him by the payee.

On tender of any balance due by the acceptor after such set-off, the drawer is discharged from liability; but till such tender is made, his liability continues as the liability of a surety but only for the balance due after the set-off.

Even in the absence of a tender, the drawer is entitled to the benefit of a set-off existing in favour of the principal debtor as against the creditor, and the latter cannot enforce liability for the whole amount on a notice of dishonour for non-payment on the due date. In spite of dishonour the drawer remains a surety and will always remain a surety, and a surety will always be discharged as soon as the principal debtor acts in such a way as to discharge himself from the principal liability.

Defendant drew a bill of exchange on 31st July 1913 for Rs. 10,000 on *M* payable to the plaintiff Bank twelve months after date. *M* duly accepted the bill. The amount not having been paid on the due date, *i.e.*, 3rd August 1914, the Bank treated it as dishonoured and gave notice of dishonour to defendant on 4th August 1914. The Bank went into liquidation on 23rd November 1913. On 29th August 1914, *M* tendered a sum of Rs. 2,000 to the plaintiff Bank after setting off Rs. 8,000 due to him by the Bank. The plaintiff declined to accept the tender and sued defendant for the full amount, Rs. 10,000. *M* was joined as defendant on a third party notice, and he paid the balance into Court:

Held, (1) that *M* was entitled to the set-off and the defendant was entitled to the benefit of it;

(2) that defendant's liability was running from 3rd August 1914 to 29th August 1914, but was discharged after tender of the balance due by *M* on the latter date;

(3) that the plaintiff was not entitled to enforce the whole claim on the defendant as from the date of dishonour;

(4) that even without the tender, defendant's liability was only that of a surety and he was entitled to claim any equitable set-off in favour of *M*. B INDIAN SPECIE BANK, LTD. *v.* NAGINDAS HURJIVANDAS-NANAVATI, 18 BOM. L. R. 689 628

——— S. 80 591

——— S. 80—Hundi—*No interest mentioned in instrument—Oral evidence to prove contemporaneous agreement to pay interest, if admissible—Evidence Act (I of 1872), s. 92.*

In a suit upon a *hundi*, in which no rate of interest is mentioned, the plaintiff is entitled to interest at the rate of 6 per cent. per annum under section 80 of the Negotiable Instruments Act. No evidence is admissible under section 92 of the Evidence Act, to prove an oral contemporaneous agreement as to the rate of interest. PAT BANWARI LAL *v.* JAGAR NATH PRASAD, 1 P. L. J. 71 431

NOTICE, direct or constructive—Burden of proof 893

OFFICER OF COURT, whether bound to give information to parties—Wrong information supplied, effect of 779

OFFICIAL RECEIVER'S REPORT, correctness of—Presumption—Court, duty of, to hold judicial enquiry—Official Receiver, joinder of, as party 875

OPIUM ACT (I OF 1878)—*Possession of substance containing only traces of opium—Illegal possession of opium, conviction for, whether legal.*

Possession of a black substance containing only traces of opium and hardly more than one per cent of it and which is unfit to be used as opium, is not an offence for which the person possessing it is liable to conviction under the Opium Act as for illegal possession of opium. C MOHAMMAD KAZI *v.* EMPEROR, 20 C. W. N. 1206; 17 CR. L. J. 412 972

——— S. 9 811

——— S. 9 (c) (*f*) 816

——— S. 15 811

OUDH RENT ACT (XXII OF 1886), S. 108 (15) 799

——— S. 138—*Rent suit—Third person, when can be made party—Intervener, whether can appeal—Title to receive rent, who can determine—Inquiry about receipt of rent.*

Where in a suit for rent the defendant pleads that payment has been made to a third person under compulsion, such person cannot be joined as a defendant under section 138, Oudh Rent Act.

An intervener under section 138, Oudh Rent Act, cannot appeal when the judgment-debtor himself does not appeal.

The question of title to receive rent cannot be determined between the plaintiff and an intervener in a Rent Court but in a subsequent suit in a Civil Court.

The inquiry under section 138 of the Oudh Rent Act relates to the period prior to that for which rent is claimed by the plaintiff. O CHANDRAWATI KUNWAR *v.* BHAGWANTA, 19 O. C. 32 444

——— S. 126 (2) 760

OUSTER. *See* CO-SHARER.

PARDANASHIN LADY. *See* FRAUD.

———*—Deed of gift—Presumption of undue influence—Burden of proving* bona fides*—Possession not delivered—Declaratory suit, whether maintainable—Specific Relief Act (I of 1877), s. 42.*

Undue influence will be presumed in the case of transactions with *pardanashin* women; that is to say, it will be for the party who in such circumstances affirms the *bona fides* of a transaction to substantiate his affirmation.

A knowledge of letters and of figures and a capacity of dealing at first hand to some extent with her tenants will not convert a *pardanashin* woman into a woman of the world so as to rebut the presumption of undue influence in the case of transactions with such a woman.

Plaintiff sued for a declaration that she was the absolute owner of the properties in suit. The defendants contended that she had voluntarily executed a deed of gift in favour of her brother (their father) and got it registered and had at the

same time put the donee in possession. They further alleged that no deception or misrepresentation of any kind had been resorted to. The plaintiff admitted her signature on the deed in question, but pleaded that as she had completely trusted *A. H.*, the alleged donee, she had signed whatever was put before her without knowing its contents and without asking what the document contained and that *A. H.* had concealed from her the fact that she was signing a deed of gift in his favour. In his endorsement on the alleged deed of gift the Sub-Registrar made no note to the effect that its contents were explained to her and in his evidence also declined to swear that anything in the nature of an explanation was attempted, while the other witnesses produced by the defendants were discrepant among themselves as to the manner in which this warning had been conveyed to her. It appeared further that moneys from the estate had been paid in just in the same manner before as after the date of the deed of gift; while all the entries in the books of account showed the money expended, both in payment of revenue and otherwise, as the money of the plaintiff. The evidence also showed that collections had continued to be made on behalf of the lady after as before the deed of gift:

Held, (1) that although the plaintiff did execute the deed, she did not appreciate the full significance thereof, or that it was to operate as a complete devolution *in præsenti* of all her property;

(2) that possession did not pass from her to *A. H.*, the alleged donee, as a result of the execution of this deed and that since she took immediate steps to place her position beyond doubt as soon as she discovered the full result of her action, her suit having been brought within the period of limitation from that time was not time-barred;

(3) that as possession had not passed, the plaintiff's claim for a declaration was not barred by section 42 of the Specific Relief Act. **O** NISAR HUSAIN *v.* ASHRAF-UN-NISSA 395

PARTITION. *See* BUDDHIST LAW, BURMESE; HINDU LAW; SPECIFIC RELIEF ACT, s. 42.

———*Joint family property—Suit for partial partition, if maintainable.*

A suit does not lie for partition of a portion of a joint family property. **P** RANKU *v.* HUKMI, 156 P. W. R. 1916 545

———*Partial partition, when allowed—Joint family property—Share of one co-parcener sold in execution—Purchaser suing for co-parcener's share in item of property in possession of defendant—Suit, whether maintainable.*

Fresh exceptions to the rule against partial partition should be made very sparingly and only on grounds of manifest convenience.

The predecessor-in-interest of the plaintiff purchased at a Court-auction the share of one of four co-parceners sold in execution of a decree obtained by the assignee of the mortgagee of the co-parcener's share. The plaintiff brought a suit for partition against the surviving members of the joint family and was allotted the suit properties by the decree. In execution proceedings he was resisted by the defendant, who claimed under a decree obtained by his predecessor-in-interest against the surviving members of the joint family, according to which possession of the suit properties was delivered to him. Plaintiff's application for delivery of possession having thereupon been dismissed, he instituted the present suit to recover one-fourth share of the co-parcener under whom he claimed in the items of joint family properties in the possession of the defendant. It appeared that in his previous suit he had not made the defendant a party:

Held, that the suit was in effect one for partial partition and as such was not maintainable, as the rights of the plaintiff himself in the share to which he was entitled and the rights of the other parties interested could best be established once for all in a suit for general partition. **M** SUNDARESA AIYAR *v.* KRISHNAMOORTHY AIYAR, 31 M. L. J. 317; (1916) 2 M. W. N. 156; 4 L. W. 238 677

———*Partition of limited interest—Lessee for years of underground mines and minerals, whether can claim partition—Partition Act (IV of 1893), s. 2.*

As under English law so in India a person holding a limited interest as a lessee for years may maintain a claim for partition. The right is not restricted alone to persons having a permanent title.

A lessee, therefore, for 999 years of the underground mines and minerals can claim a partition against his lessor's co-sharers, especially when persons entitled to the reversion do not object to it.

A partition should not be refused on the ground of its impossibility. If difficulties are actually met with in execution, the Court may order a sale under section 2 of the Partition Act. **PAT** LALIT KISHORE MITRA *v.* GIRDHARI SINGH, 20 C. W. N. 1306; 1 P. L. J. 441 851

———SUIT—Preliminary decree, failure to appeal against, consequences of 873

PARTITION ACT (IV OF 1893), S. 2 861

PARTNERSHIP. *See* DOCUMENT.

———*Contribution, suit for, by one partner against another, parties to—Accounts, rendition of, whether can be asked in defence when claim barred.*

In a suit for contribution brought by one or more members of a partnership which has come to an end, if there has been no adjustment, it is necessary to implead all the partners. **P** KALA MAL *v.* SOHARA MAL, 113 P. W. R. 1916 910

———*One partner contributing more capital than his share, rights of—Interest.*

As a general rule, interest between partners is not allowed, unless there is an express stipulation, or a particular course of dealing between the parties as shown by the partnership books or a trade custom to the contrary; but this general rule is subject to an important qualification, namely, that subject to any agreement between the partners, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital which he had agreed to subscribe. **C** GOVINDA CHANDRA BASAK *v.* HARIDAS BASAK, 23 C. L. J. 148; 20 C. W. N. 634 48

PARTNERSHIP—concld.

———*—Promissory note, execution of, for partnership debt—Liability of partner not party to note—Payment of consideration simultaneous with execution of note—Action on debt, whether lies.*

Where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie, as also in the case where the advance of money and the execution of the note are simultaneous, though in the latter case it may be open to the parties to show that the debt should become merged in the negotiable instrument executed for it.

A partner is always liable for the partnership debt unless there is a restriction, express or implied, on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for partnership purposes. **M** SHANMUGANATHA CHETTIAR *v.* SRINIVASA AIYAR, (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172 219

PATNA HIGH COURT, power of Single Judge of, to entertain application in revision 15

PENAL CODE (ACT XLV OF 1860), S. 71 978

———— Ss. 107, 120B—*Criminal Law Amendment Act (VIII of 1913), s. 3—Abetment by conspiracy—Option of prosecution to proceed under s. 107, or s. 120B—"Where no express provision has been made for the punishment of such a conspiracy," meaning of.*

Where an offence is committed in conspiracy, it is optional for the prosecution to proceed either under section 107, Penal Code, for abetment of the offence by conspiracy, or under section 120B of the said Code as amended by the Criminal Law Amendment Act, 1913, for the conspiracy as a substantive offence.

The words "where no express provision has been made in this Code for the punishment of such a conspiracy" in section 120B, do not mean that when there is proof of an abetment of an offence, the charge should be for such an abetment. They only include cases where there is express provision for the punishment of the particular conspiracy alleged and the only such case in the Penal Code is that under section 121A. **S** UDHASING TAHILSING *v.* EMPEROR, 10 S. L. R. 69; 17 CR. L. J. 366 670

———— S. 109 999

———— S. 120B 670

———— Ss. 120B, 109—*Abetment by conspiracy—Evidence Act (I of 1872), s. 10—Appeals, criminal, in connected cases—Cross-references to evidence and judgments in cases by Appellate Court—Irregularity.*

It is irregular for a Judge, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases.

A conviction under section 120B, Indian Penal Code, cannot stand if the offence was committed before that section came into force but the accused can be convicted of abetment under section 109, Indian Penal Code, as abetment includes abetment by conspiracy.

PENAL CODE—contd.

The accused, a loading officer of a Railway Company, fraudulently endorsed shorter weights on the back of consignment notes, whereby the Railway Company were defrauded and the consignees were benefited. It was proved that the firm of the consignees was in negotiation with the accused about something and that the firm had, through its dealings with some loading officer of the Railway Company, been able to defraud the company of considerable sums and the name of the accused signed by himself appeared in one of the note books of the firm and there was positive evidence that it was the duty of the accused to make out the weights on the consignment notes:

Held, that under section 10 of the Evidence Act the note books and *jama kharach* of the firm could be used as evidence of abetment by conspiracy against the accused. **C** SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* MON MOHAN ROY, 20 C. W. N. 292; 17 CR. L. J. 439 999

———— S. 120B, 195, 511—*False evidence, attempt to fabricate, charge of, when sufficient—Photographing under-trial prisoners against Police rules—Intention—Offence—Conspiracy.*

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable When two or more agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, becomes capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. A conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them."

Three Police Officers joined in taking a couple of photographs, one taking the photographs, the second arranging the camera and the third arranging the prisoners. They were charged with conspiracy to bring about the conviction of the prisoners for dacoity:

Held, that it was not a case where several men were proved to have taken several steps tending to one obvious purpose and through a continued portion of time, taking steps that led to an end.

There cannot be a conspiracy of one. When two people are indicted for conspiracy and are tried together, either both must be convicted or both must be acquitted. In a prosecution for conspiracy it is very necessary to prove that there were two or more persons agreeing for the purpose of the conspiracy.

Where a Police Officer took photographs of under trial prisoners contrary to the Police Department rules:

Held, that in the absence of evidence it could not be said that his intention was necessarily to use the photographs for the purpose of fabricating false evidence.

A mere surmise and thought of probability on the part of a Judge as to the object of a certain act is not enough to justify a conviction for attempt to commit an offence **A** GULAB SINGH *v.* EMPEROR, 14 A. L. J. 688; 17 CR. L. J. 431 991

———— S. 121A 670

PENAL CODE—contd.

S. 147 519, 978

Ss. 147, 325, 323—*Riot, serious—Revision—Sentence, reduction of.*

The accused convicted in a very serious riot case are not entitled to reduction of their sentences in revision on the ground that men on their side sustained a certain number of injuries. **A** NOOR MOHAMMAD *v.* EMPEROR, 17 CR. L. J. 300 172

S. 148—*"Lawfully in possession," significance of—Going armed with sticks to recover possession from trespasser, whether amounts to rioting.*

A person who has been found to have reaped the crops and to have been in possession of the property must be deemed to be lawfully in possession, and anybody who disturbs his possession must be taken to be a trespasser.

Where, therefore, the accused had sown the crops and harvested them and the complainant's party having after the harvest entered upon the land and ploughed it the accused party went to the field armed with sticks:

Held, that the conduct of the accused party in going to the field with a number of people armed with sticks did not constitute them members of an unlawful assembly, and they were not guilty of an offence under section 148, Indian Penal Code. **M** SAMBA PILLAI, *In re*, 4 L. W. 125; (1916) 2 M. W. N. 213; 17 CR. L. J. 391 823

S. 149 978

S. 152 519

S. 193—*Conviction for perjury, legality of, where Magistrate not empowered to administer oath.*

There is nothing in the Indian Railways Act, empowering a Magistrate to make an inquiry as to the true heirs of a deceased Railway servant.

A person giving false evidence on oath in such proceedings, cannot be legally convicted for an offence of perjury under section 193, Indian Penal Code, as the Magistrate has no authority to administer an oath. **S** ALLAHWARAYO *v.* EMPEROR, 10 S. L. R. 64; 17 CR. L. J. 368 672

S. 195 991

S. 196 820

Ss. 224, 225—*Escape from custody—Obstructing apprehension—Opium Act (I of 1878), ss. 9, 15—Arrest by Excise Officer, of a person selling a black substance alleging it to be opium, if legal.*

An Excise Officer acting under section 15 of the Opium Act has lawful authority to arrest a person who sells a black substance (not opium), alleging it to be opium, though its possession is not an offence under section 9 of the Act. Consequently the escape of such a person as well as his rescue from the custody of the Excise Officers are offences under sections 224 and 225, Indian Penal Code, respectively. **C** MOHAMMAD KAZI *v.* EMPEROR, 20 C. W. N. 1294; 17 CR. L. J. 379 811

S. 225 811

S. 225B—*Resistance to lawful authority—Offence—Warrant—Arresting officer, duty of—Procedure.*

PENAL CODE—contd.

An officer armed with a warrant of arrest should produce the warrant before the person sought to be arrested and make an attempt to arrest him and if he is in fact resisted, then the person sought to be arrested would be guilty of an offence under section 225B of the Indian Penal Code, inasmuch as to constitute an offence under the section something more than evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest, is required.

In a serious case like this if the facts mentioned are true, a charge should be framed against the accused and the accused should be tried in the ordinary way and not summarily. **A** AIJAZ HUSAIN *v.* EMPEROR, 14 A. L. J. 731; 17 CR. L. J. 413; 38 A. 506 973

S. 289—*Ingredients of offence — Negligent management of animal—Allowing vicious animal at large—Grievous hurt—Knowledge of results—Presumption.*

The essentials of an offence under section 289, Indian Penal Code, are that there should be probable danger to human life or limb or danger of grievous hurt from the negligence shown in the custody of the animal.

If a person allows an animal in his custody to be at large in spite of its previous vicious character, the presumption is that he does so with knowledge that there is probable danger to human life or limb. **B** SHIVBHARAN AYODHYAPRASAD *v.* EMPEROR, 18 BOM. L. R. 682; 17 CR. L. J. 353 815

S. 296, *effect on, of declaratory decrees of Civil Court.*

A declaratory decree of a Civil Court should not be treated as authorizing an act which is *per se* a criminal offence, but in a dispute between two rival religionists where one of them is charged with an offence under section 296, Indian Penal Code, a decree declaring the rights of either party is one of several circumstances which might be considered in deciding the guilt or innocence of the accused. **M.** MAHOMED HANIF SAHIB *v.* ANAGAPPA MUDALI 106

Ss. 300, EXCEP. (2), 304—*Private defence—Absence of warning, effect of—Sentence.*

The right of private defence arises when a man is seen with a stick trailing in his hand and for the purpose of committing theft. But when the person exercising the right is with a companion who is armed, it is the duty of the former to warn the person to drop the stick and to surrender, and the failure to do so brings the case under the 2nd exception to section 300, Indian Penal Code. Firing the first shot in the air is not sufficient warning for this purpose. A long term of imprisonment is not called for in in such cases.

The second part of section 304, Indian Penal Code, refers only to cases in which the offender has no intention of injuring any one in particular.

Obiter dictum:—Leniency may well be shown where the accused has acted in good faith, for the protection of his person or property, and has erred

PENAL CODE—contd.

only in the degree of force or violence used or in acting too hastily. L B NGA TUN *v.* EMPEROR, 17 CR. L. J. 335 511

——— S. 302—*Murder—Motive, proof of, if necessary; in upholding conviction.*

Where two accused *T* and *G* were convicted of murder and sentenced to death by the Sessions Judge and the motive of one of them, *T*, for the murder was satisfactorily proved, while as against the other accused, *G*, there was no satisfactory evidence of any such motive, the High Court upheld the conviction, and confirmed the sentence, holding that although if it had to rely to any great extent upon motive being proved to its satisfaction, its conclusion might have been different in the case of the accused *G*, still as it was satisfied upon the evidence that the Sessions Judge was right in his conclusion that *G* was actually present with *T* at the time the murder was committed it was not necessary for the High Court to come to any definite conclusion as to what the motive was on the part of *G*. C TORAP ALI *v.* EMPEROR, 17 CR. L J. 386 818

——— S. 304 511

——— S. 323 172

——— S. 325 172, 978

——— S. 330 998

——— S. 378—*Theft—Defence — Legal right—Dishonest action.*

It is not a sufficient defence to a charge of theft for the accused merely to assert that he thought that he was acting within his legal rights But if a Court finds that a person charged with theft was *bona fide* acting on what he supposed to be his legal rights, and was not acting dishonestly, the Court should not convict him. A BHAGWAT SARAN MISIR *v.* EMPEROR, 14 A. L. J. 399; 17 CR. L. J. 295 167

——— S. 379 966

——— S. 380 984

——— S. 384—*Extortion— Charge, accurate statement of, necessity of—Criminal Procedure Code (Act V of 1898), ss. 22 , 222, 223.*

Where an offence charged involves consequences which may be stated in a general form, such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of several persons, no particular is required, the nature of the offence being sufficiently stated by the date, time and place of the setting of fire; but extortion or obtaining money from persons by unlawful means involves stating with some approach to accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person. It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. Such an irregularity is fatal to the trial. A RAM CHANDAR SAHAI *v.* EMPEROR, 17 CR. L. J. 411 971

——— S. 401—*Associating with gang of thieves, what constitutes.*

In order to sustain a conviction on a charge under section 401, Indian Penal Code, it must be proved

(1) that there existed a gang of persons,

PENAL CODE—contd.

(2) that those persons were associated for the purpose of committing theft or robbery,

(3) that theft or robbery was to be committed habitually, and

(4) that the accused was a member of such gang.

The rule that once it is established that a gang was formed for the purpose of habitually committing theft, all persons who thereafter join the gang in one or more cases of theft come under the purview of section 401, does not mean that any person who joins the members of such a gang in committing theft becomes *ipso facto* a member of that gang. It should be taken to mean that any person who, knowing of the existence of such a gang joins that gang for the purpose of committing even one theft, is guilty under section 401, but an accused person may take part in a theft with one or more members of a gang without himself becoming a member of that gang.

An association with the members of a gang of thieves at fairs, weddings and liquor shops cannot be presumed against the accused as for the purpose of committing theft or robbery, nor should any inference unfavourable to the accused be drawn from such association. P . WASAWA SINGH *v.* EMPEROR, 110 P. L. R. 1916; 47 P. W. R. 1916 Cr.; 17 Cr. L. J. 443 1003

——— S. 411—*Receiving stolen property—Essentials of offence.*

The offence of "receiving stolen property" under section 411, Indian Penal Code, is constituted only on proof of the accused's knowledge or belief that the property was stolen and of his having received the goods in that state of mind. It is not enough to prove that the accused must have suspected that the property was stolen. M EMPEROR *v.* SANKARA NARAYANA CHETTI, 4 L. W. 53; 17 CR. L. J. 312 488

——— S. 424—*Landlord and tenant—Dishonest removal of crops sown on batai system—Conviction—Bengal Tenancy Act (VIII B. C. of 1885), s. 71 (4).*

The object of section 71, sub-section (4), of the Bengal Tenancy Act, is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by a tenant. If the tenant acts dishonestly in removing them, he is also liable to be convicted under section 424, Indian Penal Code. PAT KULDIP PANDEY *v.* RAMNATH SINGH, 1 P. L. J. 353; 17 CR. L. J. 315 491

——— S. 436—*Arson—Previous fires in the locality, evidence of—Conviction on evidence partly inadmissible.*

Where the Sessions Judge convicted the accused of arson and in summing up his conclusion observed: "On these facts I believe the evidence of the Sub-Registrar (that is the complainant) and his servant Asdu, supported as it is by the previous chain of events" and the previous chain of events consisted of fires which had occurred in the village with which, however, the accused was not shown to have been connected in any shape or form:

Held, that it would not be safe to allow the conviction to stand, as the Judge had laid a very considerable stress upon the previous chain of events, which was not admissible in evidence, and it was doubtful whether he would have come to the conclusion at which he arrived but for the chain of events to which he referred.

PENAL CODE—contd.

The High Court, doubting the evidence of identification, set aside the conviction and sentence and directed the accused to be set at liberty without ordering a re-trial. **C** TODAN MIR *v.* EMPEROR, 20 C. W. N. 1267; 17 CR. L. J. 421 981

——— Ss. 441, 447—*Criminal trespass—Possession, physical and juridical, distinction between—Notice of ejectment, failure to obey, consequences of—Trustee, possession of.*

The possession contemplated under section 441, Indian Penal Code, is actual physical possession and not merely a power of control such as a trust scheme vests in a trustee. Where property is held in actual physical possession by one person and in juridical possession by another, it is the person in actual physical possession whose feelings have to be considered under section 441, Indian Penal Code. Failure to obey a notice of ejectment does not of itself constitute criminal trespass. **L B** TOK GYI *v.* EMPEROR, 17 CR. L. J. 378 810

——— S. 447 810

——— S. 447—*Trespass, when offence.*

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right without intention to intimidate, insult or annoy the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass. **C** AKSHOY SINGH *v.* RAMESWAR BAGDI, 20 C. W. N. 1071; 17 CR. L. J. 339 515

——— Ss. 451, 457—*Lurking house-trespass, essential element of—House trespass by night.*

In order to constitute lurking house-trespass the offender must take some active means to conceal his presence from some one who has a right to exclude him.

The mere fact that a house-trespass was committed by night does not make the offence one of lurking house-trespass.

Where, therefore, the accused had entered the courtyard of a *haveli* through the *deorhi* but the *deorhi* itself had no door attached to it, and was caught red-handed in the act of stealing cattle:

Held, that he was guilty of the offence of house trespass. **P** BUDHA *v.* EMPEROR, 21 P. R. 1916 CR.; 123 P. L. R. 1916; 44 P. W. R. 1916 CR.; 17 CR. L. J. 304 176

——— S. 456—*Lurking house-trespass—Intention—Offence—Illicit intercourse with widow, if offence.*

Where the accused entered the complainant's house with a view to carry on an intrigue with his widowed sister who was of age, and was discovered:

Held, that his entering the house could not be said to have caused such annoyance or insult as is contemplated by section 456 of the Indian Penal Code and that the accused committed no offence, inasmuch as to have criminal intimacy with a widow of age is no offence. **A** GAYA BHAR *v.* EMPEROR, 14 A. L. J. 719; 17 CR. L. J. 419; 38 A. 517 979

——— Ss. 456, 457, 380—*Charge under ss. 457, 380—Conviction under s. 456—Criminal Procedure Code (Act V of 1898), s. 238—Intention, whether should be specified in charge under s. 456, Penal Code.*

PENAL CODE—contd.

An inflexible rule of universal application cannot be laid down that under no circumstances can a conviction be made under section 456, Penal Code, when the accused has been charged with the commission of an offence under section 457, Penal Code.

Where the specific intent, namely, an intent to commit theft, imputed to the accused to sustain a conviction under section 457, Penal Code, has not been established, the accused may be convicted of an offence under section 456, Penal Code, in conformity with section 238, Criminal Procedure Code, if he is not prejudiced at the trial by such conviction for the minor offence.

To sustain a conviction under section 456 it is not necessary to specify the criminal intention, in the charge; it is sufficient if a guilty intention, such as is contemplated by section 441, is proved either from direct evidence or from conduct and other circumstances.

An accused was found at midnight in the house of the complainant, a respectable widow, while she was asleep on the same bed with her mother. He was caught but ran away leaving his wearing cloth behind. He was charged with and tried of offences under sections 457 and 380, the case for the prosecution being that the entry in the house was made with intent to commit theft of the complainant's ornaments. The explanation of the accused was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation. The trying Magistrate found that the accused had entered the house that night, not to commit theft as the prosecution alleged, nor to carry on an intrigue at the complainant's invitation as the accused asserted, but really with a view to make immoral proposals to her:

Held, that the accused could be convicted under section 456, Penal Code. **C** KARALI PRASAD GURU *v.* EMPEROR, 20 C. W. N. 1075; 17 CR. L. J. 424 984

——— S. 457 176, 984

——— Ss. 482, 486—*Merchandise Marks Act (IV of 1889), s. 15—Using false trade mark—Limitation for criminal prosecution—"First offence", meaning of.*

The recourse to Criminal Courts under sections 482 and 486, Indian Penal Code, for use of false trade marks has been provided as a speedy remedy to traders who are diligent, and any prosecution not filed within three years from the date of the first offence will be barred by section 15 of the Merchandise Marks Act.

The expression "first offence" in section 15 of the Merchandise Marks Act, must be construed as the first offence of the series of similar offences regarding the same trade mark **S** JAGAN NATH *v.* EMPEROR, 10 S. L. R. 45; 17 CR. L. J. 367 671

——— S. 486 671

——— Ss 498, 499 657

——— S. 499, EXCEPS. (8), (9)—*Defamation—Complaint to Police Constable—Privilege—Burden of proof—Evidence Act (I of 1872), s. 105.*

A complaint to a Police Constable is not privileged. The rule of law that parties before the Court,

PENAL CODE—concld.

Counsel and witnesses are absolutely privileged, cannot be extended to the case of complaints to a Police Constable.

An accused person, who in a charge of defamation pleads privilege under exception 8 of section 499, Indian Penal Code, has to establish affirmatively two ingredients which alone will bring him within that exception, *viz.*, (1) the preferring of a complaint in good faith and (2) preferring it to a person who has authority over the person complained against. This is what section 105 of the Evidence Act lays down. M KAKUMARA ANJANEYALU, *In re*, 17 CR. L. J. 381 813

——— S. 511 497, 991

PLAINT. *See* PLEADINGS.

———, amendment of—Executors, suit against, as such and personally—Cause title, omission to designate as executors in—Defect, whether fatal—Election, order for, between reliefs claimed—Civil Procedure Code (Act V of 1908), O. II, r. 5 792

PLEADER AND CLIENT—*Admission by Pleader on client's behalf, how far binding.*

Where the plaintiffs at first contested the validity as well as the factum of a certain Will but at a subsequent stage of the suit their Pleader admitted the factum of the Will on their behalf:

Held, that the plaintiffs were bound by the statement made by their duly appointed Pleader. P INDAR SINGH *v.* KARM SINGH, 86 P. L. R. 1916; 164 P. W. R. 1916 870

———*Pleader, authority of—Parties, obligations of—Execution proceedings, initiation of, within time, effect of.*

Parties are bound by what Counsel do in the exercise of their discretion acting within the scope of their authority.

Per *Walsh, J.*—The Bar have privileges of audience, and a good deal more than audience, which involve correlative obligations, and matters like admissions, consents, withdrawals by Counsel in the conduct of their cases made in open Court are, unless they have been induced or misled by some circumstance to make a statement under a mistake, final and binding upon the parties. A BIRJ BHUKAN LAL *v.* MAHADEO PERSHAD 205

PLEADER, enrolment of—Woman, right of, to admission as Pleader 925

PLEADINGS. *See* CIVIL PROCEDURE CODE, O. VI, R. 4.

———*—Plaint, amendment of, in second appeal, if allowable—Suit, nature of, change of.*

The High Court in second appeal refused to allow a plaintiff to amend his plaint and to litigate the suit as a suit for rectification of a decree founded on a mistake, where the original suit which was to set aside the decree as based on fraud was dismissed by the first Appellate Court on the ground that no fraud was committed by the defendant but that errors in the decree were due to mistakes of both parties. C SHYAMA SUNDARI GHOSE *v.* ASWINI KUMAR CHAKRAVARTI 91

POLICE ACT (V OF 1861), S. 23—*Police officers, power of, whether restricted to prevention of cognizable offences—Stopping pwe held without license, whether illegal.*

The preventive action of the Police is not restricted to the prevention of cognizable offences under section 149, Criminal Procedure Code. The Criminal Procedure Code and the Police Act together define the extent of their preventive powers.

Section 23 of the Police Act gives wide powers to Police Officers for preventing offences or breaches of the law generally, and it is not outside their power to stop a *pwe* which is held without a license. L B EMPEROR *v.* NGA KALA, 8 L. B. R. 329; 17 CR. L. J. 347 523

——— Ss. 30, 31, 32—*Licence to regulate resort of persons to public places, legality of—Order, if* ultra vires*—Licences, nature of.*

The Police have no authority to regulate by licence the resort of any persons or class of persons to any public place or thoroughfare, nor does section 31 of the Police Act, which assigns the duty of "keeping order" at places of public resort and of "preventing obstructions" on certain occasions in such places to the Police, authorize them to give any general order.

The accused was convicted under section 32 of the Police Act of having contravened the order of the Superintendent of Police, Benares, that no one plying the trade of a *jatrawal* is to be allowed to frequent the Moghal Sarai Railway Station, and the thoroughfares and other public places in Moghal Sarai, without having first obtained a pass or licence from the Superintendent of Police or District Magistrate:

Held, setting aside the conviction, that the order of the Superintendent was *ultra vires*, inasmuch as the only licences which could be lawfully issued by him were in connection with the conduct of assemblies and processions and the use of music on the occasion of festivals and ceremonies under section 30 of the Police Act. A KRISHNA LAL *v.* EMPEROR, 14 A. L. J. 1072; 17 CR. L. J. 448 1008

——— Ss. 31, 32 1008

POSSESSION, long, of lands after Permanent Settlement, whether raises presumption that they were possessed at the time of the Permanent Settlement 885

———, physical and juridical, distinction between 810

PRACTICE—*Party in default—Court, duty of—Discretion.*

When a party is in default, either through failure of the Court officials to serve notice or from some neglect to pay the necessary process-fees, the question whether he should be denied a hearing or should be allowed an adjournment, is a question which must be judicially determined upon proper materials *i.e.*, upon evidence and for reasons to be given by the Judge who decides to deny him a hearing, so that such reasons may be reviewed, if necessary, by a higher tribunal, inasmuch as it amounts in substance to a final order and is in fact a judicial act requiring as much care, circumspection and judicial discretion as any other judicial act.

The practice of lower Courts commented upon. A SARJU PARSHAD *v.* UMANPATUR 464

PRACTICE—concld.

———*Prosecution evidence weak and biased—Benefit of doubt—Revision.*

Where in a case of theft of grass, the Magistrate found that the evidence for the prosecution was weak and biased and that it was possible that the accused did get permission from the joint proprietors to cut the grass:

Held, that under the circumstances the accused could not be convicted of theft. P RAM JAS *v.* EMPEROR, 66 P. L. R. 1916; 27 P. W. R. 1916 CR.; 17 CR. L. J. 303 175

———*Sentence — Offence under different sections—Penal Code (Act XLV of* 1860), *ss.* 71, 147, 149, 325.

Where there are different definitions of the same offence or where the same offence is provided for in different sections or by separate and different provisions in the Code, under no circumstances should the accused be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. A DHARAMDEO SINGH *v.* EMPEROR, 14 A. L. J. 738; 17 CR. L. J. 418 978

PRÆSUMITUR RETRO—Presumption, backward—Possession, long, of lands after Permanent Settlement, whether raises presumption that they were possessed at the time of the Permanent Settlement.

The principle of *præsumitur retro* is not confined to cases where the question is as to the existence of a *taluk* at the time of the Permanent Settlement, but it applies also to cases where the question is, whether certain lands, possessed for a long time after the Permanent Settlement as part of a *taluk* existing from before the Permanent Settlement, appertained to the *taluk* at the time of the Permanent Settlement.

From long possession of certain lands as part of a *taluk* existing from before the Permanent Settlement a presumption may arise that those lands were comprised within the *taluk* at the time of the Permanent Settlement.

But such a presumption is one of fact and it is open to a Court to attach such weight to it as it likes, having regard to the facts and circumstances of a particular case. C. RAM KRISTO CHAKRABURTTY *v.* NARENDRA KISHORE ROY 885

PRE-EMPTION. *See* CUSTOM; MUHAMMADAN LAW.

———*Colourable transaction—Sale in guise of gift —Right to pre-empt.*

By a deed which was in terms one of gift, *N* made a gift of the land in suit to defendant as some return for the services rendered to him at various times by the latter, who was described as a near kinsman and a very good friend. The deed also stated that the value of the land was Rs. 1,000. The plaintiff sued for pre-emption and it was found that defendant was not related to *N* nor had rendered him any service:

Held, that the transaction was really one of sale though disguised as a gift and the plaintiff was entitled to pre-empt the land in suit. P CHIRAGH DIN *v.* ALLAH DIN, 70 P. R. 1916; 118 P. W. R. 19 6; 129 P. L. R. 1916 303

———Deed of sale wrongly describing property sold—Subsequent rectification—Limitation 278

PRE-EMPTION—contd.

———*Mortgage—Prior mortgagee getting pre-emption decree against subsequent mortgagee on ground of subsequent mortgage being a sale—Suit by former against mortgagor personally for recovery of mortgage-money—Transfer of Property Act (IV of* 1882), *s.* 68—*Maintainability of suit—Merger.*

Where a prior mortgagee got a pre-emption decree against the subsequent mortgagee on the ground that the subsequent mortgage was really a sale, and then, after giving credit for the sum mentioned in the subsequent mortgage as having been left with the subsequent mortgagee for payment to the prior mortgagee, sued the mortgagor personally for the balance of the money due on his mortgages:

Held, that the suit was not maintainable, as the effect of the pre-emption decree was to merge the two rights of the mortgagor and the mortgagee in one and the same person, the prior mortgagee. O ARJUN PRASAD *v.* LAIQ SINGH, 3 O. L. J. 276 845

———*Mortgage prior to Transfer of Property Act—Transfer of Property Act (IV of* 1882), *s.* 72, *applicability of—Mortgagor liable to pay Government Revenue—Mortgagee paying the amount — Sale—Pre-emptor, if bound to pay whole amount.*

A mortgage executed prior to the passing of the Transfer of Property Act, 1882, provided that the mortgagor would pay the Government revenue and if he failed to do so, the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent. per mensem. The mortgagee had to pay and did pay the Government revenue and got a sale-deed executed in his favour by the mortgagor of the equity of redemption for the original money and the Government revenue paid by him. On a suit for pre-emption of the property:

Held, that the principle of equity contained in section 72 of the Transfer of Property Act existed before and governed the case and that the vendee was entitled to the full amount contained in the sale-deed. A BHOJ RAJ *v.* RAM NARAIN, 14 A. L. J. 717; 38 A. 530 915

———*Rival pre-emptors - Decree providing for succession of one by other in case of failure to pay decretal money into Court by certain date Payment to vendee out of Court before that date certified later whether amounts to proper payment into Court.*

An action on the part of the pre-emptor and the vendee completed before the due date and calculated to put the Court into a position to issue an immediate warrant for possession may be taken as equivalent to payment into Court.

Two rival pre-emptors, *F* and *A* secured a joint decree for pre-emption, the rights of *F* being preferred to those of *A*. The decree provided that *F* should pay the price into Court on or before the 5th March 1915, that in default his claim should stand dismissed and *A*'s claim should come in. On the 5th March *F* put in a receipt for the whole sum and asked the Court to certify the payment. The Court issued notice to the judgment-debtors to appear on the 25th March. Notice not having been served, fresh notices were issued for the 2th April. On the 31st March 1911 the judgment-debtors appeared and confirmed the receipt and also vouched for two others who were

PRE-EMPTION—concld.

dead. On the 12th April four more appeared and confirmed the receipt. In the meantime *A* on the 16th March applied for execution:

Held, that *A* was entitled to a very strict compliance by *F* with the terms of the decree and as the payment by the latter to the judgment-debtors had not been certified to Court by the fixed date, his decree became a mere waste paper afterwards and *A* was entitled to execute his decree. P ABUL FATTEH *v.* FATTEH ALI, 73 P. R. 1916; 121 P. W. R. 1916; 137 P. L. R. 1916 363

PRELIMINARY DECREE, appeal against, whether affected by failure to appeal against final decree subsequently passed 873

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S 7—*Notice to creditor of intention to suspend payment, what amounts to—Inference—Act of bankruptcy - Transaction between creditor and insolvent after notice, effect of*—Bona fides, *whether necessary under s 57—English decisions, value of.*

An intimation to a creditor that a debtor is insolvent is not an act of insolvency. But where the intimation is expressed in such a manner as to lead to the inference that the debtor had suspended or is about to suspend payment, it is an act of insolvency. It is a question of inference from the terms of the notice in each particular case.

Though the protection afforded to a transaction with an insolvent under section 57 of the Presidency Towns Insolvency Act is dependent only on the creditors not having notice of the presentation of the insolvency petition, and not, as under the English Law, of any available act of bankruptcy, a creditor who deals with the debtor with the knowledge that he had committed such an act does not act *bona fide* and is not entitled to the benefit of the section.

Under section 57, the question is not narrowed down to a consideration of whether the transaction is a real transaction, and if so, whether it is protected by the words of the section. The Court is bound to consider whether a transaction is contrary to the policy of the Bankruptcy Law, although it does not come within the four corners of any particular section.

When an Act of the Indian Legislature is to be construed which in many instances is taken word for word from an English Act and a branch of Law is to be dealt with which is essentially English Law, the greatest respect must be paid to the decisions of the English Court of Appeal, though they may not be actually binding on the Indian Courts.

The Solicitor of *V* wrote to the Mercantile Bank, one of *V*'s creditors, that *V* was in insolvent circumstances and warned the Bank to remove certain goods lying in *V*'s godown, and the debtor gave them a letter of lien to secure past and future advances and overdrafts. The Bank, thereupon, took possession of the goods and put their board on the godown. The next day *V* filed his petition in insolvency:

Held, (1 that the notice, under the circumstances, amounted to an act of insolvency by *V*;

(2) that the transaction with the Bank was not *bona fide* and the Bank was not entitled to the benefit of the protection in section 57 of Act III of 1909;

PRESIDENCY TOWNS INSOLVENCY ACT—concld.

(3) (*obiter*), that the transaction was not a fraudulent preference. M MERCANTILE BANK OF INDIA, LTD., MADRAS *v.* OFFICIAL ASSIGNEE OF MADRAS, 39 M. 250 942

PRESUMPTION. *See* RAILWAYS ACT, S. 68.

PRIMOGENITURE, rule of. *See* CHOTA NAGPUR ESTATE; CUSTOM.

PRINCIPAL AND AGENT—*Agent acting beyond scope of authority—Principal, liability of.*

The plaintiff consigned certain goods at a station outside the limits of the United Provinces of Agra and Oudh to a station within the limits of the United Provinces and was charged at special famine rates, which applied only to consignments booked at stations within the limits of the United Provinces. When the goods arrived at the destination the defendant company claimed the difference between the ordinary rates. The plaintiff sued for damages:

Held, that the station master at the consigning station acted beyond the scope of his ordinary authority as the defendants' agent and, that, therefore, the defendant company was not liable for breach of the contract entered into by the agent. A GOVIND RAM *v.* G. I. P. RAILWAY, 14 A. L. J. 601 208

——— —— Contract by broker without principal, validity of 3

PRIVY COUNCIL, appeal to. *See* CIVIL PROCEDURE CODE, S. 110.

PROBATE. *See* WILL.

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 98 (1) (3)—*Limitation Act, applicability of, to applications asking Court to do what it has no discretion to refuse—Executor or administrator, duty of, to exhibit inventory or account.*

The Limitation Act does not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character; but section 98 (1) (3) of the Probate and Administration Act does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. Section 98 (1) itself imposes the duty of doing this on the executor or administrator. If he does not perform it the Court may require him to do so, but that is a matter for its discretion. L B MOOLLA CASSIM *v.* MOOLLA ABDUL RAHIM, 9 BUR. L. T. 148 950

PROCEDURE. *See* MESNE PROFITS.

PROMISSORY NOTE. *See* NEGOTIABLE INSTRUMENTS ACT, S. 9; PARTNERSHIP.

——— —— Recital as to consideration—Proof of payment of different kind, whether admissible 301

PROPERTY, acquired by gift, whether is ancestral 742

PROVINCIAL INSOLVENCY ACT (III OF 1907)—*Petition for insolvency not made* bona fide, *but for inequitable purpose—Inherent power of Court to dismiss - Debt proveable in insolvency—Maintenance, claim for.*

A Court has inherent power to dismiss a petition

for insolvency when it is presented, not with the *bona fide* view of obtaining an adjudication, but for an inequitable and collateral purpose.

Obiter.—A claim for maintenance ordered to a wife by a decree of the Court is not a debt proveable in insolvency. S PAMANMAL HEMANMAL, *In the matter of*, 10 S. L. R. 28 541

——— S. 7—*Withdrawal of insolvency petition after adjudication.*

Under section 7 of the Provincial Insolvency Act, a petition for insolvency cannot be permitted to be withdrawn after the making of an order of adjudication. S FLEMING SHAW & Co., *In the matter of a petition by*, 10 S. L. R. 47 539

——— Ss. 16, 18, 36, 46—*Alienation by insolvent—Order of Court cancelling alienation—Rights of other sharers in property, whether affected—High Court—Order of single Judge in revision under s. 46—Appeal.*

The cancellation by Court of a sale by an insolvent does not affect the interests of the other sharers in the property and a Court has no jurisdiction by its order to deal with such shares.

An appeal lies to a Division Bench from the order of a single Judge of the High Court under section 46 of the Provincial Insolvency Act. M PALANIAPPA MUDALI *v.* OFFICIAL RECEIVER OF TRICHINOPOLY, 4 L. W. 51; (1916) 2 M. W. N. 123; 20 M. L. T. 334 610

——— S. 18 610

——— S. 34 (3)—*Purchase of insolvent's property from* bona fide *purchaser thereof—Validity of second purchase with notice of insolvency.*

A purchase of an insolvent's property, even with notice of his insolvency, from a person who by purchase of the same in good faith under a sale in execution acquired a good title to it under section 34 (3) of the Provincial Insolvency Act against the Receiver, cannot be set aside. C MADHU SUDAN PAL *v.* PARBATI SUNDARI DASYA 643

——— S. 36 610

——— Ss. 36, 44 (4)—*Official Receiver's report, correctness of—Presumption—Court, duty of, to hold judicial enquiry—Official Receiver, joinder of, as party.*

Section 44, clause (4), of the Provincial Insolvency Act only provides for a presumption in favour of the correctness of any statement in the Official Receiver's report but does not empower the Court to leave the duty of judicial enquiry, as a preliminary to judicial action under section 36, to the Official Receiver or to act in proceedings under that section on evidence which it has not itself taken.

In such enquiry the Official Receiver should be joined as a party. M SIMIL ROWTHER *v.* KUMARAPPA CHETTY, (1916) 2 M. W. N. 182 875

——— S. 43, *proceedings under, nature of—Charge to be clearly stated—Irregularity in proceedings, effect of.*

Proceedings under section 43 of the Provincial Insolvency Act are in the nature of criminal proceedings and it is necessary that there should be a charge, a finding and a conviction as a foundation for a sentence. Everything should be strictly and accurately pursued and if in any one of these particulars a substantial defect should appear, it would be a ground for reversing the proceedings.

Where, therefore, no charge was framed of any specific offence punishable under section 43 of the Provincial Insolvency Act, and the insolvent was sentenced to three months' imprisonment merely on the deposition of the Receiver to the effect that the insolvent had threatened to assault any one who attempted to sell his property, which threat the insolvent, who was examined as a witness, denied to have offered:

Held, that the proceedings were wholly irregular and liable to be set aside. P NAWAB *v.* TOPAN RAM, 62 P. W. R. 1916; 110 P. R 1916; 145 P. L. R. 1916; 17 CR. L. J. 318 494

——— S. 44 (4) 875

——— S. 46 610

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 17 613

——— S. 17—Ex parte *decree, setting aside of—Deposit of decretal amount or security, necessity of.*

In order to set aside an *ex parte* Small Cause Court decree the applicant must, at the time of presenting his application, either deposit in Court the amount of the decree or give security as provided for by section 17 of the Provincial Small Cause Courts Act. A JAI RAM *v.* PURNA 625

——— S. 17 (1), *proviso, applicability of—Application for revival of suit dismissed for default.*

A plaintiff who applies for revival of his suit, which has been dismissed for default by a Small Cause Court, has not to make the deposit or furnish the security as required by the proviso to sub-section (1) of section 17 of the Provincial Small Cause Courts Act, as his application is not for an order to set aside a decree passed *ex parte*. C YUSUF AKRAM *v.* ARFAN ALI KHAN, 23 C. L. J. 147 45

——— S. 25—*High Court—Revision.*

Per *Sadasiva Aiyar, J.*—The High Court should not interfere in revision with the finding of a Small Cause Court, on the mere ground that the latter misdirected itself as to the burden of proof in arriving at a finding of fact when it weighed the evidence on both sides. M RANGASWAMY BHATTAR *v.* SESHADRI AIYENGAR, 4 L. W. 611 204

PUBLIC STREET. *See* PUNJAB MUNICIPAL ACT, s. 3 (13) b.

PUBLIC TRUST, suit relating to, maintainability of, without consent of Advocate-General—Right to worship idol—Sufficient interest—Special interest 846

PUNISHMENT, lenient, award of, to confessing accused 962

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 9 (3)—*Reference to Deputy Commissioner—Civil Courts, whether can interfere afterwards—Jurisdiction.*

A Civil Court is *functus officio* and has no further jurisdiction in a case after it has made a reference to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act, for such action as he might think fit, and after the Deputy Commissioner has taken such action. P BAKHTAWARI *v.* SHARBAN LAL, 55 P. R. 1916; 155 P. W. R. 1916 532

PUNJAB ALIENATION OF LAND ACT—concld.

——— Ss. 9, 19, 23—*Mortgage by way of conditional sale made before the Act—Agreement to strike out sale conditions—Mutation—Punjab Land Revenue Act (XVII of 1887), s. 37 (b).*

The period of a mortgage by way of conditional sale made before the Punjab Alienation of Land Act and subsisting after the Act came into force should not be altered, if the mortgagee agrees that the sale condition shall be excised.

Where, therefore, the parties to a mortgage by way of conditional sale agreed that the mortgagees (who were non-agriculturists) should come into possession and the mortgagors should occupy the land as tenants subject to the payment of rent, and on this understanding applied for mutation of names:

Held, that mutation could not be allowed as the position of the parties was not in accordance with the Punjab Alienation of Land Act, which aimed at the excision of conditions intended to operate by way of conditional sale when they came to notice in the usual course of business;

(2) that inasmuch as the parties being put to their election agreed that the conditions intended to operate by way of conditional sale should be struck out, mutation should be effected under section 37 (*b*) of the Land Revenue Act. P HARJAS *v.* HARDITTA, 79 P. L. R. 1916 709

——— Ss. 19, 23 709

PUNJAB COURTS ACT (III OF 1914), whether retrospective 67

——— S. 41—*Appeal, second—Misreading of evidence—Money paid validly to prior mortgagee in excess of sum mentioned in sale-deed—Legal necessity.*

Misreading of evidence is a sufficient ground for the Chief Court's interference on second appeal.

A sum of money paid by the vendee to a prior mortgagee, due on the footing of the mortgage but in excess of the sum mentioned in the sale-deed, is a payment for valid necessity and should be allowed against the collaterals of the vendor. P JOWALA SINGH *v.* LAKHA SINGH, 18 P. R. 1916; 126 P. W. R. 1916. 892

——— S. 41 (1) (c)—*Appeal, second—Error in weighing evidence, whether defect of procedure.*

A mere alleged error in weighing evidence is no ground for second appeal under section 41 (1) (*c*) of the Punjab Courts Act. P RAMJI DAS *v.* THAKAR DEVI, 72 P. R. 1916; 119 P. W. R. 1916; 138 P. L. R. 1916 366

——— S. 41 (3)—*Grant of certificate on point of custom—No evidence as to custom—Certificate, grant of, effect of.*

Where a lower Appellate Court is of opinion that, far from there being any conflicting or uncertain evidence to warrant a substantial doubt as to the existence of an alleged custom, there is no evidence worth the name in support thereof, no certificate under section 41 (3) of the Punjab Courts Act ought to be given and, if given, the Chief Court will decline to act upon such a certificate as under the law it ought not to be granted. P BANI SINGH *v.* SUMAT SINGH, 82 P. R. 1916; 129 P. W. R. 1916 884

PUNJAB COURT OF WARDS ACT (II OF 1903), Ss. 11, 12, action by Deputy Commissioner under 718

PUNJAB EXCISE ACT (I OF 1914), S. 61 486

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 37 (*b*) 709

PUNJAB LOANS LIMITATION ACT (I OF 1904), SCH. I, S. Nos. 3, 7 577

PUNJAB MUNICIPAL ACT (III OF 1911), S. 3 (13) (b)—*Public street—Limited access by public to private place, effect of—Municipal Committee whether can interfere in repairs of private gateways.*

A limited access by the public to a private place does not operate to convert it into a public street.

Where, therefore, the gateways of a private *serai* belonging to the plaintiff and two other private persons having fallen down, he proceeded to put them in position and the Municipal Committee served him with a notice to remove the gates, upon which he brought a suit for a perpetual injunction to restrain the Municipal Committee from interfering with the gateways in dispute:

Held, that inasmuch as the *serai* was a private one occupied by the tenants of the proprietors, who had a right of way over the road leading through a square owned by the plaintiff, the closing of the gateways would give them a cause of action, but the Municipal Committee had no right to interfere with the gateways in dispute P MUNICIPAL COMMITTEE, KARNAL *v.* MAHOMED UMAR DARAZ ALI KHAN, 109 P. R. 1916; 145 P. W. R. 1916; 136 P. L. R. 1916 355

——— S. 3 (13) (b)—*Public street—User of road by public as of right—Presumption—Dedication limited to particular class of persons—Burden of proof.*

The user of a road by the public openly and as of right is sufficient to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive use.

The onus is on the owners of the site to show that the dedication was limited to a particular class of persons only.

Where, therefore, in a suit for possession of a plot of land in a market taken up by the defendant Municipality for making a metalled road, it appeared that the predecessors of the plaintiffs built the market with shops and left an open space lying between the shops, this open space opening into thoroughfares at various points, and then let the shops to grain-dealers:

Held, (1) that the presumption certainly was that they intended the members of the public to make use of the space left vacant as a highway;

(2) that, as there was no evidence to show that the dedication was limited to any particular class of persons and as the road had ever since been used by all members of the public without any interruption whatsoever, it was a public street within the meaning of the Municipal Act and the plaintiffs could not, therefore, get possession of the site. P MUNICIPAL COMMITTEE, KARNAL *v.* MUHAMMAD RUSTAM ALI KHAN, 108 P. R. 1916; 146 P. W. R. 1916 458

PUNJAB MUNICIPAL ACT—concld.

——— Ss. 189 (3) (i, (iii), 193, 195—*Sanction conditional on leaving some land vacant—Condition, propriety of—Question whether Municipal Committee acted* bona fide, *if of fact—Appeal, second.*

The plaintiff's application for leave to build a two-storied house was sanctioned by the Municipal Committee, subject to the condition that he must leave vacant seven feet of his land towards the west. It appeared that there was already an open space, about 5 feet 4 inches in width, on the west and the condition meant that he should not build within 2 feet of this open space. Plaintiff having built his house in contravention of this condition, the Municipal Committee served him with a notice under section 195 of the Punjab Municipal Act, calling upon him to demolish the upper storey of his building. Plaintiff then brought a suit for an injunction restraining the Committee from interfering with the upper storey of his house:

Held, (1) that the question whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted sanction to plaintiff to build a two-storied house, was one of fact and having already been decided adversely to plaintiff by the Courts below could not be re-opened in second appeal;

(2) that *prima facie* there was nothing illegal, wanton, capricious or oppressive in a condition such as this, which was aimed at restraining the building of erections consisting of more than one storey alongside a narrow open space, but was on the contrary eminently reasonable and conducive to sanitation, free circulation of air and ventilation within the meaning and for the purposes of section 189 (3) (*i*) and (*iii*) of the Punjab Municipal Act, read with section 193 thereof;

(3) that the Court was not concerned with the fact that compliance with the notice would entail heavy loss upon the plaintiff, who having acted defiantly and with his eyes open must bear the loss. P ABDUL SAMAD *v.* MUNICIPAL COMMITTEE OF DELHI, 75 P. R. 1916; 154 P. W. R. 1916; 140 P. L. R. 1916 377

——— Ss. 193, 195 377

PUNJAB TENANCY ACT (XVI OF 1887), S. 77 (3) (d)—*Suit for redemption—Defendants' claim to occupancy rights—Civil Court, whether can take cognizance of claim.*

The plaintiff mortgaged the land in suit, with possession, to the defendants who were recorded as tenants-at-will. On his suing for redemption, the defendants set up a plea that their real position was that of occupancy tenants and that consequently the plaintiff was not entitled to a decree for physical possession of the property:

Held, that the plea of the defendants related to a matter in respect of which they were entitled to bring a suit in a Revenue Court and could not, therefore, be taken cognizance of by a Civil Court. P JHANDA *v.* DATA RAM, 59 P. R. 1916; 93 P. L. R. 1916 597

PURCHASER at certificate sale, rights and duties of, after cancellation of sale—Decree for rent obtained by such purchaser, validity of, after cancellation of certificate sale 339

RAILWAYS ACT (IX of 1890)—Power of Magistrate to inquire about heirs of deceased Railway servant 672

——— Ss 68, 112, *offence under, essence of—Knowledge of breach of Railway rules, if evidence of intent to cheat—Rules, posting of, on Stations Presumption of knowledge.*

The fact that a passenger is travelling by a Railway train and, on being called upon, produces a ticket bearing date of a previous day throwing away another in his possession, cannot lead to an inference of dishonest intention so as to justify a conviction under section 112 of the Railways Act, the essence of the offence under that section being an intent to defraud the Railway Company.

In the absence of any evidence from which it can be clearly inferred that a passenger knows that the ticket he is holding has been used before, an intention on his part to cheat the Railway Company cannot be inferred from the mere fact that the passenger is aware that he is committing a breach of the Railways Act or rules framed thereunder.

Where there is nothing on a ticket intimating to its holder that, under the Railway rules, it is only available for a particular train or on a particular day, his knowledge of the Railway rules cannot be inferred from the fact that the rules have been posted on the Railway Stations, unless and until it is proved that the attention of the particular traveller was drawn to them. C MANINDRO NATH MITTER *v.* BENGAL NAGPUR RAILWAY CO., 17 CR. L. J. 361 665

——— S. 112 665

RAILWAY COMPANY—*Consignment under risk-note form H—Loss—Wilful neglect—Company, liability of.*

The plaintiffs delivered certain bags of potatoes to the B. B. and C. I. Railway to be carried to a station on the G. I. P. Railway under a risk-note form H. The bags were duly carried to the junction station of the two Railways and were put into an empty waggon belonging to the G. I. P. Railway. They should have been transhipped at another station, but it was not done and they were carried to some other station where they remained unnoticed for sometime. Thereafter they were sent to their destination and as they were found to be in a stinking condition, they were sold by public auction without any notice to the plaintiffs or their agents, etc. On a suit by the plaintiffs:

Held, that the Railway Authorities were not guilty of wilful neglect within the meaning of the risk-note. A JHUNNI LAL *v.* B. B. & C. I. RAILWAY, 14 A. L. J. 396 265

RAILWAY RECEIPT, whether 'document of title or instrument of title'—'Title,' meaning of 154

RAIYAT. See BENGAL TENANCY ACT, S. 20 (7).

REAL PROPERTY ACT 8 & 9 VIC. c. 106, whether does not apply to India 92

RECEIVER, appointment of—Guardian of incapacitated person, whether can be appointed Receiver—Appellate Court, powers of, to interfere with appointment once made 939

——— , money in hands of—Disputes relating to such money, which Court can decide—Jurisdiction 589

RECORD OF RIGHTS, suit for declaration as to incorrectness of—Presumption 427

———, value of—Presumption 424

REDEMPTION. *See* MORTGAGE.

REGISTRATION ACT (XVI OF 1908), S. 2 (6)—*"Immoveable property", meaning of "Standing timber" and "standing trees", distinction between—Mortgage of grove.*

The term "standing timber" means trees the wood of which can be used for building or repairing houses or for other industrial purposes, and implies an intention, sooner or later, to sever the trees from the soil. The term "standing trees", however, does not imply any such severance or use.

Where a mortgagee took a usufructuary mortgage of a tenant's rights in a grove, consisting mostly of fruit-bearing trees, and the parties to the mortgage did not contemplate the prospect of severance of the trees and use of their wood for industrial purposes:

Held, that the trees of the grove could not be considered to be "standing timber" and that, therefore, the mortgage of the grove-holder's rights was a transfer of "immoveable property" within the meaning of the Registration Act. O RAMMAN LAL *v.* RAM GOPAL, 3 O. L. J. 367 713

——— S. 17 371, 718, 864

——— S. 17—*Lease constituted by a number of documents—Registration—Tank-bed lands, grant of, whether valid.*

Section 17 of the Registration Act does not apply to a lease which is constituted by a number of documents, none of which taken singly can be regarded as a lease. M CHITRAVELU SERVAI *v.* SAMANNA IYER 108

——— Ss. 17, 49—*Mutation proceedings—Compromise, admissibility of, in evidence—Family settlement—Civil Procedure Code (Act V of 1908), O. XVIII, r. 11—Objection as to admissibility—Procedure.*

In a mutation case the plaintiff filed a compromise giving up her rights in the property in dispute and the Revenue Court ordered "mutation according to the compromise." The compromise not having been acted upon by the defendant, and being unregistered the plaintiff brought a suit for possession of the property in dispute:

Held, (1) that the interest of the plaintiff had not been transferred and she was entitled to possession;

(2) that the mutation proceedings were not judicial proceedings nor was there any decree which could have the effect of transferring the interest of the plaintiff, inasmuch as all that the mutation officer had to do or had jurisdiction to do was to order whose name should be recorded;

(3) that the transaction was not a family arrangement.

Per *Richards, C. J.*—A document which discloses "family arrangements" and which at the same time "purports or operates" to create, declare, assign, limit or extinguish a right to, or interest in, immoveable property of the value of Rs. 100 or upwards must be registered.

REGISTRATION ACT—contd.

A document which cannot be objected to for want of registration is admissible, provided it is relevant to some issue in the case and unobjectionable on any other valid ground.

A document cannot be received in evidence on the ground that it does not "purport or operate" as an assignment or relinquishment of rights in property and then be used by the Court for the very purpose of showing that the right was relinquished or assigned.

No definite rule can be laid down as to the admissibility of applications and orders in mutation proceedings. Each case must be dealt with according to law.

The proper time to object to the admissibility of a document in evidence is when the document is tendered, and not for the first time in appeal.

When a document tendered as evidence, or a question to a witness, is objected to as inadmissible, it is the duty of the Judge to rule on the objection, and if he admits the document or allows the question to be asked notwithstanding the objection, the Judge should note that the objection has been made.

Per *Tudball, J.*—*(obiter)* If the document in dispute was one which purported or operated to extinguish the plaintiff's title, registration thereof would be compulsory. A JAGRANI MISRAIN *v.* BISHESHAR DUBE, 14 A. L. J. 449; 38 A. 366 701

——— Ss. 17 (b), 49—*Mutation proceedings—Compromise, petition of, filed in mutation proceedings—Registration, whether obligatory—"Create, declare, assign, limit or extinguish," meaning of—Order of Revenue Court in mutation proceedings, whether confers title—Family arrangement—Interpretation of documents.*

In order to constitute a binding family arrangement it is not necessary that there should be any formal contract between the parties.

Such arrangements are given effect to, not on the ground that they amount to transfers of property, but because they constitute binding agreements between the parties from which the law will not permit them to resile.

No order of a Revenue Court in mutation proceedings can *per se* operate to confer title.

The expressions "create", "assign", "limit" or "extinguish" in section 17 *(b)* of th Registration Act, all imply a definite change of legal relation to property by an expression of will embodied in the document referred to, and the expression "declare" imports a similar meaning. of implies a declaration of will, not a mere statement of fact.

Where a petition by way of compromise is filed before a Revenue Court in a mutation case between the members of a family, and mutation is made in accordance with it, such petition, in spite of its being unregistered, is subsequently admissible in evidence as proof of a family arrangement, if it does not create or confer upon the parties to it fresh and distinct titles but simply recognises or acknowledges their antecedent titles. For, in such a case it cannot be regarded as a dispositive document requiring registration, but merely as an admission, expressed in writing, of a title which was already

REGISTRATION ACT—concld.

in existence and which was not called into being for the first time by the execution of the petition. The petition has in each case to be interpreted in order to find out its nature and purport.

Where a document amounts to a record of a formal agreement which is to regulate the respective interests of the parties in the property, not merely in present but in future, it falls under the provisions of section 17 (*b*) of the Registration Act and requires registration.

The question of the true interpretation of any particular document should not be approached with any ready-made assumption concerning the nature of the legal effect which it is intended to produce, but must be based upon the intention of the parties to the document, which depends upon a consideration of the evidence disclosing the circumstances attending the execution of the document. O SATROHAN LAL *v.* NAGESHAR PRASAD, 3 O. L J. 339; 19 O. C. 75 770

——— S. 35 (3)—*Registrar's power to register—Admission by executant of having signed on blank sheets, whether admission of execution.*

A Registrar cannot register a document whose execution is not admitted by the alleged executant.

Execution of a document consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there cannot be execution. Where an executant clearly says that he signed on a blank paper and that the document which he had authorised is not the document which he contemplated, the statement is a denial, not an admission of execution. PAT EBADUT ALI *v.* MUHAMMAD FAREED 56

——— S. 47—*Operation of registered deed, date of.*

A house was sold on January 20th, 1909. The sale-deed was presented for registration the same day but the registration was completed on the 29th of January 1909. The present suit for *zar-i chaharum* was brought on the 28th of January 1915:

Held, that the suit was barred by limitation, the right to sue having accrued to the plaintiff from the date of the sale and not from the date of completion of registration. A BINDESHRI *v.* SOMNATH BHADRY, 14 A. L. J. 382 347

——— S. 49 701 770

——— S 77, *suit under, scope of—Validity of document, whether in issue.*

The scope of a suit under section 77 of the Registration Act is limited to two points only: (*a*) whether the document has been executed and (*b*) whether the requirements of the law for the time being for registration of documents have been complied with

In such a suit the plaintiff would be entitled to a decree if the document was in fact executed by the defendant, even if it was not freely executed and even if it was not a *bona fide* document, and the Court is not concerned with the questions whether the document is valid and whether it has been freely executed. C JOGENDRA NATH DATTA CHOWDHURY *v.* HARIDAS CHONG 778

RELIGIOUS AND CHARITABLE TRUST, when public trust 880

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 13 646

——— S. 14 88

——— S. 18 88, 880

RELIGIOUS OFFICE—*Bungas* attached to Golden Temple at Amritsar—Manager, office of, alienation of, whether valid 620

REMAND. *See* CIVIL PROCEDURE, CODE, 1908, O. XLI, R. 23.

RES JUDICATA. See CIVIL PROCEDURE CODE, S. 11; LANDLORD AND TENANT.

———, constructive—Assessment of fair rent under section 10, Bengal Tenancy Act—Subsequent declaratory suit by tenant, when barred 695

——— Decision in previous suit proceeding on two grounds—Error in law, effect of 266

——— Enquiries under Guardians and Wards Act, whether constitute *res judicata* 16

——— *Previous decision of Revenue Court not given effect to—Fresh suit, maintainability of.*

Where the Revenue Court once determined that the relationship of landlord and tenant existed between the parties, that point is *res judicata* between the parties; but if it is set up that events have taken place since then which have put an end to the tenancy and the landlord has entered into possession of the land as trespasser, pure and simple, the question has to be determined by the proper procedure. A BHAWAN *v.* MADAN MOHAN LAL, 14 A L J. 734; 38 A. 533 41

——— remark, chance, in judgment in previous case, whether operates as 547

REVERSIONERS, suit for declaration by, withdrawal of—Subsequent suit for possession after widow's death, maintainability of 185

REVIEW. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII, R. 1.

REVISION. *See* CIVIL PROCEDURE CODE, 1908, S 115; CRIMINAL PROCEURE CODE, SS. 437, 439.

——— Benefit of doubt 175

Death of party pending revision—Abatement—Power to deal *suo motu* on merits in absence of questions affecting jurisdiction 821

——— Interference by High Court, when allowable 74

RIPARIAN RIGHTS, *nature of—Infringement of right, action for—Damage, proof of, unnecessary.*

The right which a riparian owner has to the use of water flowing past his land is a natural right and it must be in respect of a natural stream and not an artificial waterway.

It is not necessary, for the exercise of this right, that the water should empty itself in a lake or river. So long as water runs in a defined channel, which is not artificial, and from a known source and it goes past a man's land, that man has the right to treat it as a stream from its source as far as the lower end of his land.

A person who owns land which is not on the bank of a river or stream cannot have the rights of a riparian owner, and even an owner occupying land on the bank of a stream cannot use the water from the stream for the purpose of a piece of land which is not on the bank.

RIPARIAN RIGHTS—concld.

It is not necessary for a riparian owner seeking to restrain another riparian owner from diverting the water of a stream beyond his riparian tenement to prove that he has suffered any damage. Nor is it a defence to such an action that the plaintiff's land is amply irrigated independently of the stream. L B MAUNG KAW LA *v.* MAUNG KE, 9 BUR. L. T. 183 356

SALE in guise of gift—Right to pre-empt 303

——— *Non-payment of consideration, effect of.*

Non-payment of consideration for a sale does not prevent the transfer of ownership to the buyer and does not entitle the seller to retain and withhold possession, although on equitable principles the Court will not make a decree for possession in favour of the purchaser without attaching to it a condition directing payment of the purchase-money. A NARAIN DAS *v.* DHANIA, 14 A. L. J. 65; 38 A. 154 23

——— *of proprietary rights with outbuildings—Ex-proprietary tenancy—Outbuildings, if appurtenance—Outbuildings, right in, if created.*

The question whether or not certain buildings are appurtenances to the holding of a particular tenant, in the sense that the tenant cannot be ejected therefrom so long as his tenancy subsists, is a mixed question of fact and of law.

The defendants purported to transfer to the plaintiff the whole of their proprietary rights in a certain village and in the same deed of sale they expressly specified a *dera* and the buildings appertaining thereto as included in the property transferred to the plaintiff. The plaintiff got possession over the buildings through a suit. The defendants resisted plaintiff's possession over certain outbuildings. The plaintiff sued for possession. The defendants pleaded *inter alia* that these outbuildings were used by them for the storage of agricultural implements and for the shelter of their cattle and that they were, therefore, appurtenances to the tenant-holding which they still possessed in the village:

Held, that the transfer in respect of these buildings and of the land on which they stood was not limited in any way by the operation of the Statute which created the ex-proprietary holding and that the defendants had no right to treat them as appurtenances to their holding. A UMRAO SINGH *v.* CHHEDA LAL 262

SALVAGE. *See* MORTGAGE.

SANCTION TO PROSECUTE—*Forgery—Civil Court, sanction of, whether necessary.*

A person alleged to have abetted the forgery of a document cannot be prosecuted for the offence without the sanction of the Civil Court, if he was a party to the proceeding with respect to the document in that Court A BHAWANI DAS *v.* EMPEROR, 14 A. L. J. 74; 38 A. 169; 17 CR. L. J. 289 161

SAPINDA. See HINDU LAW.

SARASARI. See MADRAS ESTATES LAND ACT, s. 3.

SECOND APPEAL. *See* APPEAL; PUNJAB COURTS ACT, 1914, s. 41 (1) (c).

SECONDARY EVIDENCE. *See* EVIDENCE ACT, s. 56.

SENTENCE. *See* PRACTICE.

———*Perverse finding—Misconduct in procedure—Penal Code (Act XLV of 1860), ss. 147, 152.*

In charges for "riot" and "obstruction of the Police" against the accused, which were not proved and which were of a trivial and venial character, all the accused were ordered to undergo 3 years and 9 months' rigorous imprisonment, bound over for a further year in their own bonds of Rs. 200 and two sureties of Rs. 100 each and fined Rs. 100 each, and in default of payment of the fine they were ordered to undergo 3 months' further rigorous imprisonment:

Held, setting aside the convictions, that under the circumstances of the case, these savage sentences were the combined result of erroneous views of the law, unjustifiable and perverse findings of fact and misconduct in procedure. A BADRI PRASAD *v.* EMPEROR, 17 CR. L. J. 343 519

SETTLEMENT. *See* MUHAMMADAN LAW.

SETTLEMENT DECREE—*Under-proprietary rights—Lease, execution of, by under-proprietor, effect of—Tenancy held by joint under-proprietor, effect of—Superior proprietor purchasing share in under-proprietary holding—Adverse possession—Joint under-proprietors—Limitation—Appellants, some of, dead—Heirs of appellants not brought on record—Appellate Court, power of—Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33.*

Where a settlement decree awarded to certain persons under-proprietary rights in an entire village, named Nakha, but the Extra Assistant Commissioner, in proceeding to assess the under-proprietary rent as ancillary to the settlement, declared those persons liable for the rent of only one of the hamlets of the village named Nakha Khas:

Held, that the Extra Assistant Commissioner had no authority to go behind and supersede or alter the settlement decree and that the said persons were entitled to under-proprietary rights in respect of the *entire* village, if they had nevertheless been all along so treated.

The mere execution of a lease by an under-proprietor in favour of the superior proprietor does not detract from his status as under-proprietor, unless it is shown that the lease was acted upon or that the lessee obtained possession under it.

A tenancy held in an under-proprietary holding by an under-proprietor, who is only entitled to a share in the holding, is not necessarily inconsistent with his joint interest in that holding.

Where the superior proprietor of a village purchases a share in the under-proprietary rights in the same, no right by adverse possession as between him and the other under-proprietors can be recognized in the absence of evidence to prove an express ouster by the former within the knowledge of the latter.

In cases of joint possession of a village, the land of which is not formally divided into different *mahals* by metes and bounds, possession by some of the co-sharers of different portions of the joint land is sufficient to prevent limitation from running against them in regard to the remainder.

SETTLEMENT DECREE—concld.

Where an appeal is filed by more than one person, and some of them die subsequently, and their heirs are not brought upon the record, but the judgment proceeds on a ground common to all of them, the Appellate Court may, in view of Order XLI, rules 4 and 33, Civil Procedure Code, reverse or vary the decree of the lower Court in favour of all the appellants, including the said heirs as well. O JANG BAHADUR *v.* MUHAMMAD ABUL HASAN KHAN, 3 O. L. J. 279 743

SETTLEMENT RECORD—"Lagan ab tak nahin dia," *meaning of*

The description "*lagan ab tak nahin dia*" used in a Settlement Record, is equally consistent with the possibility that the lands may be "*belagan*," that is rent-free, or "*kabil lagan*", that is capable of assessment. PAT HARBANS PRASAD TEWARI *v.* RAMA KANT TEWARI 588

SPECIFIC PERFORMANCE. *See* CONTRACT; COURT FEES ACT, S. 10 (*a*); VENDOR AND PURCHASER.

SPECIFIC RELIEF ACT (I OF 1877), S. 21 710

——— S. 22 (1)—*Contract for sale of immoveable property—Possession, absence of provision for—Suit to enforce contract—Tenants, whether necessary parties—Decree directing delivery, illegality of—Undue advantage to vendee—Inadequacy of price—Title defective—Discretion of Court—Adverse possession, failure to pay rent, whether constitutes.*

Failure to pay rent for a certain period is not such an assertion of right as will make a tenant's possession adverse to his landlord's.

In a suit to enforce the specific performance of a contract for the sale of immoveable property, the tenants in possession are not proper parties in the absence of any provision for delivery of possession in the contract.

Mere inadequacy of price will not entitle a Court to withhold specific performance of a contract for sale of land. If the vendor's title to the land is open to suspicion and the exertion and expense necessary to enforce it was in the minds of the parties in fixing a low price, the contract should be specifically enforced.

In order to justify the application of section 22 (1) of the Specific Relief Act, there should be evidence of facts, unknown to or fraudulently concealed from one side, of which the other was aware or of the use of undue influence. M NARASINGA ROW *v.* RANGASAMI THEVAN, (1916) 2 M. W. N. 191; 4 L. W. 397 871

——— S. 42 345, 395

——— S. 42—*Declaration, suit for, by person in possession—Nature of proof—Hindu Law—Claim for declaration based on grant from Hindu widow—Defendant's plea of adverse occupation under alleged Will of last male owner—Finding against defendant—Appeal—Waiver of objection to lower Court's finding at hearing, effect of—Decision by Appellate Court as to widow's power to transfer—Jurisdiction.*

In a suit for ejectment of a defendant who is in possession, the plaintiff must prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, in a suit for a declaration of title by a plaintiff in possession, plaintiff must first establish his right to the declaration and is entitled to a decree when the defendant fails to prove the title set up by him.

The plaintiff sued for a declaration that he had proprietary title to a *taluka* by virtue of a transfer from a Hindu widow with the consent of her next reversioners. The defendant pleaded possession in himself under a Will of the last male owner whose widow had no right to make the transfer. The Subordinate Judge found the gift to plaintiff proved and the alleged Will set up by defendant fictitious and accordingly granted plaintiff the declaration prayed for. The defendant appealed to the Court of the Judicial Commissioner and at the hearing of the appeal informed the Court through his Counsel that he would not contest the said findings but confine himself to the question of the widow's power to confer any valid title on plaintiff. The Appellate Court went into a lengthy discussion of the powers of a Hindu widow to dispose of property and eventually dismissed the suit:

Held, (1) that when plaintiff proved the grant in his favour, it was obligatory on the defendant who had no concern in the title to the *taluka* and was not connected with the proprietor's family, to prove the Will set up by him;

(2) that it was the duty of the Appellate Court when the appellant waived objections to the correctness of the findings against him, to dismiss the appeals and that it acted without jurisdiction in discussing the right of a widow to alienate property. P C CHANDRIKA BAKHSH SINGH *v.* BIKRAM SINGH, 20 C. W. N. 1149; 20 M. L. T. 164; (1916, 2 M. W. N. 120; 4 L. W. 288; 31 M. L. J. 505; 14 A. L. J. 1024; 18 BOM. L. R. 846; 38 A. 440; 24 C. L. J. 291; 19 O. C. 141 958

——— S. 42—*Declaratory suit—Dispossession from streamlet, what amounts to—Temporary disturbance of possession, effect of.*

An attempt to confer a right to catch fish in a streamlet on third persons, or the fact that some persons have caught fish in the streamlet does not amount to dispossession of owners from the streamlet.

A mere temporary disturbance of possession is no bar to a suit for a declaration. PAT SAHDEO LAL BHAGAT *v.* KESHO MOHAN THAKUR, 20 C. W. N. 1274 916

——— S. 42—*Declaratory suit by trespasser, if maintainable.*

The essence of section 42 of the Specific Relief Act is a title vesting in the plaintiff and, therefore, no suit will lie by a trespasser for a declaration that he is a trespasser. PAT SES LAL SINGH *v.* HALDHAR NARAIN, 1 P. L. J. 95 441

——— S. 42—*Partition, suit for—Prayer for declaration only of right and not for possession—Dismissal of suit, legality of—Plaint, amendment of—Executors, suit against, as such and personally—Cause title, omission to designate as executors in—Defect, whether fatal—Election, order for, between reliefs claimed—Civil Procedure Code (Act V of 1908), O. II, r. 5.*

A Court is not justified in dismissing a suit for partition on the ground that it contains only a

prayer for declaration of the properties sought to be partitioned and none for possession. The defect may be allowed to be remedied by an amendment of the plaint.

A suit against executors, which contains a claim against them personally, should not be dismissed merely because in the title portion of the plaint the executor defendants have not been described as such, when in the body of the plaint they have been so described.

If in a suit for construction of a Will and for administration of the estate of the testator, a claim for certain ornaments, not belonging to the estate of the testator but of which possession was obtained by the executors as such, is joined with claims for other properties in the hands of the executors, it is unnecessary to put the plaintiffs to their election in respect of their claim for the ornaments. **C** JAGATTARINI DASI *v.* PRAFULLA CHANDRA GHOSE 792

——— S. 42 *proviso—Declaratory suit, maintainability of, when properties are in possession of Receiver—Receiver's possession.*

As the result of a certain proceeding under Act XIX of 1841 between the plaintiff and the defendant upon the death of a Hindu widow, some of the properties left by her, which were at first taken possession of by the plaintiff, were placed in the hands of a Receiver appointed by the Court and the others were either retained or disposed of by the plaintiff. The plaintiff then brought a suit under section 42 of the Specific Relief Act for declaration of his title to those properties as an heir to the widow:

Held, that the suit could not be thrown out on ground that in the absence of a prayer for possession it was not maintainable by reason of the proviso to section 42 of the Specific Relief Act, as the Receiver's possession was to be considered to be the plaintiff's possession, if the plaintiff succeeded in establishing his title. **C** CHINTAMONI PATNI *v.* TARAK CHANDRA 17

——— S. 54 40

——— S. 54, ILLUS. (p)—*Declaratory decrees, form of—Specific determination of rights in dispute—Larger relief than in plaint, award of, illegal—Injunction, grant of, against a community, when permissible.*

Courts, by their decrees, should determine the rights of parties as definitely as the evidence before them will permit, but a decree is not illegal merely because it is not more specific.

An injunction against a community is not illegal when the community is sued in a representative capacity and such an injunction is clearly within the scope of section 54 of the Specific Relief Act.

Where the relief claimed in the plaint in a suit brought by the Hindus against the Muhammadns was to restrain the latter by an injunction from interfering with the former's celebration of the *Muriamman* festival in a *medai* near a mosque with music playing, but the decree extended the scope of the injunction by the words "and to carry on the procession with music without any restriction as

to time", implying thereby a right to go in possession with music past the mosque to the *medai*:

Held, that the decree awarded a larger relief than that claimed in the plaint and the word "carry on the procession" with music must be expunged therefrom. **M** MAHOMED HANIF SAHIB *v.* ANAGAPPA MUDALI 106

STAMP ACT (II OF 1899), S. 26 864

——— S. 33—*Jurisdiction of Court to impound document—Impounding documents in bound book not relating to claim—'Produced in the performance of his functions', meaning of—Civil Procedure Code (Act V of 1908), O. VII, r. 14—Plaint.*

In a suit for recovery of money due on a *hat-chita*, the plaintiffs, when presenting their plaint, produced in Court under Order VII, rule 14, the *hat-chita* bound in a volume which contained many other *hat-chitas*, with a prayer that the *hat-chita* on which their claim was founded should be detached and placed on the record and the remainder of the volume should be returned to them. The Munsif on examination of the volume, finding that none of the *hat-chitas* was properly stamped, proceeded to impound all of them under section 33 of the Stamp Act:

Held, that the Munsif had no jurisdiction to impound the *hat-chitas* other than the one which formed the basis of the plaintiffs' claim, as they were not produced nor came before him in the performance of his functions. **C** SASHISHI MOHAN SHAHA *v.* KUMUD KUMAR BISWAS 415

——— S. 35—*Unstamped agreement containing submission to arbitration, validity of.*

An agreement containing a submission to arbitration is not invalid in default of bearing an eight annas stamp. **S** FIRM OF TARACHAND GHANSHAMDAS *v.* MESSRS. LOUIS DREYFUS & Co., 10 S. L. R. 14 449

——— — SCH. I, ARTS. 5, 6 864

STOPPAGE in *transitu*, right of seller to, as against pledgee of Railway receipt 954

SUB-LEASE. *See* LANDLORD AND TENANT.

STRAITS SETTLEMENT BANKRUPTCY ORDINANCE, 1882, S. 30 (4)—*Bankrupt, discharge of, in Singapore, effect of—Liability of bankrupt's properties in British India for his debts in Singapore—'Jointly bound' meaning of—Son, whether 'jointly bound' with father—Liability of son of bankrupt—Hindu Law—Debts—'Pious obligation' of son to pay father's debt, nature and extent of.*

Defendants Nos. 1 and 3 were discharged under the Straits Settlement Bankruptcy Ordinance by the Supreme Court at Singapore. Plaintiffs, to whom the defendants Nos. 1 and 3 were indebted, were parties to the bankruptcy proceedings, proved their debts in bankruptcy and received dividends. They subsequently sued the bankrupts and their undivided sons in the Court of the Subordinate Judge of Sivaganga for the said debts, on the ground that they owned property within the jurisdiction of the Court. The sons were impleaded as being 'jointly bound' with their fathers under clause 4 of section 30 of the Singapore Ordinance, which provides that "an order of discharge shall not release any person who, at the date of the receiving order,

STRAITS SETTLEMENT BANKRUPTCY ORDINANCE—concld.

was *jointly* bound or had made any *joint* contract with him":

Held, (1) that the release of the debt under the Bankruptcy Law of Singapore operated as a discharge of it everywhere and the rule was unaffected by the fact that the parties had their domicile in British India;

(2) that the special liability of a Hindu son to pay his father's debts on the pious obligation theory was not a 'joint' liability with the father within the meaning of section 30, clause (4), of the Straits Settlement Ordinance;

(3) that the suit was not maintainable against the sons alone during the lifetime of their fathers after the extinction of the latter's liability.

Under the Hindu Law no suit can be instituted against the sons alone so long as the father is alive and the family is undivided, even though the father's liability is subsisting. *A fortiori* the extinction of the father's liability extinguishes the liability of the sons, their pious obligation lasting only so long as the father's liability subsists.

The joinder of a son with his father in a suit to enforce payment of the father's debt is for the purpose of enabling the Court to exercise the power, which the father has, of selling family property, including his son's share, to pay his own private debts, provided they are not illegal or immoral, and to prevent the son from questioning the nature of the debt in execution in the event of the decree against the father being executed by attachment and sale of the family property, including the son's share.

Quære.—Whether, if the adjudication in bankruptcy has been made by a *forum* of the domicile, the power of the father to sell the shares of his sons for the payment of his debts is a power which can vest in the assignee under the bankruptcy. M NARAYANA CHETTIAR *v.* VEERAPPA CHETTIAR, 20 M. L. T. 318; (1916) 2 M. W. N. 271; 4 L. W. 422 918

STRAITS SETTLEMENTS CIVIL PROCEDURE CODE ORDINANCE (XXXI OF 1907), Ss. 133, 169 323

STRAITS SETTLEMENTS LIMITATION ORDINANCE (VI OF 1896), Ss. 4, 17 (1), 22 323

SUBROGATION. *See* MORTGAGE.

———, doctrine of. *See* MORTGAGE.

SUCCESSION. *See* CUSTOM; HINDU LAW.

SUCCESSION CERTIFICATE, *application for—Security demanded not furnished Dismissal of application—Second application, if maintainable.*

The mere fact that a previous grant of succession certificate was subject to a condition which the applicants were unable to comply with, is no ground for refusing a second application. A PORNA KOER *v.* CHUNNI LAL, 14 A. L. J. 654 718

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—*Assignee from legal representative of deceased person, right of, to succession certificate—Question to be decided.*

SUCCESSION CERTIFICATE ACT—concld.

An assignee of a debt from the legal representative of a deceased person to whom the debt was due, is entitled to a succession certificate in respect of the debt assigned.

On an application for a succession certificate by an assignee of a debt, the only question which a Court has to decide is whether the applicant is the representative of the person to whom the debt is alleged to have been due, and not whether the assignor of the applicant had a valid title or not, or whether the assignment conveyed any title to the applicant or whether the debt secured was recoverable or not. A RADHIKA PRASAD BAPULI *v.* SECRETARY OF STATE, 14 A. L. J. 650; 38 A. 438 717

SUIT for damages for tort in detinue or trespass, nature of 86

SUPERIOR PROPRIETOR purchasing share in under-proprietary holding—Adverse possession 743

SURETY. *See* CONTRACT ACT, s. 134.

TALAYARI of village, whether public servant under section 197, Criminal Procedure Code 826

TEMPLE TRUSTEES—*Enquiry into conduct of hereditary temple servants—Absence of notice—Irregularity in procedure—Burden of proof—Small cause suit—Error as to burden of proof.*

Where the act of temple trustees in inflicting punishment on the hereditary servants of the temple is called in question by the latter on the ground that they had no notice of any intended enquiry into their conduct, the burden of proof is on the trustees to show that they gave notice of the enquiry and that their procedure was legal. M RANGASWAMY BHATTAR *v.* SESHADRI AIYENGAR, 4 L. W. 611 204

TENANCY held by joint under-proprietor, effect of 743

THUMB-IMPRESSIONS *See* EVIDENCE ACT, s. 73.

TORTURE. *See* EVIDENCE.

TRANSFER OF PROPERTY ACT (IV OF 1882), s. 41—Benamidar—*Real owner permitting another to hold himself out as owner of estate—Mortgage by latter—Doctrine of* bona fide *purchaser for value, applicability of—Notice, direct or constructive—Burden of proof.*

It is a principle of natural equity that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it.

Where, therefore, *A* conveys property to *B*, coupled with an agreement that the latter should re-convey the same to the former on the happening of a certain event, but *B* is permitted to remain in possession of the property and on the faith of that possession

TRANSFER OF PROPERTY ACT—contd.

third persons obtain mortgages from *B* and set up title as *bona fide* mortgagees for value: the onus is upon *A* to show that the mortgagees from *B* had notice of *A*'s title when they obtained their mortgages from *B*.

The proposition that the defence of *bona fide* purchaser for value is a single defence and cannot be split up, has in its general aspect reference to the form of pleadings and cannot be treated as decisive of the question of onus in all cases in which such a defence is pleaded. M RAJAH OF KARVETNAGAR *v.* ECHAMPADI SARVANA PILLAI, 4 L. W. 200 893

——— S. 44 294

——— S. 49 18

——— S. 53—*Transfer in fraud of creditors—Land, grant of, transfer of, with grantor's permission—Non-solvency of transferor—Absence of consideration—Presumption—Payment by volunteer to save attachment, effect of.*

A, who had a grant of land from the Collector with power to transfer the same with the Collector's permission, conveyed it to his brother *B*, after having secured the Collector's consent, for no consideration and at a time when he was pecuniarily embarrassed. *C*, a decree-creditor of *A*, attached the land, ignoring the transfer to *B*. The attachment having been raised at *B*'s instance, *C* sued *B* for a declaration that he was entitled to attach the land:

Held, that, under the circumstances, the presumption under section 53 of the Transfer of Property Act was that the transfer was void as against *C*.

D, who paid off a previous attaching creditor of *A*, claimed to stand in *A*'s shoes:

Held, that *D* had only a cause of action against *A* personally. L B MAUNG MAUNG *v.* S. G. FIRM, 8 L. B. R 233 448

——— S. 54 23

——— S. 54—*Sale—Admission, whether title can pass by—Release, whether can operate to pass title—Bengal Local Self-government Act (III of 1885 B. C.), s. 138 (d), rr. 93, 98, 102, 103, scope of—Interpretation of Statutes—Statutes, mandatory or directory—Contracts made by agents of Corporation, how far bind it—Contract, rescission of, by another contract—Contract, abandonment of—Civil Procedure Code Act V of 1908, O. XLI, rr. 22 (3), 33—Cross-objection by one respondent against another.*

Where land being sold to the highest bidder for Rs. 1,280 by the District Board, a sale certificate (not registered) was issued to the purchaser, but the property not having been specifically described therein, the Chairman of the District Board executed in favour of the purchaser a registered deed of release which did not, however, purport to be a conveyance and was stamped as a release:

Held, (1) that by the documents no valid title passed to the purchaser, as the unregistered sale certificate could not operate as a conveyance and that the deed of release was inoperative to transfer title because title to land could not pass by a mere admission when the Statute required a deed;

TRANSFER OF PROPERTY ACT—contd.

(2) that even if the release was construed as a conveyance, as this document as well as the sale certificate, though sealed and signed by the Chairman, were not signed by two members of the Board, the sale was invalid, being in contravention of rule 98 of the Statutory Rules made by the Lieutenant-Governor on the 15th December 1885, under section 138 *(d)* of the Bengal Local Self-government Act (III of 1885 B. C.);

(3) that these documents did not constitute even a valid contract for sale, as it was not sanctioned at a meeting of the Board, or executed in accordance with rule 103 of the District Board;

(4) that the purchaser, who came into Court as plaintiff for recovery of possession of the land and declaration of title thereto, must succeed on proof of a valid title and was not entitled to a postponement to entitle him to complete his title by securing a duly executed instrument from the District Board.

Rules 93 and 98 of the Statutory Rules made by the Lieutenant-Governor under section 138 (*d*) of the Bengal Local Self-government Act are not *ultra vires* and rule 98 is not merely directory but is mandatory, and must be read along with rule 93; the effect of these two rules is that no immoveable property vested in a District Board can be sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board.

Section 138 (*d*) of the Bengal Local Self-government Act, which authorises the Lieutenant-Governor to make rules consistent with the Act for the purpose of regulating the powers of District Boards to transfer property, authorises him not only to frame rules which impose restrictions on alienations but also to frame rules which prescribe the formalities to be observed when alienations are made.

A rule framed for the purpose of regulating the power to transfer property may deal with the extent as also the mode of exercise of that power, though it cannot prevent or prohibit the exercise of the power.

Courts in construing a Statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty it has been to construe, execute or apply it, although such interpretation is not conclusive upon the Courts.

No universal rule can be laid down for the construction of Statutes. As to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience; it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed.

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, a rigorous observance of them is regarded essential to the acquisition of the powers or rights. But where a public duty is imposed and

TRANSFER OF PROPERTY ACT—contd.

the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative.

Where a Corporation is acting within the scope of the legitimate purposes of its institution, even a parol contract made by its authorised agents raises implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the Corporation; provided, the contract is not by Statute positively required to be under seal or it is not *ultra vires* in the sense that it is beyond the scope of the authority of the Corporation under any circumstances.

One contract is rescinded by another between the same parties, when the latter contract is inconsistent with, and renders impossible the performance of, the former But if it turns out that the latter contract can not operate as the parties intended, it does not have the effect, by implication, of affecting their rights under the former contract.

Where one party, by acts and conduct, evinces an intention no longer to be bound by his contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract. But such an abandonment of the contract must be made out by clear and precise evidence.

Where a Corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain it: either it must return it or make compensation for it:

A respondent in an appeal is not ordinarily entitled to urge cross-objections except as against the appellant, but under special circumstances of a case the Appellate Court can, under the provisions of Order XLI, rules 22 (3) and 33, give effect to the cross-objections of one respondent against another. **C** MATHURA MOHAN SAHA *v.* RAMKUMAR SAHA, 23 C. L. J. 26; 20 C. W. N. 370; 43 C. 790 305

——— S. 55 23

——— S. 55 (1), (5)—*Vendor and purchaser—Contract, breach of—Agreement to sell property—Non-purchase by buyer within time specified—Vendor's failure to offer title-deeds for inspection—Covenant against incumbrance—Duty of purchaser—Auction sale without advertisement at place where property situate—Damages, assessment of—Receipt of payment of mortgage amount—Registration—Registration Act (XVI of 1908), s. 17.*

A breach for the purchase of a property, within a specified time, cannot be justified on the ground that the vendor did not offer the title-deeds for inspection.

The words 'on his request' in clause (*b*) of sub-section 1 of section 55 of the Transfer of Property Act, make it the duty of the seller to produce his documents of title for examination by the buyer only when the latter asks for them; if the buyer does not ask for them within the time fixed for the completion of the contract, he is not excused from the consequences of his failure to fulfil it by the plaintiff not having offered to show his documents of title.

A receipt of repayment of the mortgage money in full stating that the mortgage-deed is, therefore, returned, need not be registered as it does not on the face of it purport to extinguish the mortgage, such a document being exempted under clause (*b*) of sub-section 2 of section 7 of the Registration Act.

If a buyer acquires knowledge of any mortgages subsisting on the land contracted to be sold free from incumbrances, all that is open to him under clause (*b*) of sub-section (5) of section 55 of the Transfer of Property Act is to retain out of the purchase-money the amount due to the mortgagee; non-production of the registered release-deed does not absolve the buyer from liability for damages for refusal to purchase.

A seller, who puts up the property for sale on refusal by the party who contracted to purchase it, is bound to advertise the sale in the place where the property is situate. If the advertisement is inadequate, the buyer cannot be held liable for the difference between the contract price and the inadequate price realised at such sale. **L B** MAUNG PO TE *v.* MAUNG SHWE KO 373

——— S. 55 (4)- *Charge, vendor's—Transferees for value without notice, if affected.*

The vendor's charge mentioned in section 55 (4) of the Transfer of Property Act cannot be enforced against subsequent transferees for value without notice. **A** GUR DAYAL SINGH *v.* KARAM SINGH, 14 A. L. J. 304; 38 A. 254 289

——— S 59—*Attestation Scribe writing name of second witness—No proof of authorization—Document, if mortgage—Charge—Money-decree, grant of.*

A document bore the signature and mark of the executant and the signature of one attesting witness. It contained in the margin the name of another witness written by the scribe, but not his signature or mark. He was dead at the time of the suit and there was nothing to show that he authorized the scribe to sign his name for him. A suit was brought on this document within six years of the date of the cause of action:

Held, that the document was not a valid mortgage, as it was not duly attested as provided in section 59 of the Transfer of Property Act, nor could it create a charge.

Held, also, that a money-decree could, however, be given, as it was a suit upon registered document. **A** PARAM HANS *v.* RANDHIR SINGH, 14 A. L. J. 673; 38 A. 461 748

——— S. 59 - *Mortgage—'Attest', meaning of—Attestors not present at execution - Mortgagor admission, effect of—Personal decree, if allowable.*

A mortgage-deed signed by attestors who did not see the mortgagor sign is not an operative

document, and cannot be enforced by the mere admission of its execution by the mortgagor.

The Court can, however, in such a case grant a personal decree. A RADHE SHIAM v. CHUNNI, 14 A. L. J. 361 192

—— —— S. 59—*Mortgage, equitable—Deposit of title-deeds, when creates mortgage—Letter accompanying deposit, when requires to be stamped and registered—Stamp Act (II of 1899), s. 26, Sch. I. Arts. 5, 6—Registration Act (XVI of 1908), s. 17—Mortgage, creation of—Oral evidence, admissibility of—Evidence Act (I of 1872), s. 92.*

The 2nd defendant deposited the title-deeds of his house with the 1st defendant, and simultaneously delivered to him a letter in which he stated: "I hereby give you full authority to make use of this property in any manner you think best and pay yourself up to these amounts and, if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my other properties to recoup all the short balances." The letter was neither stamped nor registered and made no reference to the deposit. The 1st defendant effected a sub-mortgage to the plaintiff. In a suit by the plaintiff to recover the amount due on the basis of an alleged equitable mortgage:

Held, (1) that the letter created a simple mortgage of the properties covered by the title-deeds and was invalid for want of registration;

(2) that it was incumbent on the plaintiff to prove that the deposit of title-deeds created an equitable mortgage and for this purpose evidence independently of the letter was admissible.

Per *Abdur Rahim, Offg. C. J.*—The letter, though it did not require registration, should be stamped on the basis of an agreement under Article 5 of the Stamp Act.

It is the deposit of the title-deeds that creates an equitable mortgage and a letter or writing which contains evidence of the transaction cannot be said to create or declare any right to or interest in immoveable property within the meaning of section 17, clause (*b*), of the Registration Act.

Per *Seshagiri Aiyar, J.*—The letter is not covered by Article 6 or 40 of the Stamp Act and as such is not required to be registered under section 17 of the Registration Act.

Article 26 of the Stamp Act does not refer to the admissibility of a document. It rather deals with the quantum of interest allowable in a suit when the document is sued on and accepted as evidence.

A mortgage by deposit of title-deeds is not created by the writing which accompanies, precedes or is contemporaneous with the deposit. The essence of the transaction is the deposit. It is that that creates the mortgage.

The declaration mentioned in section 17 of the Registration Act must, by its own force, have the legal consequences contemplated by the parties and should not simply be a statement of what has been effected. Consequently, the declaration contained in the letter, if the letter itself does not constitute the mortgage, would not attract the provisions of section 17.

Section 92 of the Evidence Act will be no bar to the reception of oral evidence to prove an equitable mortgage, as the letter indicates altogether a separate transaction, *viz.*, a simple mortgage.

If the letter makes a bare reference to the factum of deposit and to the creation thereby of the equitable mortgage, no question of stamp or registration will arise. M MUTHIAH CHETTY v. KOTHANDARAMASWAMI NAIDU, 31 M. L. J. 347; (1916) 2 M. W. N. 221; 4 L. W. 472 864

——— S. 67—*Mortgage, construction of—Suit for interest alone—Covenant for payment of periodical interest and enhanced interest on default—'Contract to the contrary'—Right of suit.*

If there is an absolute covenant in a deed of mortgage prohibiting the mortgagee from suing before the principal becomes due, he cannot sue for the interest before that date. In the absence of such a prohibition, the mortgagee is entitled to sue for interest, though the principal may not become payable for a considerable time.

A stipulation in a deed of mortgage that interest is to be paid on specified dates and, on default, at a higher rate, is a 'contract to the contrary,' to which the provisions of section 67 of the Transfer of Property Act do not apply. M SUBBIAH CHETTY v. KUPPAMMAL, 3 L. W. 587; (1916) 2 M. W. N. 86; 31 M. L. J. 437 104

——— S. 68 845

——— S. 72 915

——— S. 82—*Contribution, suit for—Necessary parties—Plaintiff, duty of—Valuation of items of properties—Principle.*

Where a suit is brought for contribution to enforce a statutory charge, mentioned in section 82 of the Transfer of Property Act, all the persons in whom all the mortgaged property is vested should be made parties, inasmuch as it is only when such persons are properly before the Court, that a proper decree finally settling all disputes can be made.

It is the duty of a plaintiff to take every reasonable precaution to have the necessary parties before the Court. If, by some accident, some party is omitted, an application to bring him on to the record ought to be made at the earliest possible opportunity.

In valuing the different items of property the valuation ought to be as at the date of the mortgage, but if the plaintiff adduces evidence to show the value of the property at the time that he purchased it, it lies upon the other side to say that the valuation at the date of the mortgage was different. A SHANKAR LAL v. LATAFAT ALI, 14 A. L. J. 713 600

——— S. 90—*Mortgagors, several, joint liability of.*

Section 0 of the Transfer of Property Act has no application, except in cases where the mortgage-deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognized that a mortgagee has the right to proceed concurrently

with all the remedies he is entitled to, to enable him to realize his debt. He is perfectly entitled to sue on the personal covenant contained in a mortgage-deed.

Mortgagors are jointly and severally liable to the mortgagee, though as amongst themselves they are entitled to contribution. PAT RAJA RAM LAL *v.* HANUMAN UPADHYA 43

——— S. 95 794

——— S. 108 (*b*) 251

——— S. 108 (*h*) 735

——— S. 111 (*g*)—*Lease—Permanent tenancy, termination of—Denial of landlord's title—Landlord and tenant Ejectment Inference as to status—Question of law—Appeal, second.*

A permanent tenancy under the Transfer of Property Act is determinable by the tenant's denial of the landlord's title and the latter can sue for ejectment of such tenant.

An inference as to a question of status is always a question of law and hence liable to be rejected in second appeal. PAT BIDYA NATH *v.* KHIKHINDA KOER, 1 P. L. J. 157 544

——— S. 119—*Warranty—Exchange of immoveable property prior, to enactment of Transfer of Property Act—Compensation, claim for, for breach of warranty of title—Law applicable—Application of Common Law rule—'Equity and good conscience' Real Property Act* (8 *&* 9 *Vic. c.* 06)—*Letters Patent, s.* 21—*Exchange of property transferred by Hindu widow—*Caveat emptor, *doctrine of, extent of.*

The law applicable to exchanges of immoveable property effected prior to the enactment of the Transfer of Property Act is the Common Law of England and not the Statute Law embodied in the Real Property Act (8 & 9 Vic. C. 106).

An exchange of property effected prior to 1882 implied warranty of title. An exchange implied both a condition for re-entry on the land given in exchange and also the right to obtain compensation for breach of the warranty.

The state of the law in England as to the nature and extent of warranties of title on transfers of real property and Parliamentary enactments relating to and laying down the laws applicable to India prior to the passing of the Transfer of Property Act reviewed by Seshagiri Aiyar, J.

Per *Seshagiri Aiyar, J.*—It is clear that the highly technical enactment of 1845 (8 & 9 Vic C. 106) which required the execution of a deed to evidence an exchange, was not extended to India. The Act of 1781 which looked with disfavour at the introduction of the English Statute Law into India laid down that, as far as practicable, the Courts should administer Indian law to Indians. There is nothing in Hindu Law which militates against a warranty being implied as between the parties to a contract of exchange. From the fact that, in the Transfer of Property Act of 1882, the principle of implied warranty in sales and exchanges was recognized it may be inferred that the Legislature intended to preserve to the parties the English Common Law right as to warranty.

Where there is nothing to indicate on the face of a deed evidencing a transfer by a Hindu widow or on proper enquiries by the transferee that the widow was not exercising the power which she has of disposing of the property for purposes binding on the estate, it cannot be contended that the privilege of *caveat emptor* applies.

Per *Bakewell, J.*—The rule laid down in section 119 of the Transfer of Property Act is one of 'equity and good conscience' which under clause 21 of the Letters Patent the High Court may apply to exchanges effected prior to the enactment of the Transfer of Property Act. M BALUSU VEERARAGHAVALU *v.* BOPPANA MANIKYAM, 31 M. L. J. 380; 20 M. L. T. 329 92

S. 123—*Gift by Muhammadan, deed of, proof of—Evidence Act (I of* 1872), *s.* 68, *applicability of*

The provisions of section 123 of the Transfer of Property Act are inapplicable to gifts made by Muhammadans and valid according to the Muhammadan Law.

Therefore, a deed of gift executed by a Muhammadan is admissible in evidence although not proved as required by section 68 of the Evidence Act. A KARAM ILAHI *v.* SHARF-UD-DIN, 14 A. L. J. 119; 38 A. 212 14

"TREES standing" and "standing timber", distinction between 713

TRUST, charitable. *See* CIVIL PROCEDURE CODE, 1908, s. 92.

TRUSTS, public. *See* MUHAMMADAN LAW.

TRUSTEES, appointment of. *See* CIVIL PROCEDURE CODE, 1882, s. 539.

TRUSTS ACT (II OF 1882), S. 82—*Purchase of property in name of third party—Presumption of ownership—Advancement, doctrine of Law in India.*

The presumption of advancement as prevailing in England does not arise in India, the source from which the purchase-money was paid shifting the onus. That was the law prior to the Trusts Act.

The question is now governed by section 82 of the Indian Trusts Act, and the Court must, in each case where property is transferred to one person for a consideration paid or provided by another, address itself to the question whether it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee. In doing so, the particular circumstances of the case must be first considered, and the Court should determine whether or not there was any intention to benefit the person in whose name the purchase was made. M RAHIMAN BEEBI *v.* KHATOON BEE, 4 L. W. 193 569

U. P. COURT OF WARDS ACT (U. P. III OF 1899), Ss. 15, 35, 42, *sub-s* (1)—*Properties of ward outside territorial limits of the United Provinces Government Jurisdiction of Court of Wards over—Superintendence after ward's death Sale—Existence of debts—Consent of heirs—Presumption*

The Court of Wards of the United Provinces of Agra and Oudh has jurisdiction to deal with the property of a disqualified proprietor under its charge

U. P. COURT OF WARDS ACT—concld.

situated outside the limits of the territories subject to the Lieutenant-Governor of those Provinces.

As section 15 of the U. P. Court of Wards Act makes no distinction at all between moveable and immoveable properties, properties both within the limits of the Provinces of Agra and Oudh as well as outside thereof are subject to the administration set up by the Act in the event of a person coming under the terms of the Act.

Section 35 of the Act gives a general power to the Court of Wards to sell or mortgage any part of any property under its superintendence subject to the restrictions in regard to property taken charge of by the "Court" under section 9 of the Act.

After the death of a ward, who was a disqualified proprietor, the Court of Wards may retain charge of his property until the debts and liabilities of the ward have been discharged.

Where the Court of Wards, after the death of the ward, who was a disqualified proprietor, sold his property and there was no evidence to show that there were unliquidated debts and liabilities of the ward and that his widows (who were the heiresses) gave consent to the sale:

Held, that under the ordinary presumption, arising in favour of the acts of the Executive Government, it must be held that there were unliquidated debts and liabilities and that the widows were consenting parties to the sale. C GADADHAR BHATTA *v.* SARAT CHANDRA MUKHERJEE 634

—— — Ss. 35, 42 (1) 634

U. P. LAND REVENUE ACT (III OF 1901), SCH. IV, R. (d), *S. Nos.* 47, 48.

Per *Sundar Lal, J.*—All that Schedule IV, rule (*d*), serial Nos. 47 and 48 of the Land Revenue Act, 1901 require is that the proceedings for execution must be initiated within time and when once an application for execution has been made within time, it can go on for a considerable time. A BIRJ BHUKAN LAL *v.* MAHADEO PERSHAD 205

U. P. MUNICIPALITIES ACT, (I OF 1900), S. 52 222

—— —— S. 87, 88, 52—*Erection without permission—Notice—Civil suit, maintainability of—Remedy.*

The plaintiff applied to the Municipal Board of Cawnpore for permission to re-erect his house on the old foundations and attached a plan with his application in which a *sandas* and *chhajja* were shown but a *tora* with the *antiya* was not shown. The Municipal Board granted permission to re-build the house with the exception of the *chhajja* and the *sandas*. The plaintiff re-built his house with the *sandas* and *chhajja* and the *tora* and *antiya*. The Municipal Board served a notice upon him. The plaintiff sued in the Civil Court for issue of a perpetual injunction restraining the Municipal Board from interfering with the constructions and for damages:

Held, that the notice by the Municipal Board was partly under section 87 and partly under section 88 and was a valid notice and that the civil suit was not maintainable, the only remedy of the plaintiff being that laid down in section 52 of the Municipal Act.

U. P. MUNICIPALITIES ACT—concld.

Section 87 of the Municipalities Act is not applicable only to that part of a building which abuts on and overhangs a public street, inasmuch as a building may adjoin a public street and yet may not overhang or project in to it. A RAHAS BIHARI LAL *v.* MUNICIPAL BOARD, CAWNPORE 222

—— —— Ss. 87, 128—*Pump, erection of—Proceedings under s. 87, legality of.*

Proceedings against a person, who erects a pump in a public street, brought under section 87 of the U. P. Municipalities Act, 1900, are wholly misconceived.

Semble.—A Municipality under section 128 of the Municipalities Act can make rules for the control and management of the streets vested in it under section 55, and anybody who erects a pump or refuses to remove a pump which is maintained in breach of one or other of such rules is liable to penalty under section 147.

Any member of the public, who either resides in the street or uses the street, can bring an action in a Civil Court for the removal of such pump by saying that his user of the public way as a member of the public is prejudiced by such pump.

Whether or not a pump is a building is a question of fact. A JAGANNATH *v.* EMPEROR, 17 CR. L. J. 350 526

——— S. 88 222

——— S. 128 526

——— S. 128 (a)—*Rules—Charge of digging up road, proof of—Right to dig up road or drain.*

The applicant had been allowed to put a stone over a drain in front of his shop for the use of himself and persons visiting his shop. Expecting a visit from the Chairman of the Municipal Board the applicant was getting the soil from underneath the projection removed, when he was charged for having dug up the road:

Held, that under the circumstances of the case the applicant was not guilty of digging the road.

No one has any right to dig up any portion of a roadway or to dig up or alter any portion of a drain. A GULAB SINGH *v.* EMPEROR, 17 CR. L. J. 404 964

U. P. GOVERNMENT RULES, RR. 30, 32 473

U. P. REGISTRATION RULES, R. 174 718

USAGE AND CUSTOM, finding of, whether questionable in second appeal 630

VENDOR AND PURCHASER—Contract, breach of—Agreement to sell property—Non-purchase by buyer within time specified—Vendor's failure to offer title-deeds for inspection—Covenant against incumbrance—Duty of purchaser—Auction sale without advertisement at place where property situate—Damages, assessment of—Receipt of payment of mortgage amount—Registration—Registration Act (XVI of 1908), s. 17—Transfer of Property Act (IV of 1882), s. 55, sub-ss. (1) and (5) 373

——— *Contract—Option to re-sell to vendor, if valid—Specific performance of option, suit for—Action*

VENDOR AND PURCHASER—concld.

misconception of, by Court—Decree for redemption, effect of—Technical mistake.

An option by a purchaser to re-sell the property to the vendor on certain terms and conditions is a valid contract (subject to any possible question of perpetuity) which the purchaser is bound to fulfil. If the conditions are complied with strictly, specific performance should be decreed in an action to enforce the option.

Where the Court, misconceiving the action as based on a mortgage, wrongly decrees redemption instead of specific performance, the decree is only technically wrong and should not be interfered with in appeal as the parties are in exactly the same position as in a decree for specific performance. **C** DHARANIDHAR MUKHERJI *v* RAKHAL DAS BHATTACHARJEE 631

——— *Property in goods, when passes to purchaser.*

Property in goods under a contract of sale does not pass to the purchaser until it is weighed by the vendor, unless there are other terms of the agreement or some particular trade or local usage to the contrary. **S** FIRM OF TARACHAND GHANSHAMDAS *v.* MESSRS. LOUIS DREYFUS & Co., 10 S. L. R. 14 449

——— *Sale of land—Vendor, duty of, to put vendee in physical possession of property sold.*

A vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if in fact the subject-matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell. The obligation is upon the vendor to give the vendee possession; and not upon the latter to go and get possession for himself, specially when any difficulty arises in identifying the particular land sold. **PAT** DARPAN KOER *v.* KEDAR NATH, 1 P. L. J. 140 539

——— Vendor's remedy when part of consideration not paid 284

WAJIB-UL-ARZ. *See* CUSTOM.

WAQF — Endowment for religious purposes and charity — Suit for scheme and removal of trustees — Sanction of Court, if necessary — Necessary parties, who are 880

WAQFNAMA, validity of—"Mutawalli", *word of, not used, effect of.*

Where the terms of a *waqfnama* show that the dedicator appointed himself a *mutawalli* and provided that his successor should be the next *mutawalli*, the *waqfnama* is not invalid merely because the word "*mutawalli*" has not been used in it. **O** MUHAMMAD HAMID ULLAH KHAN *v.* SITA RAM, 3 O. L. J. 377 732

WARRANT—Arresting Officer, duty of 973

WARRANTY OF TITLE implied in changes effected prior to 1852 92

WILFUL NEGLECT. *See* RAILWAY COMPANY.

WILL, construction of. *See* HINDU LAW.

——— *Executor, whether can sue before obtaining Probate—Administrator, title of — Straits Settlements Limitation Ordinance (VI of 1896), ss. 4, 17 (1), 22, scope of—"Legal representative," definition of—"Capable of instituting an action," meaning of—English practice—Supreme Court, whether can grant Probate of Will of person domiciled anywhere—Straits Settlements Civil Procedure Code Ordinance (XXXI of 1907), ss. 133, 169.*

An executor derives his title and authority from the Will of his testator and not from any grant of Probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death and consequently he can institute an action in the character of executor before he proves the Will. He cannot, of course, obtain a decree before Probate, but this is not because his title depends on Probate, but because the production of Probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An Administrator derives title solely under his grant, and cannot, therefore, institute an action as Administrator before he gets his grant.

An executor is not only the legal representative of his testator, but capable of instituting an action within the meaning of section 17 (1) of the Straits Settlements Ordinance VI of 1896. There is nothing in the Ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. The words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The Will under which the executor claims must be capable of Probate, otherwise the action must fail.

There is nothing in the Straits Settlement Civil Procedure Code Ordinance (XXXI of 1907) or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting Probate of the Will of a person wherever domiciled.

According to English practice, Probate may be granted of the Will of a person domiciled abroad upon proof that it is a valid Will according to the law of the domicile, and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile.

Section 22 of Ordinance VI of 1896 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. Section 133 of the Civil Procedure Code Ordinance provides against the defeat of an action on this ground, and enables the proper party to be added or substituted.

Section 22 of Ordinance VI of 1896 has no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within section 133, but within section 169, of the Civil Procedure Code Ordinance, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties.

Quære.—Whether one of two joint executors can properly institute proceedings on behalf of the estate? **P C** SOONA MAYNA KENA ROONA MEYAPPA CHETTY *v.* SOONA NAVENA SUPPRAMANIAN CHETTY, 20 C. W. N. 833; (1916) 1 M. W. N. 455; 18 BOM. L. R. 642; 85 L. J. P. C. 179 323

WILL—contd.

——— *Genuineness proved—Testator in disposing state—Will not conforming to reason and justice, whether ground for discrediting—Medical evidence—Disposing power ascertainable from eyes and expression.*

When a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice.

There are many signs by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression. **P C** ARUNACHELLAM CHETTY *v.* RAMASWAMI CHETTY, 30 M. L. J. 555; 20 C. W. N 673; 3 L. W. 503; (1916) 1 M. W. N. 399; 18 BOM. L. R. 408; 23 C. L. J. 632; 20 M. L. T. 50 1

——— *Modification of, by subsequent testamentary declaration—Construction- Codicil—Pleadings—Nuncupative Will—Strictness of proof.*

A person who sets up a nuncupative Will is bound to strictness of pleading, and must allege, as well as prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

A person who seeks to establish a modification of the provisions of a Will by a subsequent testamentary declaration, must prove an actual intention to revoke the clauses which he seeks to avoid and if the testator's expressions are declaratory only of a future design, they will not be sufficient.

Where a Will contains a clear and unambiguous disposition of property, real or personal, it cannot be revoked by a codicil, except by the use of words equally clear and distinct. **P** NARINJAN DASS *v.* DEVI DASS, 112 P. W. R. 1916 899

——— *Probate and Letters of Administration with Will annexed, distinction between—Validity of Will, whether can be questioned after grant of Letters of Administration with Will annexed.*

No distinction can be drawn between a grant of Probate and a grant of Letters of Administration with a Will annexed, so far as it affects the proof of the genuineness and validity of the Will.

WILL—concld.

Probate and Letters of Administration with a Will annexed are conclusive evidence of the factum and validity of the Will. **M** VENKATA RATNAM *v.* RAJA RAM MOHANA RAO, 31 M. L. J. 277; 4 L. W. 248 854

———*Probate proceedings—Adoption, determination of—Jurisdiction.*

It is not within the province of a Probate Court to inquire into the title of a testator to the properties covered by his Will. The question whether or not a person was adopted by a testator is not a matter which could be decided in a Probate proceeding. **PAT** MAHASUNDER KUER *v.* RAM RATAN PRASAD SAHI 416

WITHDRAWAL OF SUIT. *See* CIVIL PROCEDURE CODE, 1908, O. XXIII, R. 1 (3).

WORDS AND PHRASES—

INTIQAL 210

PUTRA PUTRADI 383

WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), SS. 1, 5—*Jurisdiction of Court, what determines.*

Under the Workman's Breach of Contract Act, the jurisdiction of the Court is determined by the place of residence or of business of the employer, irrespective of the place of residence of the workman, or of the place where the advance was made, or the work was to be performed or the breach was committed. **S** ALI MOHAMED *v.* EMPEROR, 10 S. L. R. 56; 17 CR. L. J. 308 484

——— S. 2—*Applicability of Act—Artificer, labourer or workman—Contractor, whether belongs to any of these classes.*

The Workman's Breach of Contract Act applies only to persons falling within the definition of "artificer, labourer or workman." To make the Act applicable the relation between the parties to the contract must be that of labourer and employer of labour. A contractor is not ordinarily an artificer, labourer or workman, and the Act does not apply to a contractor of labour or an agent for the supply of goods, unless such person has contracted to supply his personal labour. **L B** BABA KHAN *v.* MAUNG BA NAING, 17 CR. L. J. 398; 9 BUR. L. T. 108 830

——— S. 5 484